



THE WAY OUT

New thinking about Aboriginal engagement and energy infrastructure to the West Coast

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PREFACE

This year, 2013, is the 250th anniversary of the Royal Proclamation of 1763 (pictured on the cover). The Royal Proclamation is widely regarded as having been one of the cardinal steps in the relationship between Aboriginals and non-Aboriginals in British North America – what eventually became Canada.

A quarter of a millennium later it is our judgment that that relationship has often not been carried out in the hopeful and respectful spirit envisaged by the Royal Proclamation. The result has been that the status of many Aboriginal people in Canada remains a stain on the national conscience. But it is also the case that we face a new set of circumstances in Aboriginal/non-Aboriginal relations. Indigenous peoples in Canada have, as a result of decades of political, legal, and constitutional activism, acquired unprecedented power and authority. Nowhere is this truer than in the area of natural resources.

This emerging authority coincides with the rise of the demand for Canadian natural resources, a demand driven by the increasing integration of the developing world with the global economy, including the massive urbanisation of many developing countries. Their demand for natural resources to fuel their rise is creating unprecedented economic opportunities for countries like Canada that enjoy a significant natural resource endowment.

The Aboriginal Canada and the Natural Resource Economy project (of which this paper is a part) seeks to attract the attention of policy makers, Aboriginal Canadians, community leaders, opinion leaders, and others to some of the policy challenges that must be overcome if Canadians, Aboriginal and non-Aboriginal alike, are to realise the full value of the potential of the natural resource economy. This project originated in a meeting called by then CEO of the Assembly of First Nations, Richard Jock, with the Macdonald-Laurier Institute. Mr. Jock threw out a challenge to MLI to help the Aboriginal community, as well as other Canadians, to think through how to make the natural resource economy work in the interests of all. We welcome and acknowledge the tremendous support that has been forthcoming from the AFN, other Aboriginal organisations and leaders, charitable foundations, natural resource companies, and others in support of this project.

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Photo above courtesy TransCanada Corporation.

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EXECUTIVE SUMMARY

The April 12, 2013 release of the Joint Review Panel's (JRP) interim report on the Northern Gateway pipeline project – with its lengthy list of recommendations and requirements – provided a reminder of the formidable challenges facing one of the largest and most important infrastructure projects in recent Canadian history. This hotly debated project, the subject of protests, high level politicking, and extensive public commentary, stands at the intersection of (1) Canada's aspirations to be an energy superpower, (2) the environmental standards of 21st century resource development, and (3) the present and future of Aboriginal/non-Aboriginal relations in Canada. It is a test of our country's ability to reconcile competing visions of resource development and the management of the national economy, and this is especially true with respect to newly legally-empowered First Nations communities, on whose support the success of Northern Gateway may hang.

Whether Northern Gateway goes ahead or not, Canada must find a way to build the necessary infrastructure to capitalize on the robust international markets for energy and the resource available in the Western Canadian oil sands. The opportunities, particularly in Asia, are very significant and – most important – long term. But because other suppliers may sew up those opportunities if Canada cannot get its energy products to market soon, and because alternatives to Northern Gateway, or its close equivalent, will take much longer to get approved, the project is of unusual economic significance to Canada.

Northern Gateway proponent and developer Enbridge may need to revise significantly the proposed project before it can move forward. Despite the amount of excellent technical work put into Northern Gateway thus far, the political and financial dynamics require a shift in thinking about how resource development happens. The Northern Gateway pipeline cannot be rerouted because it would send the project back to the starting point in terms of regulatory approvals; the current proposed route should be accepted only if all parties agree on a better process for defining the route for future energy infrastructure.

Equity Participation

The financial engagement of Northern First Nations should be a central part of the long-term strategy. Engaging First Nations in the regions surrounding the pipeline corridor as equity partners is the best means of ensuring productive, long-term partnerships. This paper suggests several ways to structure the equity partnership, which would yield multiple revenue streams: the return on investment; rent or other charges to be levied for the use of the pipeline right-of-way within the energy corridor; and Aboriginal property tax revenues within a pipeline corridor designated as reserve lands.

Impact and Benefit Agreements

Impact and Benefit Agreements (IBAs) are used to define how First Nations are consulted and accommodated in the resource development process, but creating this corridor brings up new issues and strains the limits of current IBAs. Existing IBAs in Canada focus on short-term resource projects, and IBAs in the corridor must take into account the need for longer-term arrangements. Given the nature of the global energy sector, conditions could include an IBA renewal system to accommodate changes in financial circumstances, pricing, and demand.

There should be a new, two-tiered process of IBAs:

- Corridor-wide IBAs. The pipeline will affect all First Nations in northern British Columbia and portions of northern Alberta. A corridor-wide IBA could address issues that extend beyond the First Nations directly connected the corridor.
- Specific First Nations IBAs. Some communities will need more targeted IBAs because of the direct impact and opportunities associated with the pipeline route through their traditional territories. It is vital that the IBAs include

- o the immediate launch of a training and workplace preparation program;
- o a commitment to sign supply, procurement, and service agreements with First Nations businesses and development corporations; and
- o a model regional initiative for elementary and high schools, designed to improve educational outcomes, increase employability, and support community development initiatives.

Environmental Protection

The pipeline and shipping system will be the most advanced in the world. To maintain this status, First Nations should participate fully and environmental groups should contribute to developing the environmental protection and response system. We recommend an expert panel with demanding deadlines produce an evidence-based report of environmental best practices and technologies to build and manage the land and sea-based aspects of the pipeline; this panel would suggest a regime that will set the highest standards available worldwide.

Land and Rights-of-way

The Government of Canada should indicate its willingness to designate the corridor land in question as reserves under the *Indian Act*. This would create another revenue stream from the pipeline (and eventually other energy infrastructure in the corridor): tax revenue. First Nations are entitled to tax, including property taxes, economic activities on their lands. The land could be transferred in one of two ways:

- The governments of Canada and of British Columbia could transfer ownership of all remaining corridor lands not currently in private hands (primarily provincial Crown lands) to the appropriate First Nations.
- The governments could undertake to transfer the lands as part of the final negotiated deal allowing Northern Gateway to proceed.

The corridor should also be the default route for future energy infrastructure (oil, gas, or electricity) under rules similar to those established for Northern Gateway.

Federal and Provincial Participation

Canada, Alberta, and British Columbia stand to benefit financially from the project; therefore, they should all contribute to the final resolution.

Alberta should

- provide fully repayable loans to finance First Nations participation in equity ownership all along the corridor. Northern Alberta First Nations already have many pipelines crossing their territories and
- encourage the collaboration of Alberta First Nations with northern BC First Nations and point to the most effective means of capitalizing on the project.

British Columbia has the opportunity to utilize its resources the way Alberta has. The BC government should target its contributions at northern First Nations and conservation issues, and

- help create an Aboriginal-owned energy corridor and then set aside equivalent conservation lands,
- establish a Northern First Nations Initiative, focussing on career and skills training and business development, and
- establish a pipeline emergency response program.

The federal government should

- help finance, on a fully repayable loan basis, First Nations' equity engagement in the pipeline company and Aboriginal ownership of the energy corridor, and
- together with Alberta, fund a substantial insurance endowment to cover the cost of any oil spill clean-up on water or land.

Northern Gateway can be seen as part of the new wave of resource-centred partnerships that redefine relationships between Indigenous peoples, the State, and the business community, and that fuel a

renaissance in Aboriginal economic activity. To be successful and sustainable, Northern Gateway must be based on a transformational business and development model. The conditions laid out in the first instance – First Nations engagement, high-level environmental protection, inter-jurisdictional collaboration, and commercial viability – must be met, ideally in an atmosphere of cooperation and mutual respect. For reasons having as much to do with government and business practices as with First Nations responses and regional protests, the project has stalled. This pipeline is too important to Canada to languish because of misunderstandings and a failure to explore all possibilities. The options, strategies, and processes outlined above represent a non-technical starting point, a principles-based approach to transforming conflict into collaboration.

Done properly, Northern Gateway could do more than carry oil sands oil to international markets. It could symbolize a new era in business-First Nations-government collaboration in the proper and carefully managed development of this country's natural resources.

SOMMAIRE

La publication le 12 avril 2013 du rapport provisoire de la commission d'examen conjoint (CEC) sur le projet de pipeline Northern Gateway – avec sa longue liste de recommandations et d'exigences – rappelle les défis gigantesques auxquels est confronté un des projets d'infrastructure les plus grands et les plus importants de l'histoire canadienne des dernières années. Ce projet provoque de vives discussions, des manifestations, un battage politique à un haut niveau, de nombreux débats d'opinion et se situe à l'intersection : (1) des aspirations du Canada à être une superpuissance énergétique; (2) des normes environnementales touchant l'exploitation des ressources au 21e siècle; et (3) de l'évolution des rapports entre les Autochtones et les non-Autochtones au Canada. Ce projet teste en somme la capacité de notre pays à concilier des visions opposées sur le développement des ressources et la gestion de l'économie nationale. Et cette capacité est particulièrement mise à l'épreuve par le nouveau statut d'autonomie juridique obtenu par les communautés des Premières Nations, dont le soutien est indispensable au succès du projet Northern Gateway.

Que le projet Northern Gateway soit mis en œuvre ou non, le Canada doit trouver un moyen de créer l'infrastructure nécessaire pour tirer profit de la robustesse des marchés internationaux de l'énergie et de l'abondance du pétrole des sables bitumineux de l'Ouest canadien. Les opportunités, notamment en Asie, sont considérables et elles le sont à long terme, ce qui est encore plus important. C'est précisément parce que d'autres fournisseurs que le Canada pourraient bien détourner ces opportunités à leur avantage si celui-là n'arrive pas rapidement à écouler ses produits sur les marchés ou s'il doit envisager des processus d'approbation plus longs pour des projets de remplacement que le projet Northern Gateway a une importance économique si inhabituelle pour le Canada.

Le promoteur du projet Northern Gateway, la société Enbridge, devra peut-être réviser le projet proposé de façon notable avant de pouvoir aller de l'avant. Malgré l'excellent travail technique exécuté dans le projet Northern Gateway jusqu'à présent, les dynamiques politiques et financières nécessitent un changement dans la manière d'envisager la mise en valeur des ressources. Le tracé du pipeline Northern Gateway ne peut pas être changé parce qu'il faudrait alors reprendre le processus d'approbation réglementaire; le tracé actuel qui est proposé ne devrait être accepté que si toutes les parties s'entendent sur un meilleur processus pour désigner le corridor sur lequel reposera l'infrastructure énergétique de l'avenir.

Participation au capital

La participation financière des Premières Nations du nord devrait être un élément central de la stratégie à long terme. Les prises de participation au capital effectuées par les Premières Nations dont le territoire avoisine le corridor du pipeline constituent le meilleur moyen d'assurer des partenariats

productifs à long terme. Le présent document suggère plusieurs modèles de participation au capital qui généreraient de multiples sources de revenus : retour sur investissement, rente ou autre imposition de frais pour l'exercice du droit de passage dans le corridor du pipeline et impôt foncier autochtone dans le corridor du pipeline qui est désigné comme territoire d'une réserve.

Ententes sur les impacts et les avantages

Les ententes sur les impacts et les avantages (EIA) servent à définir la façon dont les Premières Nations sont consultées et accommodées dans le processus de mise en valeur des ressources, mais la création de ce corridor fait apparaître de nouveaux problèmes et teste au maximum les limites des EIA actuelles. Les EIA en cours au Canada portent principalement sur les projets de ressources à court terme, tandis que les EIA dans le corridor doivent tenir compte de la nécessité d'arrangements à long terme. Compte tenu de la nature globale du secteur de l'énergie, les conditions négociées pourraient comporter des mécanismes de renouvellement des EIA qui tiendraient compte des changements de la situation financière, des prix et de la demande. Il devrait y avoir un nouveau processus à deux volets pour l'établissement des EIA :

- des EIA à l'échelle du corridor : le pipeline aura une incidence sur l'ensemble des Premières Nations du nord de la Colombie-Britannique et de certaines parties du nord de l'Alberta. Une EIA à l'échelle du corridor pourrait aborder les questions qui vont au-delà des préoccupations des Premières Nations dont le territoire est situé de part et d'autre du corridor;
- des EIA pour certaines Premières Nations : certaines communautés devront conclure des EIA plus ciblées en raison des impacts et des avantages directs qu'ils tireront du pipeline, car celui-ci traverse leurs territoires traditionnels. Il est essentiel que ces EIA puissent prévoir :
 - o le lancement immédiat d'un programme de formation et de préparation au travail;
 - o un engagement à signer des contrats d'approvisionnement, des contrats d'achat et des ententes de service avec des entreprises et des corporations de développement des Premières Nations; et
 - o un projet régional modèle destiné aux écoles primaires et secondaires qui vise à améliorer les résultats scolaires, à augmenter l'employabilité et à soutenir les initiatives de développement communautaire.

Protection de l'environnement

Le système de pipeline et de transport sera le plus avancé au monde. Pour conserver ce statut, la pleine participation des Premières Nations est sollicitée, tout comme l'est la contribution des groupes environnementaux à la protection de l'environnement et au développement de mesures d'intervention. Pour enrichir et gérer les terres et les aspects maritimes du pipeline, nous recommandons qu'une commission d'experts se voie attribuer la responsabilité de produire dans les meilleurs délais un rapport sur les meilleures pratiques et technologies environnementales qui soient fondées sur des données probantes; cette commission proposerait le régime qui fixerait les normes les plus élevées dans le monde.

Les terres et les droits de passage

Le gouvernement du Canada devrait démontrer sa volonté de désigner les terres du corridor en question comme des réserves en vertu de la *Loi sur les Indiens*. Ce geste créerait une source de revenus additionnelle qui pourrait être tirée du pipeline (et éventuellement des autres infrastructures pour le transport de l'énergie dans le corridor) : des recettes fiscales. Les Premières Nations ont droit à l'impôt, y compris l'impôt foncier, des activités économiques sur leurs terres. Les terres pourraient être transférées de deux manières :

- les gouvernements du Canada et de la Colombie-Britannique pourraient transférer la propriété de toutes les terres du corridor dont la propriété n'est pas privée (des terres provinciales de la Couronne principalement) aux Premières Nations appropriées;
- les gouvernements effectueraient le transfert des terres dans le cadre de l'accord final négocié sur la mise en œuvre du projet Northern Gateway.

Le corridor pourrait également être désigné comme le lieu principal de l'infrastructure pour le transport futur des ressources énergétiques (pétrole, gaz ou électricité) en vertu de règles similaires à celles établies pour le projet Northern Gateway.

Participation fédérale et provinciale

Le Canada, l'Alberta et la Colombie-Britannique sont les provinces qui devraient tirer un bénéfice financier du projet et, par conséquent, ils devraient tous contribuer à la résolution finale.

L'Alberta devrait :

- fournir des prêts entièrement remboursables pour financer les prises de participation aux fonds de capitaux effectuées par les Premières Nations dont le territoire est situé tout le long du corridor. Le territoire des Premières Nations du nord de l'Alberta est déjà traversé de nombreux pipelines; et
- encourager la collaboration entre les Premières Nations de l'Alberta et du nord de la Colombie-Britannique et signaler les moyens les plus efficaces de profiter des retombées du projet.

La Colombie-Britannique a la possibilité d'utiliser ses ressources de la même façon que l'Alberta. Le gouvernement de la C.-B. devrait faire porter ses interventions sur les questions touchant les Premières Nations du nord et les problèmes de conservation, tandis que la province :

- aiderait à créer un corridor énergétique dont la propriété serait autochtone, puis désignerait comme zone de conservation des terres équivalentes;
- monterait un projet pour les Premières Nations du nord qui porterait sur le développement des carrières, des compétences et des affaires;
- établirait un programme d'intervention en cas d'urgence pour le pipeline.

Le gouvernement fédéral devrait :

- contribuer à financer, par l'entremise de prêts entièrement remboursables, les prises de participation aux fonds de capitaux de la société pipelinère effectuées par les Premières nations et la propriété autochtone du corridor énergétique; et
- financer avec l'Alberta une assurance substantielle couvrant les frais liés aux activités de nettoyage à la suite de tout déversement de pétrole dans l'eau ou sur terre.

Le projet Northern Gateway peut être considéré comme faisant partie de la nouvelle vague de partenariats centrée sur les ressources qui redéfinissent les relations entre les peuples autochtones, l'État et la communauté des affaires et qui alimentent une renaissance de l'activité économique des Autochtones. Pour être efficace et durable, le projet Northern Gateway doit être fondé sur un modèle d'entreprise et de développement en transformation. Les conditions énoncées dans le premier cas – l'engagement des Premières Nations, la protection environnementale à un haut niveau, la collaboration interjuridictionnelle et la viabilité commerciale – doivent être respectées, idéalement dans une atmosphère de coopération et de respect mutuel. Pour des raisons qui relèvent autant des pratiques des gouvernements et des entreprises que de la réaction des Premières Nations et de l'opposition des régions, le projet piétine. En raison de son importance inhabituelle pour le Canada, ce projet de pipeline ne peut être entravé par des malentendus et par l'échec des efforts à explorer toutes les possibilités. Les options, les stratégies et les processus décrits précédemment constituent le point de départ non technique d'une approche fondée sur les principes utiles pour transformer le conflit en collaboration.

S'il est mené de façon appropriée, le projet Northern Gateway pourra faire bien plus que de seulement transporter le pétrole des sables bitumineux vers les marchés internationaux. Il pourra symboliser une nouvelle ère de collaboration entre le monde des affaires, les Premières Nations et les gouvernements qui pavera la voie à un développement judicieux et soigneusement orchestré des ressources naturelles de ce pays.

INTRODUCTION

The April 12, 2013 release of the Joint Review Panel's (JRP) interim report on the Northern Gateway pipeline project – with its lengthy list of recommendations and requirements – provided a reminder of the formidable challenges facing one of the largest and most important infrastructure projects in recent Canadian history. This hotly debated project, the subject of protests, high level politicking, and extensive public commentary, stands at the intersection of (1) Canada's aspirations to be an energy superpower, (2) the environmental standards of 21st century resource development, and (3) the present and future of Indigenous-newcomer relations in Canada. It is a test of our country's ability to reconcile competing visions of resource development and the management of the national economy.

Northern Gateway could produce substantial wealth and opportunity for all involved.

Northern Gateway is a time-sensitive project that, if done properly, could produce substantial wealth and opportunity for Canada, Canadian governments, and Aboriginal people in the pipeline corridor from Alberta through to the Pacific coast. The project is, however, caught up in overlapping jurisdictions, Aboriginal economic and political aspirations, financial misunderstandings, and environmental concerns.

This paper argues that it is in the national interest to move this project along, both for the short-term returns associated with pipeline construction and for the much more substantial benefits connected to delivering a high value Canadian resource to world markets. The opportunity cost to all would be enormous if Northern Gateway were to fail.

Direct and Indirect Benefits

Exactly how great the benefits to Canada would be (and therefore the scale of the opportunity costs should a pipeline of the scale of Northern Gateway fail to be built) is uncertain; however, credible estimates are available. Roland Priddle, former Chair of the National Energy Board,¹ found that the 30-year economic benefits of a pipeline and port project leading to the export of 525,000 barrels a day of oil sands products from the Pacific coast are simply staggering. Even assuming no net increase in oil sands production, "first round effects" from construction, operating costs, and associated production and investment increases GDP by \$270 billion, labour incomes by \$48 billion, government revenues by \$81 billion, and employment by 558,000 person-years.

Those numbers are conservative because Canada and the US are the only western industrialized countries at this moment with the potential to significantly increase oil production in a 25-year time horizon. In fact, output could more than double. By 2035, about 90 percent of Canada's oil output could come from the oil sands, which offer longer-term development opportunities than do conventional oil fields.

The potential benefits (and therefore opportunity costs) are not limited to *this* project. Given the large number of major energy infrastructure projects being proposed to link western Canada's oil and gas resources to markets in Asia, the conditions that would make Northern Gateway (or an equivalent) succeed are likely to provide a template for other projects with similarly large and positive effects.

The Status Quo

The failure of Northern Gateway would be hugely costly for three reasons: the perishable nature of the market opportunities for Canadian oil in the Asia-Pacific region; the time needed to bring competing alternative pipeline proposals on-stream; and the consequences for other proposed energy infrastructure. The question is: Can Northern Gateway be revived from the current impasse?

We at the Macdonald-Laurier Institute believe it can. But all the main parties – companies, governments, and First Nations – will have to step back and find ways to put Northern Gateway on a surer footing. Unfortunately, this is very difficult for all these parties, especially in view of the legacy of confusion and mistrust they must overcome in order to view proposals that might come from one of the interested parties dispassionately.

The impetus, therefore, must come from the outside. The JRP's well advanced review and assessment process does not have to stop. When its work is done, it is likely that important standards and requirements will be set for the construction of an actual pipeline. Having the JRP indicate the extent to which the Northern Gateway proposal meets the necessary technical specifications, however, is only a piece of the puzzle – and perhaps not even the largest piece. The review process will probably not resolve many of the political, cultural, and other issues that stand in the way of actual construction.

As independent and non-partisan observers, we offer a preliminary outline of steps to break up the blockage in the pipeline debate and to promote the discussion of alternatives that build on what has already been accomplished rather than return to Square One, with all that implies in terms of opportunity costs. We have not been in touch with proponents or opponents of the project, and we do not argue the case from either side. Instead, we have followed the national and regional debates with interest and have a general understanding of the aspirations of First Nations people, northern British Columbians, environmentalists, and the resource sector.

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FACTORS TO CONSIDER

In such a reimagining of Northern Gateway, several things appear clear from the outset:

- Without the enthusiastic and committed support and participation of affected First Nations, the chances of the project's success plummet. First Nations groups along the corridor must support the final arrangements and be long-term partners in the project.
- First Nations' involvement must proceed in such a way that affected Aboriginal populations see tangible benefits in the form of genuine economic, social, and cultural progress and self-reliance that reduce dependence on transfers.
- While some environmental groups may oppose energy infrastructure on principle, most Canadians want reassurance that these projects are carried out in a responsible manner and to the highest standards of environmental protection. If credible assurances can be given in this regard, we believe that opposition will weaken markedly. Environmental and conservation issues therefore have to be addressed at the highest level possible to assure Canadians that the West Coast will be adequately protected and that appropriate emergency response measures are in place.
- Federal and provincial governments need to work out acceptable financial arrangements – including with First Nations groups – to ensure that jurisdictional conflicts do not stop the project.
- The project must be financially feasible for the companies involved, including the pipeline operators and the oil sands firms, otherwise this project will wither and die.
- Time is of the essence, as both Aboriginal and non-Aboriginal Canadians face huge opportunity costs if Northern Gateway fails.

ISSUES AND OPPORTUNITIES

Restarting the Pipeline Process

While moving appropriately through the regulatory process, Enbridge's current proposition has not produced widespread support inside the region, province, or nation. Even though a great deal of important technical work has been done, the political and financial dynamics make it imperative that all participants have an opportunity to rethink major aspects of the project. Enbridge need not walk away from the several hundred million dollars it has already invested. Technically, it is still well positioned to build and manage the pipeline. As a work of political economy, however, Northern Gateway needs a fresh start. The following steps seem appropriate in this context.

- The proponents should continue with the formal review process and respond in full to the JRP's interim and final recommendations.
- The technical and environmental review aside, the Government of Canada should launch a regional process with substantial Aboriginal, industrial, and regional representation that would examine and negotiate the broader elements of a general pipeline agreement. This process should have a hard deadline to focus minds on all sides.
- Proponents should establish a planning and advisory group with substantial Aboriginal participation to oversee the social, economic, and regional development aspects of this project.
- Governments and First Nations in the region should adopt the processes and structures of modern treaties (such as those developed for the Inuvialuit and Gwich'in) that define Indigenous participation in regional economic development and environmental management to oversee the planning and development process. This arrangement will ensure First Nations' participation in a long-term review.

Equity Participation

Location, as Mr Justice Thomas Berger famously said in the final report on the Mackenzie Valley Pipeline Inquiry, is a natural resource. It follows that First Nations along the pipeline corridor have a significant interest in the prosperity that the pipeline will generate. It is increasingly clear that First Nations with a financial and managerial stake in developing the pipeline are much more likely to support the project. How can that happen in a responsible, fair, and constructive way?

Specifically, proponents should consider the following:

- At the outset, participants must agree that First Nations will participate financially in the pipeline, as is evident in current discussions.
- Partnership means and requires full participation in the project, including initial investments, risk, and participation in revenue sharing when the pipeline is profitable. Enbridge, incidentally, understands the importance of this position, having already offered First Nations the opportunity to secure 10 percent ownership in the pipeline.
- The financial engagement of Northern First Nations should be a central part of the long-term strategy. Engaging First Nations in the regions surrounding the pipeline corridor as equity partners is the best means of ensuring productive, long-term partnerships. This would involve going beyond Enbridge's current proposal for Aboriginal equity.
 - This could involve the creation of a stand-alone company to build, own, and operate the pipeline;²
 - First Nations could buy additional equity in the new corporation at fair market value;
 - First Nations are to buy their equity with their own resources, including loans (potentially from the governments of Canada and Alberta) to be repaid out of projected revenues;

- o First Nations should acquire a sufficiently large equity share to ensure long-term management and board participation in the project;
- o Other complementary possibilities are worth considering. For example, the leasing, on fair market terms, of the existing pipeline corridor from private land-owners and the federal government and its designation as an Aboriginal energy corridor to be run by a company owned and operated by First Nations; or the transfer of the Crown lands involved to First Nations along the route and the designation of those lands as reserves (more on this below); and
- o The pipeline should pay rent to the Aboriginal energy corridor company for use of the corridor for an amount to be determined in advance and fixed in a contractual agreement.

Such an approach has many advantages. As we have argued elsewhere, equity participation by First Nations would help to turn the pipeline proposal

from an outsiders' project resented by mistrustful First Nations along the route into a full partnership between an industry with expertise and capital and newly empowered Aboriginal people and governments. An Aboriginal energy corridor across Northern BC, for example, could be the conduit for all forms of energy seeking to flow across BC to Asian markets, and majority Aboriginal ownership would give First Nations the confidence, authority, and incentives to embrace responsible development. Best of all, such a powerful equity position removes the seller's remorse that too often afflicts Aboriginal agreement to resource development: as owners, they would participate fully in all the value created by their involvement and consent.⁵

Additionally, our proposal could create three distinct revenue streams for First Nations, each one justified by their powerful negotiating authority under treaties, Aboriginal title, and judicial decisions. The three streams are:

- 1) The return on investment (that is, equity participation);
- 2) rent or other charges to be levied for the use of the pipeline right-of-way within the energy corridor; and
- 3) Aboriginal property tax revenues within a pipeline corridor designated as reserve lands.

We have not counted Aboriginal tax revenues that First Nations governments might raise by taxing Aboriginal businesses and workers on reserve lands where these business and workers benefit from pipeline-related jobs and other opportunities. In the next section, we discuss the other benefits streams that appropriate impact and benefit agreements should create.

We have not opened the actual question of revenue sharing in the natural resource sector. A clear distinction is to be drawn between royalties and other government revenues generated by the extraction and sale of natural resources, and the creation of the infrastructure needed to move resources that have already been extracted. Northern Gateway and other energy pipelines fall in the second category; it would be a mistake to mix them together. It would be helpful, however, to specify that agreements over the energy corridor are made without prejudice to Aboriginal claims to a share of natural resource revenues. It is self-defeating for parties interested in obtaining a share of natural resource revenues to obstruct the development of energy infrastructure if that significantly reduces those same revenues. Our concern in this paper is to create a flow of benefits for Aboriginal participants in pipeline development; benefits that are directly related to the creation, construction, and long-term management of that infrastructure.

It is also important to address directly and openly the issue of how the federal government should react to the economic benefits created for Aboriginal people. Some Aboriginal communities fear that Ottawa will react to improved incomes and economic prospects by cutting their services. A large number of Canadians might support such a policy.

Overall government spending per capita on Aboriginal peoples is far less than on other Canadians.

What many people do not realize, however, is that (popular misconceptions notwithstanding) overall government spending per capita on Aboriginal peoples falls well short of per capita spending on other Canadians, despite the fact that Aboriginal people are among the most socially and economically vulnerable populations in the country. Much work remains to be done to find an appropriate way to recognize and support rising Aboriginal prosperity in a way that treats all Canadians equitably. That is a conversation for another day.

For the moment, we recommend that, should an arrangement allowing the pipeline to proceed generate important benefits for Aboriginal communities, Ottawa will not reduce current programming for First Nations. Aboriginal communities must be left in no doubt that participating in development will result in incremental increases in revenues, leave them better off, and move them closer to parity in government services to other Canadians.

Impact and Benefit Agreements (IBAs)

Under Canadian law, First Nations have the right (as represented in the doctrine of “duty to consult and accommodate”) to be consulted on all stages of the project’s development. First Nations have made effective use of these rights in negotiating significant impact and benefit agreements with resource companies. Given the scale and nature of Northern Gateway, it is vital that IBAs balance the potential of the project and the needs of affected First Nations.

- **Two-Tiered Process of IBAs:** At present, IBAs generally focus on a specific First Nation, usually the one(s) most affected by the proposed resource development. Northern Gateway requires a modified version:
 - **Corridor-wide IBAs:** The pipeline will affect all First Nations in northern British Columbia and portions of northern Alberta. It follows a unique region or corridor-wide IBA – including scholarships for northern colleges, the University of Northern British Columbia or apprenticeship programs for northern First Nations students, and so on – address issues that extend beyond the First Nations directly connected the corridor.
 - **Specific First Nations IBAs:** Some communities will need more targeted IBAs because of the direct impact and opportunities associated with the pipeline route through their traditional territories.
- **Comprehensive IBAs:** Existing IBAs in Canada focus on short-term resource projects. Given the pipeline’s long anticipated lifespan, IBAs in the corridor must take into account the need for longer-term arrangements. Given the nature of the global energy sector, conditions could include an IBA renewal system to accommodate changes in financial circumstances, pricing, and demand.

The most advanced electronic and technological monitoring should be used at each stage of the project.

Environmental Protection

The Northern Gateway pipeline passes through some of the most remarkable lands in Canada. The shipment point on the West Coast means that oil tankers will navigate the ecologically sensitive waters of the Pacific Northwest Coast. All Canadians, especially British Columbians and First Nations, are concerned about environmental protection. To this end, the following measures might be considered.

- The pipeline company and governments must undertake that the pipeline and shipping system will be the most advanced in the world. Only electronic and technological monitoring of the highest standard should be used at each stage of the project. There are growing signs that the Government of Canada has accepted this proposition.
- First Nations should participate fully and environmental groups should contribute to developing the environmental protection and response system. To avoid an unduly politicized process, we recommend creating an expert panel with a demanding reporting deadline whose mandate would be to:

- o produce an evidence-based report of environmental best practices and technologies to build and manage the land and sea-based aspects of the pipeline; and
- o recommend a regime that will set the highest standards available worldwide. This particular proposal may be superseded by the JRP's final recommendations, whose interim report has strong statements about environmental protection.
- First Nations companies and employees should provide the backbone of the surveillance and response units along the pipeline corridor.
- The Northern Gateway pipeline cannot be rerouted because it would send the project back to the starting point in terms of regulatory approvals; the current proposed route should be accepted only if all parties agree on a better process for defining the route for future energy infrastructure. This process might be defined as part of the regional process to define a general pipeline agreement as contemplated above. In particular, the parties should find a method that allows First Nations to raise objections to the proposed route and propose alternatives while keeping the cost of the overall project within bounds. Perhaps some amount (equivalent to, say, five percent of the total cost) could be set aside and available for re-routings justified to protect sites of special significance to Aboriginal people. Anything above that limit would be deducted from Aboriginal equity or be a charge against future Aboriginal pipeline revenues. The current proposed route is not completely inflexible. For example, changes to the route within the proposed corridor could be accommodated within the existing JRP. This may offer some scope to adjust the route to avoid specific sites of cultural or conservation significance. And, of course, the JRP will make recommendations on pipeline routing as well to take account of evidence heard during its hearings.

Corridor lands should be designated reserves under the Indian Act.

Land and Rights-of-way

In the normal course of the economy, the land on which the pipeline travels will not have a very great commercial market value. As the *route* for the pipeline, however, these lands become extremely important. The vast majority of the lands in the pipeline corridor are not yet covered by land claims settlements.

As a gesture of good faith, and on the explicit understanding that First Nations control over these lands would not be used to block the project, the governments of Canada and of British Columbia could transfer ownership of all remaining corridor lands not currently in private hands (primarily provincial Crown lands) to the appropriate First Nations. Alternatively, governments could undertake to transfer the lands as part of the final negotiated deal allowing Northern Gateway to proceed. In either case, the Government of Canada should indicate its willingness to designate the land in question as reserves under the *Indian Act*. This would create another revenue stream from the pipeline (and eventually other energy infrastructure in the corridor): tax revenue. First Nations are entitled to tax, including property taxes, economic activities on their lands. With a framework agreed in advance to keep such taxation within reasonable bounds, this would be another mechanism allowing First Nations to benefit directly and immediately from their involvement with the corridor.

The corridor could also be explicitly given status as the primary focus of future transportation of energy resources (oil, gas, or electricity) under the rules similar to those established for Northern Gateway. This would ensure that the First Nations would get the maximum financial benefit from developments through and in their territories. The land allocations would be a charge against eventual land claims settlements.

As a response to the legitimate concerns of conservationists, the governments involved could undertake to designate equivalent acreage of equivalent ecological significance in the relevant province(s) (in this case BC and Alberta) as conservation zones.

Collaborative Infrastructure Planning and Development

As the pipeline is developed, northern infrastructure will need major improvements. It is vital that these improvements be undertaken with a view to the needs and aspirations of the people of

northern British Columbia. A collaborative planning process, using existing organizations and fora but involving all corridor communities, will ensure that the pipeline investments in road, power, Internet, and other infrastructure will meet regional Aboriginal and non-Aboriginal needs. This commitment would address a long-standing problem with regional resource development, and potentially provide a template for future developments.

Training, Jobs, and Business Opportunities

Northern First Nations are eager for local, steady, well-paying jobs. It is vital that the employment and business development opportunities associated with the pipeline project match First Nations abilities and human resources. This part of the project – typically captured in the IBAs – would include:

- the immediate launch of a training and workplace preparation program;
- a commitment to sign supply, procurement, and service agreements with First Nations businesses and development corporations, so that local firms would have a fair opportunity to capitalize on pipeline related demand and opportunity; and
- a model regional initiative for elementary and high schools, designed to improve educational outcomes, increase employability, and support community development initiatives.

Federal and Provincial Participation

The Northern Gateway project has become a focal point for conflict between the governments of Canada, Alberta, and British Columbia. All three governments stand to benefit financially from the project; therefore, they should all contribute to the final resolution.

ALBERTA

Alberta could make a financial contribution to the First Nations through whose traditional territories the pipeline passes. This could be paid for from the incremental royalties flowing to the government as a result of the project's existence.

- Alberta and the Government of Canada should help pay for the highest quality oil-spill protection and for clean-up facilities on the coast.
- Using the first five years of incremental provincial revenue made possible by the pipeline, Alberta and the Government of Canada could help establish a substantial insurance endowment that would cover the cost of any oil-spill clean up on water or on land. The commitment of both governments should be to total remediation of and compensation for any such damage beyond the limits of corporate insurance, should this be an issue.
- Alberta should provide fully repayable loans to finance First Nations participation in equity ownership all along the corridor.
- Northern Alberta First Nations already have many pipelines crossing their territories. It would be very helpful if the Government of Alberta were to encourage the collaboration of Alberta First Nations with northern BC First Nations and to point to the most effective means of capitalizing on the project.

BRITISH COLUMBIA

The Government of BC has been uncertain about the provincial benefits of the project. Indeed, the issue featured prominently in the May 2013 provincial election. The re-election of the Liberal Party government makes progress possible, but within the limits spelled out by Premier Christy Clark. We argue that the greatest benefits to the province are (a) the further opening of the natural resource economy to northern BC First Nations on an equitable and responsible basis; (b) the establishment of the highest standards of environmental protection for the province's lands and waters; (c) the potential for major economic spin-offs in the province's north that would redound to the benefit of Aboriginals and non-Aboriginals alike; and (d) the creation of a template for agreement on northern energy corridors that will facilitate the development of BC energy resources, such as are found in

the Peace River region. The government should target its contributions at northern First Nations and conservation issues.

- The government could establish a Northern First Nations Initiative, focussing on career and skills training and business development, to better ensure that northern First Nations can capitalize on the pipeline's opportunities.
- The government could establish a land-based pipeline emergency response program using northern companies and employees to ensure a rapid reaction system is in place and permanently operational.
- The government could help create an Aboriginal-owned energy corridor and then set aside equivalent conservation lands.

CANADA

The federal government understands the national and long-term benefits of the Northern Gateway project. It is in a unique position because of its legal and constitutional obligations to work with First Nations peoples, and because federal coffers will benefit from significant increases in revenue as a result of the pipeline. Specific initiatives could include:

- A financial contribution to First Nations' equity engagement, on a fully repayable loan basis, to finance Aboriginal participation in the pipeline company and Aboriginal ownership of the energy corridor. Ideally, this contribution would be based on the First Nations Financial Management Board model, thus ensuring full transparency and accountability for the use of the borrowed money and the handling of the associated returns;
- a substantial insurance endowment from the federal and Alberta governments that would cover the cost of any oil spill clean-up on water or land (see above) funded through the first five years of incremental federal revenue associated with the shipment of oil through the pipeline; and
- the commitment of both governments to total remediation of and compensation for any environmental damage, irrespective of the liability of companies and other parties.

The long-term benefit of Northern Gateway is access to world oil markets.

FINAL THOUGHTS

Northern Gateway is a crucial Canadian undertaking, designed to capitalize on the robust international markets for oil and the resource available in the Western Canadian oil sands. The opportunities, particularly in Asia, are very significant and – most important – long term. The pipeline would have significant short-term benefits in terms of construction, but the major benefits would come through the ability to reach world markets with the oil sands production.

Northern Gateway could symbolize a new era in business-First Nations-government collaboration in the proper development of Canada's natural resources.

Under Canadian law and in line with recent economic practices, First Nations along the pipeline corridor have every reason to share in the decision making surrounding the project and benefit in the short and long terms from its economic activities. In this, the first green-field undertaking of this magnitude since First Nations were empowered under the “duty to consult and accommodate” rulings of the Supreme Court of Canada, it is clear that First Nations expect and deserve far more than perfunctory consultation, and demand greater short- and long-term engagement than resource and infrastructure companies are used to providing. Northern Gateway can be seen, therefore, as part of the new wave of resource-centred partnerships that redefine relationships between Indigenous peoples, the State, and the business community, and that fuel a renaissance in Aboriginal economic activity.

To be successful and sustainable, Northern Gateway must be based on a transformational business and development model. The conditions laid out in the first instance – First Nations engagement, high-level environmental protection, inter-jurisdictional collaboration, and commercial viability – must be met, ideally in an atmosphere of cooperation and mutual respect. For reasons having as much to do with government and business practices as with First Nations responses and regional protests, the project has stalled. This pipeline is too important to Canada to languish because of misunderstandings and a failure to explore all possibilities. The options, strategies, and processes outlined above represent a non-technical starting point, a principles-based approach to transforming conflict into collaboration.

Done properly, Northern Gateway could do more than carry oil sands oil to international markets. It could symbolize a new era in business-First Nations-government collaboration in the proper and carefully managed development of this country's natural resources.

AUTHOR BIOGRAPHIES



Brian Lee Crowley

Brian Lee Crowley has headed up the Macdonald-Laurier Institute (MLI) in Ottawa since its inception in March of 2010, coming to the role after a long and distinguished record in the think tank world. He was the founder of the Atlantic Institute for Market Studies (AIMS) in Halifax, one of the country's leading regional think tanks. He is a former Salvatori Fellow at the Heritage Foundation in Washington DC and is a Senior Fellow at the Galen Institute in Washington. In addition, he advises several think tanks in Canada, France and Nigeria.

Crowley has published numerous books, most recently *Northern Light: Lessons for America from Canada's Fiscal Fix*, which he co-authored with Robert P. Murphy and Niels Veldhuis and two bestsellers: *Fearful Symmetry: the fall and rise of Canada's founding values* (2009) and MLI's first book, *The Canadian Century; Moving Out of America's Shadow*,

which he co-authored with Jason Clemens and Niels Veldhuis.

Crowley twice won the Sir Antony Fisher Award for excellence in think tank publications for his health care work and in 2011 accepted the award for a third time for MLI's book, *The Canadian Century*.

From 2006-08 Crowley was the Clifford Clark Visiting Economist with the federal Department of Finance. He has also headed the Atlantic Provinces Economic Council (APEC), and has taught politics, economics and philosophy at various universities in Canada and Europe.

Crowley is a frequent commentator on political and economic issues across all media. He holds degrees from McGill and the London School of Economics, including a doctorate in political economy from the latter.



Ken Coates

Ken Coates is MLI's Senior Fellow in Aboriginal and Northern Canadian Issues. He is the Canada Research Chair in Regional Innovation in the Johnson-Shoyama Graduate School of Public Policy at the University of Saskatchewan. He has served at universities across Canada and at the University of Waikato (New Zealand), an institution known internationally for its work on Indigenous affairs. He has also worked as a consultant for Indigenous groups and governments in Canada, New Zealand, and Australia as well as for the United Nations, companies, and think tanks. He is currently finalizing a book called *Treaty Peoples: Finding Common Ground with Aboriginal Canadians*. He has previously published on such topics as Arctic sovereignty, Aboriginal rights in the Maritimes, northern treaty and land claims processes, regional economic development, and government strategies for working with

Indigenous peoples in Canada. His book, *A Global History of Indigenous Peoples: Struggle and Survival*, offered a world history perspective on the issues facing Indigenous communities and governments. He was co-author of the Donner Prize winner for the best book on public policy in Canada, *Arctic Front: Defending Canada in the Far North*, and was short-listed for the same award for his earlier work, *The Marshall Decision and Aboriginal Rights in the Maritimes*. Ken contributes regularly, through newspaper pieces and radio and television interviews, to contemporary discussions on northern, Indigenous, and technology-related issues.

ENDNOTES

- 1 Drawn from Executive Summary , p. 2, of *Making Oil and Water Mix: Oil Tanker Traffic on Canada's West Coast*, 2012, available at <http://www.macdonaldlaurier.ca/files/pdf/OilTankerBan-FINAL.pdf>.
- 2 Our understanding is that, if a new owner of the stand-alone pipeline company (including a company jointly owned by, say, Enbridge and a consortium of First Nations) were to take on everything that Enbridge has done, provided in evidence and undertaken to do, the JRP would require no significant change. On the other hand, the JRP would doubtless want complete assurance that the new company could deliver on everything that Enbridge said it could: Could it retain the shipper commitments? (It would presumably have had in-depth discussion with the potential shippers to convince them that it could perform just as well as Enbridge). Could it demonstrate the same financial strength? Could it convincingly undertake the same insurance/compensation commitments in the event of a major spill? Could it convince governments, partners, and others about its ability to mobilize technical and managerial resources? The new company would need to answer all these questions quickly if the process were to remain on track to deliver a report to the Governor in Council by end-2013, as promised.
- 3 January 3, 2013. "The Way to Break the Northern Gateway Logjam: Aboriginal Equity." *The Globe and Mail*. Available at <http://www.macdonaldlaurier.ca/mli%E2%80%99s-brian-lee-crowley-and-ken-coates-in-the-globe-and-mail-the-way-to-break-the-northern-gateway-logjam-aboriginal-equity/>.



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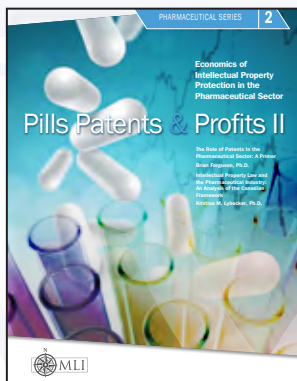


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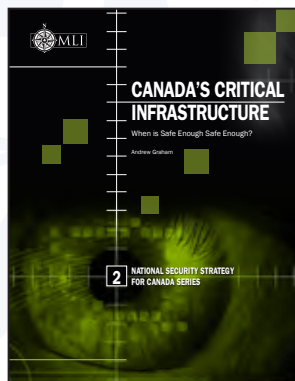
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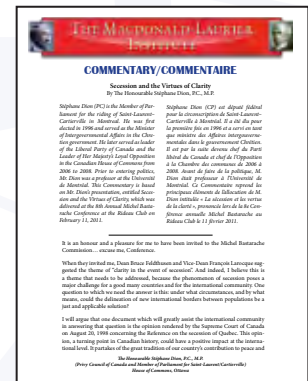
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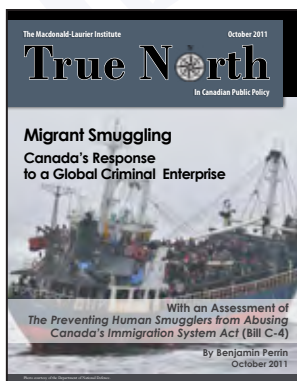
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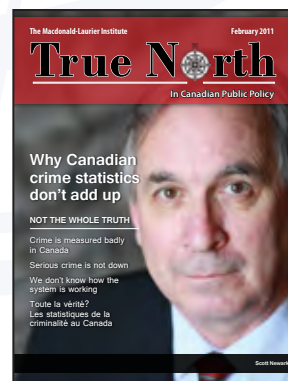
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PRESTON MANNING, PRESIDENT AND CEO,
MANNING CENTRE FOR BUILDING DEMOCRACY
