Legal backgrounder:
The Crown's approach to First Nations consultation on the Enbridge Gateway Pipeline

The proposed 1,170 kilometre-long Enbridge 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. The project proposal engages the jurisdiction and lawful authority of dozens of First Nations, from the Dene and Cree peoples of the Athabasca River basin in the east to the Haida in the west, as well as the nations who rely on the health of the Fraser, Skeena, and Mackenzie Rivers and their tributaries.

Decision-making about this project brings into play section 35(1) of the Canadian constitution, which mandates the reconciliation of "pre-existing Aboriginal sovereignty with assumed Crown sovereignty,"[1] and imposes a duty of honourable consultation and accommodation on the Crown.

The Crown's decision-making responsibility over the pipeline, which comes from statutes including the *Canadian Environmental Assessment Act* (*CEA Act)* and the *National Energy Board Act* (*NEB Act*), is different from and subject to its constitutional duty to consult. As a result, the Crown must complete its consultation with First Nations, in a way that fulfills the duty, before it makes a decision on the project.[2]

Affected First Nations are faced with the dual challenges of making their own decisions about the project and ensuring that their decisions are respected by the Crown and third parties. Ensuring the Crown meets its constitutional duties to First Nations is one strategy for doing so.

THE CONSULTATION PROCESS PROPOSED BY THE CROWN IS FLAWED

The Crown's proposed approach to consultation is contained in a February 2009 document entitled "Approach to Crown Consultation for the Northern Gateway Project." This document was unilaterally developed and sent to some First Nations around February 9, 2009. It states that: "For the Northern Gateway Project, the Crown will rely on the consultation efforts of the proponent and the Joint Review Panel (JRP) process, to the extent possible, to meet the duty to consult."

The proposed terms of reference for the JRP are set out in a draft agreement between the Canadian Environmental Assessment Agency (CEAA) and the National Energy Board (NEB). The JRP itself would be made up of three permanent or temporary members of the NEB. Among other things the JRP would hold public hearings to consider any project-related issues within the mandate of the *NEB Act* and *CEA Act*. The Crown considers the JRP the "key assessment and decision-making body for the project."

The CEAA is identified as the point of contact for the Crown for any leftover or 'residual' matters raised by First Nations that lie outside the mandate of the JRP. However, the only 'residual' consultation specifically offered is on the final report of the JRP before it goes to Cabinet for decision. In the February 2009 document First Nations were informed that: "There is no separate or parallel process to deal with issues within the JRP mandate."

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1 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 20.
2 *Haida Nation* at para. 67.

The flaws in the Crown's consultation process: The approach proposed by the Crown has a number of serious shortcomings when viewed in light of Crown's constitutional duties to First Nations. These concerns can be summarized as follows:

(1) The Crown's proposed approach to consultation on the Enbridge project was unilaterally developed without First Nations involvement. The courts have held that "the first step in the consultation process is to discuss the process itself."[3] While the Crown has requested First Nations' comments on the draft terms of reference for the JRP, to date the Crown has not been prepared to negotiate changes to its overall framework for First Nations consultation. In particular, there has been no meaningful consultation on the preliminary question of the appropriate role of the JRP, if any, in meeting the Crown's constitutional duties. In addition, the Crown has not engaged First Nations upriver and downriver of the pipeline, whose rights could be seriously impacted by a spill.

(2) The Crown's proposed approach to consultation disregards First Nations' rights of governance, management and decision-making in their territories. By unilaterally proceeding with the JRP process, the Crown has made it impossible to have good faith, meaningful, reasonable and responsive consultation in regard to First Nations' Aboriginal Rights of governance. Although the specifics of the jurisdictional authority of each nation may not yet have been adjudicated by a court or defined in treaty, the honour of the Crown nevertheless demands consultation and accommodation to give appropriate 'interim effect' to First Nations' decision-making authority. By way of contrast, the JRP process does not involve First Nations as decision-makers on a government-to-government basis.

(3) The Crown's proposed approach treats First Nations consultation as an 'afterthought' to standard public participation requirements. CEAA and NEB have statutory obligations regarding public participation in the JRP process; however, the JRP process engages First Nations only indirectly as a subset of the public.[4] The only distinct First Nations consultation offered is late in the day after the Environmental Assessment Report has been completed, and then only on the 'residue' of issues that have not been addressed by the JRP or the proponent.[5] This is not consistent with the Crown's duties as outlined by the courts.[6]

(4) The JRP has no mandate to conduct First Nations consultation[7] **or to fully assess potential impacts on Aboriginal Title and Rights.** Before federal authorities can issue approvals for the Enbridge pipeline, CEAA must conduct an environmental assessment.[8] However, the *CEA Act* limits this assessment to impacts on current First Nations land uses and cultural heritage,[9] not the full scope of potentially affected Aboriginal Rights. The JRP has no mandate, for example, to assess impacts on the jurisdictional aspects of Aboriginal Title and governance rights, including the right to decide the uses to which the land and

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[3] *Gitxsan First Nation* v. BC (Minister of Forests), 2004 BCSC 1734 at para. 113; *Huu-Ay-Aht First Nation* v. *BC (Minister of Forests)* 2005 BCSC 697 at para. 123. Recent litigation with respect to the Mackenzie Gas Pipeline suggests that the duty to consult and accommodate with respect to the Enbridge Gateway project was likely triggered at a very early stage, when the agencies involved initially contemplated proceeding by way of Joint Review Panel and other decisions about process design: *Ministry of Environment et al* v. *Dene Tha' First Nation*, 2006 FC 1354 at para. 110, aff'd 2008 FCA 20. In *Carrier Sekani Tribal Council* v. *British Columbia (Utilities Commission*), the BC Court of Appeal recently confirmed that the process of consultation requires discussion at an early stage of a government plan that may impact Aboriginal interests, before a decision crystallizes, "so that First Nations do not have to deal with a plan that has become an accomplished fact": 2009 BCCA 67 at para. 52.

[4] For example the draft JRP agreement refers throughout to "the public, including Aboriginal People."

[5] While First Nations have been given a longer period of time than the general public to review and comment on the draft JRP agreement and terms of reference, the level of input into decision on the JRP's mandate is no deeper than that which is available to the general public.

[6] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 64.

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

[8] The course of action recommended by the JRP's Environmental Assessment Report must also be approved by the federal Governor General in Council (Cabinet).

[9] The *CEA Act* defines "environmental effect" as including effects of changes to "physical and cultural heritage" and "the current use of lands and resources for traditional purposes by aboriginal persons."

water will be put, or indeed impacts on any *future* uses of land or water grounded in Aboriginal Title and Rights. While the JRP also has the power under the *NEB Act* to consider the public interest and any other relevant factor in deciding whether a Certificate of Public Convenience and Necessity should be issued to approve the pipeline, impacts on Aboriginal Title and Rights are not among the considerations explicitly listed in the *NEB Act,* which focuses on more narrow financial and economic considerations.

The courts have held that there is a "duty to focus on the relevant issues" in consultation with First Nations.[10] The JRP does not have the mandate to do so with respect to Aboriginal Title and Rights.

(5) The Enbridge Gateway pipeline raises issues that require higher, strategic level assessment and consultation beyond the scope of the proposed JRP process. According to the Supreme Court of Canada's *Haida* decision, the Crown has a duty to consult at high level of strategic planning for utilization of resources.[11] Consultation at the operational or project-specific level may have "little effect" if First Nations have not been honourably consulted at the strategic level.[12] For the Enbridge Gateway pipeline, a strategic level assessment process is required that first addresses policy considerations relevant to "whether" the project should proceed, rather than "how." Such strategic questions include whether Canada's energy policy should restrict the expansion of the tar sands and related infrastructure like the Enbridge Gateway pipeline, given Canada's international commitments to reduce greenhouse gas emissions, and the impacts of global warming on First Nations' ability to exercise their Aboriginal Title and Rights. Another policy question is whether to lift the longstanding federal policy moratorium on crude tanker traffic, given the potentially devastating impacts of oil spills on First Nations and their territories.

In contrast, the *CEA Act* does not require a strategic environmental assessment. Given that over 99 percent of projects submitted to CEAA are approved, it seems clear that the CEAA process fails to effectively answer the question of "if" a project should proceed, focusing instead on "how" a project should be built. In addition, the proposed terms of reference do not address the issues of tar sands and climate change, and it is uncertain whether oil tanker and shipping issues will be dealt with comprehensively. Based on *Haida*, honourable consultation and accommodation with respect to these higher-level, strategic decisions may be required before the federal Crown can lawfully begin a project-specific review of the Enbridge Gateway pipeline project.

(6) The Crown's proposed approach involves inappropriate delegation to the applicant/proponent. In *Haida*, the Supreme Court of Canada held that: "The honour of the Crown cannot be delegated" to third parties. While "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development… .the ultimate legal responsibility for consultation and accommodation rests with the Crown."[13] However, policy documents from the NEB indicate that it relies almost exclusively on the company who is planning the project to consult with First Nations. The company is then expected to provide evidence of its engagement with First Nations to the NEB (or JRP), who then assesses the consultation and accommodation efforts of the company in its recommendations/decision.[14] This approach is echoed in the "Approach to Crown Consultation for the Northern Gateway Project" document.

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[10] *Ke-Kin-Is-Uqs* v. *BC (Minister of Forests)*, 2008 BCSC 1505, at para. 250.
[11] *Haida* at para. 76.
[12] *Ibid*.
[13] *Ibid*. at para. 53.
[14] NEB, July 2008, "Consideration of Aboriginal Concerns in National Energy Board Decisions."

The implication is that the proponent has the principal substantive obligation of consultation, with the Crown merely dealing with the 'residue' or any outstanding issues. This seems directly at odds with direction of the Supreme Court of Canada in *Haida*.

While the Crown has already set out on its chosen path without adequately consulting, First Nations possess a number of legal and political tools that could be used to change the direction of the process. As a starting point, it is important for First Nations to raise their concerns with the Crown's proposed approach to consultation on the Enbridge project, and indicate their interest in negotiating and participating in a more meaningful process. The impact of concerns raised and the effectiveness of resulting negotiations is likely to be increased by unified action by a number of First Nations.

The Crown has an obligation to make genuine efforts to address First Nations concerns about the process, and to be willing to alter its current process proposals in response to consultation.[15] This will require a process of back and forth and dialogue that has not occurred to date. If the Crown is not responsive to First Nations requests to negotiate an amended or alternative approach to consultation before finalizing the terms of reference for its review process, it may be vulnerable to legal challenge.

First Nations may also wish to advance their own proposals for a process that would respect the lawful responsibilities and duties of both First Nations and the Crown. Such proposals should address:

- How First Nations will be engaged in higher level strategic policy decisions relevant to the Enbridge project
- How First Nations and the Crown will assess potential impacts on all aspects of Aboriginal Title and Rights (including the role of Indigenous knowledge and independent science in this assessment)
- The process that First Nations and the Crown will use to make their respective decisions about the project
- The process that will be used, if necessary, to reconcile the decisions of the Crown and First Nations
- What mechanisms will be used to ensure compliance with decisions made

Communications with the Crown regarding its proposed consultation process can be sent to:

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[15] "Responsiveness is a key requirement of both consultation and accommodation": *Taku River Tlingit First Nation* v. *BC (Project Assessment Director),* 2004 SCC 76 at para. 25.