

## **Asper-IHRP Summer Internship: Final Report**

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I spent my internship at West Coast Environmental Law (WCEL), an NGO that works on issues in Aboriginal and Environmental law. I spent most of my time on two of WCEL's projects: the proposed "Northern Gateway" pipeline, and law reform related to forest licences in British Columbia.

### **The Northern Gateway Pipeline**

The Northern Gateway is a proposed oil pipeline that would run across Northern BC to the Pacific coast. It would permit oil tankers to export crude oil from the oilsands to Asian markets at a profit of several dollars more per barrel. As well as posing the dangers of large-scale tanker traffic and expanded oilsands production, the pipeline would run through many First Nations' traditional territories. WCEL represents a coalition of First Nations along the pipeline route. Pursuant to their Indigenous laws, these Nations have decided that the project is impermissible and will not allow it to proceed on their lands. These Nations' rights to self-governance or governance of fisheries and waters have not yet been recognized, thus their challenge is to find ways of navigating the Canadian legal system that help establish such rights and ensure that their decision is respected.

The pipeline would pass through lands to which First Nations have unresolved rights and title claims. (In fact, I was surprised to learn that no one has yet succeeded in making a successful claim for Aboriginal title). As a result, the most important tool available to First Nations is the so-called "duty to consult and accommodate." The Supreme Court held in two 2004 cases that when the Crown considers an action that would adversely impact claimed Aboriginal rights or title, it must consult with the First Nations that would be affected and accommodate their concerns. The Court has been clear, however, that this does not amount to a veto power on the part of First Nations.

Needless to say, what constitutes adequate consultation and accommodation is a difficult question, especially if the affected First Nations are adamantly opposed to the proposed undertaking. This has proven to be a highly controversial matter as the Northern Gateway project is assessed by the federal Joint Review Panel (JRP). I researched the case law on a number of questions on the nature of the duty to consult, and other factors that may play into the JRP process such as the cumulative environmental impacts of other proposed projects, and the implications of various environmental statutes.

My work in this area also allowed me to learn more broadly about the important currents in Aboriginal law. For example, I briefed *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, a recently judgement from the BC Court of Appeal on the first successful claim for a right to harvest and sell commercially valuable species of fish. I

also briefed *Canadian Forest Products v. Sam*, 2011 CBSC 676, a case in which a branch of the Wet'suwet'en First Nation sought an injunction against a logging operation on important traditional lands. What makes this case particularly interesting is the Court's discussion of Wet'suwet'en governance and how it relates to the claim for an injunction. Aside from case law, I learned a great deal about the landscape of First Nations' issues in BC and Canada. For example, I researched the legal history of the Dene Nation in the Northwest Territories, the Hul'qumi'num Treaty Group's dispute with the Crown over the sale of claimed lands, the BC Treaty process, and initiatives under the Province's "New Relationship" with First Nations. Finally, I had the opportunity to read a good deal of the Report of the Royal Commission on Aboriginal Peoples, which provided me with the essential historical context that underlies current issues in Aboriginal law.

## **Forest Tenure Law Reform**

WCEL's work in this area proceeds from the realization that forests play a paramount role in preserving ecosystems and in mitigating climate change. For forests to do so adequately, they will have to be protected from development on a much greater scale. This entails zoning more forest land as protected areas, and reforming the content forest tenures. One way to do so is to recognize that trees have economic value not only as timber, but as carbon sinks. WCEL is helping create legislative proposals to create property rights in carbon sequestration for the purpose of offsets, and ensure that they harmonize with Aboriginal title and rights.

My research for this project navigated the web of BC legislation pertaining to the ownership of sequestered carbon, and investigated how Australian law managed conflicts between the rights of carbon owners and landowners. One particularly interesting question was which property rights would attach to carbon sequestered in trees. Is it best conceived, for example, as a part of fee simple ownership of the land, as a chattel, or something else altogether? Each possibility may have different implications, especially for the question of whether Aboriginal title includes sequestered Carbon.

I also researched a number of recently formulated forestry related agreements that the Province now offers to First Nations to satisfy the duty to consult and accommodate. One important question was the extent to which the certain products were compatible with Carbon sequestration as a land use.

## **Conclusions**

I am very happy with the opportunity I was granted to learn substantive law in Aboriginal law. My work familiarized me with most of the important cases in the field, and allowed me to follow recent developments. I also spent a great deal of time researching various statutory schemes, something I had not had the opportunity to do in my first year of law school, and which I understand can often be more important than researching case law.

I was also fortunate to learn more about the legal landscape of Aboriginal law in BC. First, I learned a great deal about the sorts of issues that arise in an Aboriginal law practice, and what life is like for an organization working on them. Second, I learned a great deal about how BC history and contemporary politics tie-in with Aboriginal issues. Third, I learned about the legal players in Aboriginal issues: for example, what firms work on Aboriginal issues, what working in government might entail etc. This information, and the contacts I have gained, have helped me develop my vocational interests.

Finally, I was greatly impressed by the people I worked with: both the staff and the other interns. I was lucky to share the office with similarly-minded people, from whom I learned a great deal, and who I hope will be ongoing friends and professional contacts.

I am deeply thankful to the Asper Centre, and to Cheryl Milne, for providing the funds to make this internship possible. I hope and intend that this summer's experience will help me build a career in Aboriginal Law, and am grateful that such an opportunity was available.