

## MEMORANDUM

To: Cheryl Milne  
From: Chris Evans  
Date: 11/07/2011  
Re: IHRP-Asper Grant Mid-Term Report

My work at West Coast Environmental Law (WCEL) has focused on two areas: the proposed "Northern Gateway Pipeline" project, and law reform related to forest licences in British Columbia. WCEL works closely with First Nations on both initiatives to advance recognition of their rights under section 35 of the Constitution, focusing mainly on the Crown's duty to consult and accommodate and Aboriginal rights and title.

### **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 one to two more dollars 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' territory. WCEL has worked with many 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. Canadian law does not yet fully recognize their rights to self-governance or governance of fisheries and waters. Their challenge is to find ways of navigating the Canadian legal system that help establish such rights and ensure that their decision is respected.

I have contributed to WCEL's work on this initiative firstly through legal research. A key legal issue that will arise is the nature and extent of the Crown's duty to consult with and accommodate First Nations. The Supreme Court held in *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 51 that such a duty arises when the Crown considers an action that would have an adverse impact on asserted Aboriginal rights or title. The duty to consult and accommodate being highly variable and contextual, my research has focused on what the scope and content of the duty might be for a project such as the Northern Gateway.

I have also researched parts of the statutory scheme for the environmental assessment of major pipeline projects. Namely, I have looked at the project review requirements for other nascent pipeline projects, and how they might interact with those for the Northern Gateway. I also mapped out the legislative regime relating to endangered species in BC and Canada, and the requirements that it will impose on the review process.

## **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 restructuring forest tenures. WCEL is presently helping develop 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 contribution to this initiative began with a review of the BC legislation pertaining to land use and forest tenures. I sought out the provisions relating to carbon sequestration, and analyzed the extent to which current tenures—especially the proposed “First Nations Woodland Tenure”—are compatible with carbon sequestration as a land use. I also examined how carbon sequestration has been discussed and articulated as a property interest (e.g. a component of fee simple, a profit-a-prendre etc.) in Canada and abroad, and the implications that different models might have for Aboriginal title.

## **Miscellaneous**

In addition to these programs, I have also researched and help draft documents on a variety of issues. For example, I prepared a post on WCEL's blog about a novel climate change litigation strategy<sup>1</sup>, researched First Nations' positions on the proposed overhaul of BC's *Water Act*, summarized recent section 35 cases such as *Ahousaht Indian Band and Nation v. Canada (Attorney General)* 2011 BCCA 237 and followed developments in other First Nations issues in BC and Canada.

## **Other Materials**

Organization website: [www.wcel.org](http://www.wcel.org)

Photo and brief bio: <http://wcel.org/about-us/staff>

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<sup>1</sup> See <http://wcel.org/resources/environmental-law-alert/atmospheric-trust-litigation>