



## Governments must get their 'duty to consult' right

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BC Hydro's Site C Dam. Trans Mountain pipeline expansion. A proposed Northern Gateway pipeline. All these, and so many other projects in B.C., hinge on government compliance with "a duty to consult."

Memorize that phrase, coined by the courts a decade ago. It is poised to influence the economic future of all British Columbians, and their children's children.

Duty to consult does not confer an Aboriginal veto power but rather requires a good-faith obligation by governments contemplating resource development or other initiatives, to address Aboriginal concerns about treaty rights.

Even if the legal status of those treaty rights is in question.

The phrase is a fuzzy one. Frustratingly, it's cited often by judges. But they've never precisely defined it, making a just-released study of the pivotal term by the Macdonald-Laurier Institute for Public Policy pertinent and compelling.

<http://www.macdonaldlaurier.ca/files/pdf/DutyToConsult-Final.pdf>

Native people these days appreciate the power of government's consultation duty - which was highlighted earlier this week by a UN Special Rapporteur's report on Canada's Aboriginals.

According to Stewart Phillip, Grand Chief of the Union of B.C. Indian Chiefs, "The Harper government still relies upon ineffective, legally outdated, prejudicial and dishonourable policies of engagement with Indigenous Peoples in Canada."

Aboriginals don't hesitate these days to go to court to protect treaty rights. And, more often than not, win.

Hence, proponents of the Northern Gateway and Trans-Mountain pipelines worry about Aboriginal unwillingness to approve their projects.

Even if the federal cabinet this month approves Northern Gateway, it still can be thwarted in court. Aboriginals don't need blockades or placards; just a good lawyer. And consider, in the case of developments such as pipelines or roads or dams, dozens of groups could be involved, with differing viewpoints.

The Macdonald-Laurier Institute study asserts that the duty to consult "will play a key role in the

nation's efforts to unlock the vast potential of its natural resources and bring prosperity to Aboriginal people."

But Canada needs to act quickly to get this consultation business right: "current world circumstances offer significant opportunities" for benefit from resource exports.

Study author Dwight Newman, a University of Saskatchewan law professor and Canada Research Chair, says while the duty to consult remains undefined, past court cases offer lessons.

They suggest the vigour of consultation required depends on the strength of the treaty rights at issue and potential impacts from a development.

If a claim is certain and the impact strong, accommodation - changing or abandoning a project, or compensating Aboriginals - may be required.

According to Newman, any hardship to be posed must be new, not historic, for courts to uphold an objection.

Accordingly, an expanded Trans Mountain pipeline has more chance of clearing the courts than Northern Gateway because it follows an existing right of way.

"By contrast, the Northern Gateway pipeline project would make use of new rights of way over Crown lands."

Governments, not private companies, have the duty to consult and, if bureaucrats botch the job, they could face lawsuits from companies whose plans get derailed by government ineptitude.

Alternatively, as has been the case with Northern Gateway, governments can share consultation duties with industry but both better be aware of what the other is doing.

The imperative for governments, says Newman, will be to engage early and often, building relationships that "lessen the need for a focus on legal technicalities" and precise definitions that can only complicate matters.

Newman warns that courts "should be very cautious about continuing to expand the duty to consult doctrine into new contexts," because governments need flexibility to plan for transportation infrastructure, including pipelines.

byaffe@vancouversun.com

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