

Gaining Native Buy-in On Projects a Challenge, CERI Conference Told

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By James Mahony

Among the challenges facing Canada's major energy projects over the next few years will be getting the buy-in of local First Nations, and in some cases, their participation in the projects.

In either case, aboriginal consultation must be part of the process for projects such as the proposed Northern Gateway pipeline to the West Coast which would affect dozens of First Nations, speakers told the **Canadian Energy Research Institute's** 2012 oil conference in Calgary.

A specialist in aboriginal law, Vancouver lawyer **Keith Bergner**, set the stage by noting there are some 200 First Nations in British Columbia and the proponent of any project that affects their lands or the lands they claim must sooner or later deal with them.

From the outset, native consultation in B.C. unfolds differently than in other provinces, mainly because B.C. First Nations, unlike many others across Canada, did not sign historic treaties with Ottawa in the 19th and 20th centuries. As a result, the rights of most B.C. bands are less well-defined and more open to negotiation than the rights of many others who are defined by their respective treaties.

While the "duty to consult" with First Nations has different purposes, depending on the context, in provinces such as B.C. with fewer treaties, its purpose is to protect native claims over unsettled areas, he said. In contrast, in regions where First Nations have signed treaties with Ottawa, the purpose of the duty to consult is to fill in procedural gaps in existing treaties, which Bergner said are often very short.

About one-third of Canada's approximately 600 First Nations live in B.C. Bergner did not say what defines a First Nation, but a map he showed, peppered by red dots designating local bands, suggests that even the smallest native group would now consider itself a First Nation. Many of B.C.'s First Nations have filed land claims with Ottawa, and according to Bergner, an "enormous" number of such claims are overlapping, especially near the West Coast.

Projects such as pipelines are especially complex when it comes to dealing with First Nations because pipelines are linear, crossing broad swaths of territory, including First Nations land, the conference heard. For example, in the case of a 250-kilometre power transmission line built through southern B.C., 67 First Nations had to be consulted before the project could proceed, he said.

Enbridge Inc.'s Northern Gateway pipeline would cross approximately 1,170 kilometres of land before terminating at Kitimat, B.C. In many cases, First Nations in several B.C. regions have laid claim to land that's also claimed by one or more other First Nations, further complicating an already-difficult task.

For Northern Gateway proponents, consultation is especially important in as-yet-unsettled parts of the province, according to a pipeline executive who also addressed the conference.

"We do have issues under the non-treaty components," said **Andrew Popko**, vice-president of community benefits and aboriginal affairs for **Enbridge Northern Gateway Pipelines**. First Nations that have not signed treaties with the federal government occupy much of the land between the middle of B.C. and the West Coast, he said.

Although Enbridge has offered aboriginal groups along the Gateway pipeline route a package worth about \$1 billion when all associated benefits and an equity stake are included, many B.C. First Nations have not signed on, especially those in the coastal areas.

In promoting the project, Enbridge is not appealing only to native self-interest. Like other Enbridge executives, Popko said the project is as much in Canada's national interests as it is in the interests of

provinces such as Alberta. "It's not just about Alberta," he said. "It's also about the rest of Canada," said Popko, pointing to the jobs, investment and infrastructure that would come with construction.

Popko also reminded executives in the audience of the danger of relying on market for Canadian oil. "We can't rely on [just] one oil market in the U.S."

In a spirit of accommodation, he said Enbridge has already made numerous changes -- 1,100 at last count -- to the original pipeline route, many at the request of First Nations living along the route.

Popko said he had been approached by oil and gas executives, some of whom complained that, in offering B.C. aboriginal groups a 10 per cent equity stake in Gateway, Enbridge has raised the bar for the broader energy industry, causing some First Nations to ask about taking a 10 per cent stake in other industry projects. Popko noted that, under Enbridge's plans, B.C. First Nations who buy such a stake would get a loan from Enbridge to finance their stake.

Yet, many B.C. First Nations have not greeted the idea with open arms, while some have refused flat out, on the grounds that they would not invest in a project to which they're fundamentally opposed.

During the question and answer session, another speaker raised the question of what role consultation plays in the regulatory process when some energy regulators rarely, if ever, turn a project down, in effect, approving everything or nearly everything that crosses their desks.

"Is it really consultation if you can't say no?" asked **David Lertzman**, assistant professor of environmental management at the Haskayne School of Business at the **University of Calgary**. "How can we have an authentic consultation? What does it mean to consult if one side [aboriginals] feels completely overwhelmed?"

Lertzman said Canada has come "quite a long ways" since the 1977 report of Justice **Thomas Berger** which led to a moratorium on plans for a natural gas pipeline from northern Canada. Yet, at the same time, "we still have a ways to go," he said, adding that the current debate about consultation has political implications. "I think we're potentially playing with very powerful forces that could take on a life of their own."

One audience member asked whether some non-governmental organizations (NGOs) -- the implication was that environmentalists were likely the NGOs concerned -- might be using First Nations for their own purposes.

"You hear a lot of talk [about] that, but I think that was more commonly true [several years ago]," Lertzman responded. "I think it's more common [now] that First Nations are using NGOs. They tell them when to start and when to stop."

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