

## Investor Brief: The Enbridge Northern Gateway Pipeline

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The Enbridge Northern Gateway Pipeline presents a number of environmental and social risks to investors that could have a material impact on long-term shareholder value. The purpose of this investor briefing note is to examine those risks, and some of the steps that Enbridge and its shareholders are taking— or could take—to mitigate them.

### The Project

The Northern Gateway project involves the construction and operation by Enbridge of two parallel pipelines from near Edmonton, Alberta, to Kitimat, in the North coast of British Columbia; ten pump stations to service the pipelines; and a new marine terminal in Kitimat. The first pipeline will carry an average of 525,000 barrels of petroleum per day from Alberta's oil sands to Kitimat, where it will be loaded onto tankers for export to oil refineries and consumers in Asia and the United States. The second pipeline will carry a daily average of 193,000 barrels of condensate, a chemical and petroleum mixture used to thin heavy oil so that it can easily flow through pipelines, from Kitimat to oil producers in Alberta. The Kitimat marine terminal will be used to import condensate and export crude oil to the United States and Asia through tankers. The terminal will include 14 tanks for oil and condensate, with potential for two additional tanks.

Enbridge had suspended the project in November 2006, citing a desire by its North American customers to first see an expansion of its existing pipeline network across the interior. The new rush for Canada's oil sands, however, has brought with it renewed interest in the Northern Gateway Pipeline by oil refiners and producers, since the pipeline will give them access to new markets in Asia and allow them to export their oil at more competitive prices.<sup>1</sup> In view of this renewed support for the project by its customers,<sup>2</sup> in June 2008 Enbridge requested the National Energy Board (NEB) and the Canadian Environmental Assessment Agency (CEAA), which had been asked by Environment Canada to conduct a joint review of the project before it was put on hold, to resume their environmental assessment process of the "preliminary information package" provided by the company. Prior to resuming the environmental assessment process, which is expected to start with a public comment period in early 2009, the CEAA will carry out consultations with potentially affected Aboriginal groups in respect of the draft Joint Review Panel Agreement. The Agreement establishes the terms under which the environmental assessment should be conducted by the Panel. On February 9, 2009, the CEAA invited written public comments on the draft Agreement, which will be received by April 14, 2009.

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<sup>1</sup> Oil sands producers with Asian owners, such as Husky Energy and Japan Canada Oil Sands (JACOS), are particularly interested in the pipeline. According to Husky CEO John Lau, "the project is very important from a Canadian oil producers' point of view," since it will provide an additional export outlet and they will not be subject to the U.S. "as the one buyer." Andrea W. Lorenz, "Kinder Morgan to partner in pipeline to supply China with North American crude?," Oilweek Magazine (Oct 2008).

<sup>2</sup> By selling 10 units at \$10 million each and giving buyers preferential treatment in booking capacity on the future pipeline, Enbridge has raised \$100 million from Asian refiners and Canadian producers to help bring the project to regulatory approval. Thus, despite gloomy economic circumstances that have caused capital to flee the oil sands and some project delays and cancellations since December 2008, Enbridge assures that project backers are thinking about the long term and remain committed to the project.

Following the environmental assessment by the Joint Review Panel, Enbridge anticipates filing for regulatory review of the project (estimated at \$ 4.5 billion) by the National Energy Board in 2009. On the assumption that the review process will be finalised and culminate in approval by 2012, the company expects to finish construction of the project by 2015.

## Environmental risks

Environmental concerns around the Northern Gateway project include pipeline spills and leaks, air pollution, ballast discharge and terminal accidents during loading and discharge. The biggest concern of environmental groups and some aboriginal groups, however, is the risk of accidental oil or condensate spills from tankers to and from the new Kitimat terminal, which would be devastating to the marine environment and the communities that depend on it, as well as the area's tourism and fishing industries.

The North coast is one of the most pristine and ecologically rich areas of BC. It includes numerous salmon and gray whale migratory routes, at least 650 spawning rivers, the Pacific Flyway –a major route of travel for migratory birds in the Americas– and the feeding habitat of humpback and killer whales. The area also supports a 1.7-billion worth fishing industry that employs more than 16,000 people in BC, and a coastal tourism industry that sees up to 500,000 people travel the Inside Passage every year. Furthermore, the north central coast of BC runs along the Great Bear rainforest, one of the few and largest coastal temperate rainforests left in the world and home to thousands of species of plants, birds and animals.<sup>3</sup> Coastal temperate rainforests are part of “some of the most complex and most dynamic systems on Earth,” and the terrestrial and marine systems are “inextricably linked: the forest reaches out to influence the diversity and productivity of life in the sea, which in turn furnishes the wind and rain necessary for maintenance of the forest character. This exchange of nutrients and energy creates the base for a complex food chain, rich enough to support numerous migratory as well as resident species.”<sup>4</sup>

The effects of an oil spill on marine life and birds are well documented, and they could be disastrous. Oiled birds can die from loss of insulation, drowning or direct poisoning from oil, or the toxic effects could be passed on to their offspring. Cleaning and rehabilitation after oiling is often attempted, but for many species it is rare for more than a fraction of oiled birds to survive cleaning, and rarer still for those that survive to breed successfully after release.<sup>5</sup> According to Environment Canada, because many species of birds along the Pacific and Atlantic coasts are very vulnerable to spills, “emphasis should be placed on preventing damage to birds by avoiding spills in critical wildlife areas.”<sup>6</sup>

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<sup>3</sup> In 2006, the BC government, First Nations, logging companies and environmental groups reached an agreement to create a Great Bear Rainforest Conservation Area to protect almost two million hectares of land on the BC central north coast. The government has until March 31, 2009 to implement the agreement, and environmental groups are advocating for federal legislation banning oil tankers along the waters of the Great Bear Rainforest Conservation Area.

<sup>4</sup> See Jim Weigland et al., “Coastal Temperate Rain Forests: Ecological Characteristics, Status and Distribution Worldwide,” Ecotrust and Conservation International” (1992), online: <[http://www.inforain.org/reports/ctrf\\_1992.html](http://www.inforain.org/reports/ctrf_1992.html)>.

<sup>5</sup> See International Tanker Owners Pollution Federation (ITOPF), “Effects of Oil Spills: Environmental Impact,” online: <<http://www.itopf.com/marine-spills/effects/environmental-impact/>>.

<sup>6</sup> Environment Canada (Environmental Emergencies), “Oil, Water and Chocolate Mousse” (1994), online: <<http://www.ec.gc.ca/ee-ue/default.asp?lang=en&n=C1EC2E00>>.

The effects of oil spills on marine mammals vary, but all exposed mammals are troubled by oil in and around their eyes and nostrils. Marine mammals such as northern fur seals, sea otters and sea lion pups are the most vulnerable, since they rely on their fur for insulation and oiled fur is a poor insulator. These mammals can ingest some of the oil while trying to clean their fur, or they may die from hypothermia or overheating, depending on the season. Effects of oil spills on fish, molluscs, worms and shrimp are also significant. Fish in their early life stages are sensitive to oil in the water column, so eggs may not hatch and young fish may die. Adult fish are mobile and generally avoid areas of heavy contamination, but dissolved or dispersed oil can be taken up through their gills or eaten, and accumulate in their liver, gall bladder and stomach. This may result in tainting of their flesh, making the fish unacceptable for consumption. Molluscs, shrimp and other commercially important organisms can also suffer from direct smothering by oil, the toxic effect of the lighter fractions of oil, or by eating oil-sediment particles.<sup>7</sup>

The Exxon Valdez disaster is perhaps the best example of how devastating an oil spill can be. When the U.S. tanker Exxon Valdez ran aground in Prince William Sound (Alaska) in 1989, it spilled 41 million litres (about 14,000 tonnes) of oil—one-sixth of the oil it carried—, polluting 2,000 kilometres of coastline. As a result of the spill, an estimated 2,800 sea otters, 250,000 birds, 1.9 million salmon and 12.9 billion herring were killed. Cleanup costs of the spill exceeded \$2 billion, and despite unprecedented efforts to clean the polluted beaches and initial surveys showing declining contamination, studies conducted between 1995 and 1999 showed that oil containing high concentrations of toxic polycyclic aromatic hydrocarbons (PAHs) persisted and was still available to biota. Long-term monitoring in the oiled areas has also shown that fauna such as sea otters and sea ducks have not recovered, and a 2001 assessment by the Auke Bay Laboratory found that an area of about 20 acres of shoreline in Prince William Sound was still contaminated with oil. The study concluded that the remaining oil deposits may have become a “chronic source” of low-level oil pollution within the area affected by the 1989 spill.<sup>8</sup> Similar conclusions were drawn in a study published in *Science* in 2003, which found lingering effects on local marine life in Prince William Sound fourteen years after the spill.<sup>9</sup>

Although its impacts on marine life are not as well understood as those of oil, condensate is acutely toxic to marine life and its effects are likely to be similar to those of crude oil. In addition, environmental and aboriginal groups are concerned that condensate may be more difficult to clean up after a spill because it is lighter in nature, making oil recovery techniques such as containment booms ineffective.<sup>10</sup> Imported shipments of condensate are already arriving at Kitimat’s Methanex/Encana terminal, where they are being sent on to Fort McMurray via rail. The Enbridge Northern Gateway project, however, would significantly increase condensate traffic and thereby heighten the risk of a spill.

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<sup>7</sup> See ITOPF and Environment Canada, *supra* notes 5 and 6.

<sup>8</sup> See Alaska Fisheries Science Center, “The Exxon Valdez Oil Spill: How Much Oil Remains?” AFSC Quarterly Research Reports (July-Sept. 2001), online: <[http://www.afsc.noaa.gov/Quarterly/jas2001/feature\\_jas01.htm](http://www.afsc.noaa.gov/Quarterly/jas2001/feature_jas01.htm)>.

<sup>9</sup> Peterson, C. et al, “Long-Term Ecosystem Response to the Exxon Valdez Oil Spill,” *Science*, Vol. 302 (2003), pp. 2082-2086.

<sup>10</sup> See Pembina Institute, “Pipelines, Tankers, and the BC Coast” (October 2006), online: <[http://pubs.pembina.org/reports/BC\\_oilgas09.pdf](http://pubs.pembina.org/reports/BC_oilgas09.pdf)>.

## Responses by the company and investors

Enbridge claims that the construction of the Northern Gateway pipeline system and terminal will follow the most modern technologies and the highest environmental and safety standards. In response to concerns regarding a spill, the company claims that ships carrying petrochemicals such as methanol, ammonia and (most recently) condensate have “safely called on the Port of Kitimat for the past 25 years,” and that Enbridge “will continue this tradition of safe passage in and out of Kitimat and will in fact provide safety improvements that will benefit shipping on the coast.”<sup>11</sup>

Enbridge assures that the Kitimat marine terminal will employ the “highest worldwide safety and navigational standards.” Its strategy to achieve “safe passage” of all tankers through coastal waterways includes vessel requirements (e.g., all vessels must be “double-hulled,” which Enbridge claims will prevent an Exxon-Valdez-like spill), operational requirements (e.g., only experienced and certified BC-based marine pilots will guide the vessels; radars will monitor marine traffic; and operational safety limits will be established to cover visibility, wind and sea conditions) and other specifications such as the establishment of first response stations at the terminal and in communities along the route.<sup>12</sup>

While the safety measures proposed by Enbridge promise to reduce the risk of oil spills, it is generally recognised that “even when every effort is made to prevent oil spills, accidents will happen.”<sup>13</sup> This is also acknowledged by Enbridge, which claims that “the company devotes significant time, energy and financial resources to ... prevent accidents before they occur,” but “if an incident should occur, Northern Gateway will be there quickly to control, contain and clean up.”<sup>14</sup>

In 1994, based on the then current levels of tanker traffic, Environment Canada predicted that Canada could expect over 100 small oil spills, about 10 moderate spills and at least one major spill offshore every year, while a “catastrophic spill” (over 10,000 tonnes) could occur once every 15 years.<sup>15</sup> Environmental groups are concerned that the risk of a spill will be much higher if tanker traffic increases in the north and central waters of BC. According to West Coast Environmental Law, the BC north central coast is of the most active earthquake zones in Canada, and its stormy and unpredictable weather has made it famous for some of the most severe types of winter storms, with recorded winds of 200 km/hour and waves of up to 29 meters. These conditions will not only make spills inevitable, but also oil recovery operations will be impractical, since winds exceeding 25 knots (46.3 km/hr) and waves exceeding one metre greatly hamper oil spill clean up efforts.<sup>16</sup>

Enbridge has told investors that it expects tanker traffic at the Kitimat terminal to go from 12 tankers a year to between 5 and 7 tankers a *week* as a result of the Northern Gateway project. This means that as many as 364 tankers could travel each year to and from the Northern Gateway Kitimat terminal across the BC north coast. Assuming that 320 tankers travel through

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<sup>11</sup> Enbridge, Northern Gateway Pipelines, “FAQs,” <<http://www.northerngateway.ca/project-info/faqs>>.

<sup>12</sup> Enbridge, “Enbridge Northern Gateway Project” at 6, online: <<http://www.northerngateway.ca/files/NGP-Brochure.pdf>>.

<sup>13</sup> Environment Canada, *supra* note 6.

<sup>14</sup> Enbridge, Northern Gateway Pipelines, “Environment and Safety: First Response,” online: <<http://www.northerngateway.ca/environment-safety/first-response>>.

<sup>15</sup> See *supra* note 13.

<sup>16</sup> See West Coast Environmental Law, “A Northern Pipeline in BC: Do British Columbians Stand to Gain?” (2006).

the area every year, industry averages suggest that a “moderate” spill of more than 159,000 litres will occur every two to three years, while a “major” spill of more than 1,590,000 litres is likely to occur every six to seven years.<sup>17</sup> Even if only 225 tankers (the official number given by Enbridge in one of its brochures) travel via the Northern Gateway terminal every year, the total number of tankers travelling BC coastal waters could quickly add up to 320 if other projects, including a Kitimat liquid natural gas (LNG) project and a Pembina Pipeline Income Fund project to import condensate to Kitimat, go forward as planned.<sup>18</sup>

Because Enbridge will not operate the tankers but only the marine terminal, it is unlikely that it would be held liable for an oil or condensate spill. Nevertheless, the viability of the Northern Gateway project ultimately depends on Enbridge’s ability to import condensate and export oil, and any restrictions on tanker traffic could entail major costs for the company and could significantly change the economics of the project. Given that spills appear to be inevitable, investors should request improved disclosure by Enbridge on how it is assessing the potential implications for the project of various potential spill scenarios, such as the possibility that a major oil spill or recurrent minor spills might lead to future oil/condensate tanker traffic restrictions (or a formal ban) to and from the new marine terminal in Kitimat. The analysis should consider government and industry spill predictions, and factor the heightened risks of a spill in the unpredictable waters of BC’s north coast and the difficulties associated with the clean up of a deeply indented coastline (i.e., it should factor in increased risks of a spill and difficult cleaning operations).

### **Social relations and litigation risks**

The proposed Northern Gateway twin pipelines will pass through the territories of at least thirty aboriginal communities whose rights and title claims over those lands remain unsettled. This presents considerable challenges to Enbridge and its investors, since Aboriginal peoples have a special status in Canada and their rights over substantial portions of Canada’s land are protected by the Constitution and have been amply recognised by the Courts. Most notably, the Supreme Court of Canada has determined that, pending resolution of final settlements, the Crown has a legal duty to meaningfully consult with Aboriginal peoples and accommodate their interests on resource developments when: 1) it has knowledge, real or constructed, of the potential existence of aboriginal rights or title; and 2) it is contemplating an action that might adversely affect such rights or title.<sup>19</sup> While this duty does not extend to companies, the government usually requires companies to engage with First Nations likely to be affected by their natural resource development projects, and such efforts are often part of the environmental and regulatory review processes for projects.<sup>20</sup>

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<sup>17</sup> See Thomas Gunton et al., “Managing Impacts of Major Projects: An Analysis of the Enbridge Gateway Pipeline Project,” prepared for Coastal First Nations by Simon Fraser University School of Resource and Environmental Management, June 2005.

<sup>18</sup> See Pembina Institute, *supra* note 10 and Pembina Institute, “Major Northern Fossil Fuel Projects in northern BC” (October 2006), online: <[http://pubs.pembina.org/reports/BC\\_oilgas04.pdf](http://pubs.pembina.org/reports/BC_oilgas04.pdf)>. The Kitimat LNG project received its environmental certificate in 2006 and, if approved, will start operating in 2013 to export natural gas to Asia. See <<http://www.kitimatlng.com>>. The Pembina Pipeline Income Fund expects completion of its project in 2010. See Pembina Pipeline Income Fund, “Insight Information’s 5th Annual Canadian Oil Sands Summit” (17 January 2008), available through <<http://www.pembina.com>>.

<sup>19</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (November 18, 2004), para 36.

<sup>20</sup> The National Energy Board, for instance, requires all project proponents to contact potentially affected aboriginal communities well before an application is filed, and to provide documentation and summaries of any

The opposition of aboriginal communities to the Northern Gateway project could compromise the successful construction and operation of the pipeline system and the new terminal in at least two ways. First, aboriginal communities are a source of potential workforce and traditional knowledge that could be instrumental to the project's long-term success. Aboriginal "traditional ecological knowledge related to areas such as fisheries, wildlife [and] vegetation," for instance, could help minimize the project's impact on the environment and affected communities.<sup>21</sup>

Second, aboriginal groups whose rights or title could potentially be affected by the pipeline or marine terminal could block or thwart progress of the project through legal challenges. There is evidence that such challenges could, at the very least, delay the project. In 2004, for instance, the Deh Cho First Nation filed a lawsuit concerning a \$7-billion natural gas pipeline project in the Mackenzie Valley, which successfully delayed the project even though other First Nations supported it.<sup>22</sup> The delay has raised alarm among Enbridge competitors that unresolved First Nations issues could affect similar projects in BC, where aboriginal land claims over large parts of the Province remain unsettled.<sup>23</sup>

Aboriginal communities have already voiced numerous concerns regarding the Northern Gateway project. In October 2006, shortly before Enbridge put the project on hold, the Carrier Sekani Tribal Council (CSTC) and its seven member First Nations challenged in federal court the government's decision to establish a NEB-CEAA Joint Review Panel (JRP) to conduct the project's environmental assessment. Noting that the proposed Gateway pipeline would cross through its unceded territory, the CSTC asked the court to overturn the government's decision to establish the JRP, on the basis that the decision had been made without its consultation.<sup>24</sup>

A few months earlier, the CSTC had issued a preliminary assessment of the potential environmental and socio-economic impacts of the Gateway pipeline, the purpose of which was to establish the context for any decision making process on the Gateway project. Among the key concerns raised in the CSTC study was the potential for pipeline ruptures and spills into waterways (e.g., at stream and river crossings) and the effects such accidents could have on soil and water quality, biota and human health (according to the report, Enbridge experienced eight failures on its pipelines between 1992 and 2006).<sup>25</sup>

In February of 2009, Enbridge reported that a malfunctioning valve at an oil storage facility in the oil sands region of northern Alberta had spewed out 4,000 barrels of oil, but the spill was mostly contained on the grounds of its tank farm.<sup>26</sup>

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meetings with those communities. See NEB, "Consideration of Aboriginal Concerns in National Energy Board Decisions" (July 2008).

<sup>21</sup> Enbridge Northern Gateway Project, "2008 Open House" at 24.

<sup>22</sup> The lawsuit claimed the Deh Cho were not given the opportunity to participate in the project's environmental review, and it resulted in an out-of-court settlement where the Deh Cho received \$31 million to finance economic development and pay for negotiations and participation in the pipeline review. In 2006, the Deh Cho filed another lawsuit alleging their rights had been violated by territorial authorities, the federal Indian Affairs Department and Imperial Oil, the project's senior partner. See, "First Nation calls on feds to cancel prospecting permits," Daily Commercial News (9 March 2006).

<sup>23</sup> See "Pipeline company raises spectre of disruptions by First Nations: An executive from pipeline giant Terasen admits that unresolved First Nation title issues create significant liabilities for the resource industry in BC," National Post (7 October 2004).

<sup>24</sup> See Carrier Sekani Tribal Council, "Enbridge Gateway Pipeline Project," online: <<http://www.cstc.bc.ca/cstc/67/enbridge>>.

<sup>25</sup> CSTC, "An Assessment of the Impacts of the Proposed Enbridge Gateway Pipeline on the Carrier Sekani First Nations" (May 2006) at 62-64 and 91, available from: <<http://www.cstc.bc.ca/cstc/67/enbridge>>.

<sup>26</sup> See "Enbridge cleaning up spill at oil sands terminal," Reuters (7 Jan 2009).

In November of 2008, following the decision by Enbridge to revive the Northern Gateway project, a group of Chiefs and representatives from six First Nations shared concerns about the project and agreed that the consultation efforts by the federal government and Enbridge had not met a standard of genuine engagement with aboriginal communities. Shortly after, the First Nations Summit, which comprises a majority of First Nations and Tribal Councils in BC, adopted a resolution calling on the federal government to establish an independent “First Nations Review Process” for the Northern Gateway project. It was argued that the NEB/CEAA Joint Review Panel process had been developed without meaningful aboriginal consultation and was designed to grant approvals irrespective of potential harm to First Nations. The First Nations Review process was presented as a way to allow potentially affected groups to genuinely evaluate risks and benefits and determine whether or not they were acceptable.<sup>27</sup>

Aside from widespread agreement among First Nations that aboriginal consultations have been inadequate, it is apparent that their views on the Northern Gateway project differ considerably. For instance, while the Haisla Nation and Gitga’at First Nation are requesting meaningful consultation and accommodation of their concerns, including on the design and implementation of the environmental and regulatory review processes for the project, the Haida Nation has publicly declared that it will oppose the project even if adequate consultation takes place. The Haida traditional territory includes the Queen Charlotte Islands and surrounding waters, and its representatives have said that the Haida Nation will oppose any plan to bring oil tanker traffic to BC’s north coast, as it would bear the burden of risk and oil spills in its waters.<sup>28</sup> Others, such as the Nadleh Whut’end Indian Band, are claiming that their free, prior informed consent (FPIC) is required for the Northern Gateway project to proceed.<sup>29</sup>

### **Company response**

According to the Director of Communications of Northern Gateway Pipelines, “the communities of the north, aboriginal and non-aboriginal, are critical to the success of Northern Gateway and [Enbridge is] treating them as such.”<sup>30</sup> Enbridge recognizes Aboriginal rights and title and has instituted a company-wide “Indigenous Peoples Policy” that is designed to ensure a consistent and respectful approach to consultation and engagement with aboriginal communities. The Policy affirms that “positive relations with indigenous peoples based on mutual respect and trust will help Enbridge to reach its strategic business objectives,” and expresses Enbridge’s commitment “to forge mutually beneficial relations with indigenous peoples in proximity to its operations.” It further states that Enbridge will “ensure forthright and sincere consultation with indigenous peoples about Enbridge’s projects that affect them, to facilitate a shared understanding of interests and appropriate courses of action,” and “respect indigenous peoples’ traditional ways, the land, heritage sites, and the environment.”<sup>31</sup>

In the context of the Northern Gateway project, Enbridge claims that it is committed to “working with all of the First Nations along the [pipeline] corridor in a way that respects their aboriginal rights and interests.”<sup>32</sup> With that purpose, the company held a series of “open houses” on the

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<sup>27</sup> See Office of the Wet’suwet’en, “Approval Process for Enbridge Gateway Flawed: BC First Nations” (November 2008).

<sup>28</sup> See “Haida Nation says it will reject Kitimat tanker traffic,” Prince Rupert Daily News (3 December 2008).

<sup>29</sup> Letter sent by Chief Larry Nooski (Nadleh Whut’end band) to Enbridge (dated October 14, 2008).

<sup>30</sup> “Enbridge Gateway pipeline back on track in BC,” by Scott Simpson, Vancouver Sun (13 November 2008).

<sup>31</sup> Enbridge, Indigenous Peoples Policy, online: <<http://www.enbridge.com/pipelines/right-of-way/pdf/indigenouspeoplespolicy.pdf>>.

<sup>32</sup> Letter by Enbridge to the Nadleh Wuth’end First Nation (dated November 12, 2008).

project in 2008, where community members along the proposed pipeline route were invited to express their views on the project. The results of these consultations will be incorporated into the preliminary project design to ensure that best practices are met with regard to safety and environmental protection.

Enbridge is also working with aboriginal communities to create opportunities for partnerships and “incorporate traditional knowledge into the route planning and operations.” Key initiatives are the development of an “Equity Investment Option” for aboriginal communities to benefit directly from the project; “Capacity Funding Agreements” for short-term opportunities to allow aboriginal communities to participate in the project’s planning process; “Comprehensive Agreements” that cover both medium and long-term opportunities such as employment, education and environmental protection; and a coastal community strategy to build upon the local knowledge and skills of coastal First Nations.

### **Responses by investors**

As discussed above, the Supreme Court of Canada has established that the Crown has a duty to engage in meaningful consultations with aboriginal communities and accommodate their interests regarding developments that could affect their rights or title. At the same time, the Court has said that First Nations do not have a veto power over what can be done with claimed land pending final resolution of a claim. This means that the prior informed consent of aboriginal communities is not legally required for a project to proceed, so the government could decide to approve a project despite strong opposition by First Nations (as long as meaningful consultations and accommodation efforts were made).

Even if the government approved the Northern Gateway project in the face of strong aboriginal opposition, aboriginal communities could hamper the project’s success through blockades and legal challenges, and their power to do so would increase if they were granted some Crown lands as a result of final treaty settlements or court decisions. In order to minimize these risks, investors should seek full disclosure by Enbridge on its concrete efforts to meaningfully consult with all the aboriginal communities likely to be affected by the project, in particular those that are publicly opposed to the project (e.g., the Haida Nation).

Investors could also request Enbridge to make serious efforts to obtain the free, prior informed consent (FPIC) of aboriginal communities along the pipeline route in order to minimize social relations and litigation risks associated with the project. This approach has been taken by The Ethical Funds Company, which filed a resolution with Enbridge in 2009 to request the Board of Directors: (1) to issue a report assessing the “costs and benefits of adopting a policy of requiring the free, prior, and informed consent of impacted aboriginal communities as a necessary condition for proceeding with the construction of Enbridge projects;” and (2) to request management to disclose to investors “the status of negotiations with First Nations along the proposed pipeline and marine transportation route of the Northern Gateway Project, including reference to specific opposition [to the project].”

The resolution claims that, in cases where aboriginal claims remain unsettled, “companies risk project delays and even cancellation without the [FPIC] of local and aboriginal communities,” and investors should thus be informed of the “efforts and success of the company in achieving the consent of impacted First Nations.”



## Regulatory risks

The long-term viability of the Northern Gateway project could also be compromised by new regulations seeking to prohibit oil tanker traffic through the north central coast of BC. In June 2008, the New Democratic Party (NDP) introduced legislation in Parliament to prohibit oil tankers to transport oil in the areas of the sea adjacent to the coast of Canada known as Dixon Entrance, Hecate Strait and Queen Charlotte Sound,<sup>33</sup> i.e., through the inside waters of BC's north central coast. Although the bill died with the dissolution of Parliament following Prime Minister Harper's election call in September 2008, it was applauded by environmental and public interest groups such as West Coast Environmental Law, the Living Oceans Society and the Dogwood Initiative, and it is possible that the NDP will reintroduce it given the considerable degree of public support for a ban on oil tanker traffic in BC.<sup>34</sup> If it became law, the bill would prohibit tankers carrying oil and condensate from travelling along the Kitimat Channel/Douglas Arm route to the open ocean.

Several environmental groups, a number of politicians and many First Nations claim that already there is a de facto moratorium on oil tanker traffic in BC's north central coastal waters, which has been in place since 1972 and only needs to be formalised by the government.<sup>35</sup> Following this view, approval of the Enbridge project would require creating a loophole in or lifting the moratorium, which environmental groups claims is currently being breached by the transport of condensate to and from the Encana/Methanex terminal.

Representatives of the federal and BC governments appear to disagree, however. According to former Federal Minister of Natural Resources Gary Lunn, there was never a moratorium for tanker traffic in BC's inside coastal waters, but simply a "voluntary exclusion zone" for tanker traffic from Alaska to the Strait of Juan de Fuca.<sup>36</sup> Similarly, the BC government has said that: 1) there is no moratorium on oil tanker traffic in BC waters; 2) there is a voluntary exclusion zone that applies to U.S. tankers travelling between Alaska and continental U.S. and 3) oil products are currently transported from the Port of Vancouver and along the coast of BC.<sup>37</sup> At the same time, Natural Resources Canada confirmed the existence of a federal moratorium on crude oil tanker traffic in 2003, when it tasked the Royal Society of Canada to conduct a study on science issues arising from possible oil and gas activity in offshore B.C. The terms of reference for the study clearly state that "in 1972, the Government of Canada imposed a moratorium on crude oil tanker traffic through Dixon Entrance, Hecate Strait and Queen Charlotte Sound due to concerns over the potential environmental impacts."<sup>38</sup>

Enbridge denies the existence of a moratorium preventing oil tankers from transiting BC's coastal waters and claims that the voluntary tanker exclusion zone that keeps tankers travelling between Alaska and Washington State away from the BC coastline does not apply to ships

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<sup>33</sup> See House of Commons of Canada, Bill C-571, *An Act to amend the Canada Shipping Act, 2001* (prohibition against oil tankers in Dixon Entrance, Hecate Strait and Queen Charlotte Sound) (18 June 2008).

<sup>34</sup> According to a Synovate poll released in August 2008 by a coalition of environmental groups, seven in ten British Columbians (72%) support a ban on oil tankers in British Columbia's inside coastal waters.

<sup>35</sup> In June 2007, the NDP submitted a motion to formalise the moratorium by requesting the federal government to "impose a formal moratorium on the passage of international tanker traffic containing condensate, oil or natural gas in the Dixon Entrance, Hecate Strait and Queen Charlotte Sound."

<sup>36</sup> See "NDP calls for tanker moratorium on B.C.'s North Coast," CBC News (22 June 2007).

<sup>37</sup> BC Ministry of Energy, Mines and Resources/UBCM Offshore Working Group, "What Happens if the Moratoria are Lifted" (May 2006).

<sup>38</sup> See RSC, "Report of the Expert Panel on Science Issues Related to Oil and Gas Activities, Offshore British Columbia" (2004), Appendix I (terms of reference).

entering the Northern Gateway terminal or other BC ports. The company also argues that “large vessels carrying petroleum are permitted to enter BC ports and waterways,” and that “in fact, over the past 25 years, 1,500 tankers carrying petrochemicals safely entered Kitimat Harbour.” According to environmental groups, however, the 1972 moratorium was first breached in 2006, when a tanker carrying 350,000 barrels of condensate entered BC’s Inside Passage bound for the Methanex/Encana terminal,<sup>39</sup> and that since then only 14 tankers have sailed through the area covered by the moratorium to deliver condensate to Kitimat.<sup>40</sup>

Regardless of how the controversial moratorium issue is resolved, there is growing pressure on the federal and provincial governments to protect BC’s north central coastal waters from oil tanker traffic. Not only do those waters run along the Great Bear rainforest conservation area, which the BC government has agreed to protect,<sup>41</sup> but also they are a critical habitat for endangered species such as orcas. In October 2008, eight leading environmental groups sued the Federal Department of Fisheries and Oceans for failing to protect critical orca habitat, following a statement by the the Department that orcas’ habitat was adequately protected by existing regulations and guidelines. The plaintiffs contend that the orcas’ population decline is due to threats to their habitat, including increased tanker traffic, and they are requesting the government to take specific steps to protect the orcas. According to a lawyer from Ecojustice, which filed the lawsuit on behalf of the eight organizations, if the lawsuit is successful it will require the government to “sit down and create marine protected areas.”<sup>42</sup> BC Premier Gordon Campbell has also pledged to develop marine protection areas off the BC coast as part of a climate action agreement he and California Governor Arnold Schwarzenegger signed in May 2007. As he signed the agreement, Campbell said that “Our planet, our province and our coastal communities depend on the health of the shared Pacific Ocean.”<sup>43</sup>

## Conclusion

The Enbridge Northern Gateway project presents a number of material risks to Enbridge and its investors, associated with the potential environmental and social impacts of the project. As discussed in this briefing note, key risks arising from the Northern Gateway project include: liabilities associated with a spill of oil or condensate in the north coast of BC, which not only sustains communities and the fishing and tourism industries of the area, but also presents a risky environment for oil tanker traffic; litigation risks from aboriginal communities whose rights could be affected by the project; and regulatory risks associated with increased pressure on the federal and provincial governments to protect BC’s north central coast from oil tanker traffic.

Investors can help mitigate these risks by:

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<sup>39</sup> See Dogwood Initiative “Climate change action for the month” (July 2007) and Living Oceans Society et al., “Methanex, Encana Violate 34-year old Oil Tanker Moratorium” (26 June 2006).

<sup>40</sup> See “Tankers sailing into Kitimat: Environmentalists claim ban being violated,” by Christina Montgomery, The Vancouver Province (3 June 2007).

<sup>41</sup> See *supra* note 3.

<sup>42</sup> See “Green groups sue feds over orcas,” Cheryl Chan, The Vancouver Province (9 October 2008).

<sup>43</sup> The “Memorandum of Understanding on Pacific Coast Collaboration to Protect our Shared Climate and Ocean” provides for action on Pacific Ocean conservation, including collaborating on best practices for the development, monitoring and management of marine protection areas and synchronization of environmental protection at Pacific ports. See BC Office of the Premier News Release, “Campbell, Schwarzenegger Sign MoU on climate action” (31 May 2007), online: <[http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2007OTP0075-000704.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2007OTP0075-000704.htm)>.

- Requesting Enbridge to assess the implications of various potential spill scenarios, taking into account government and industry spill predictions and the heightened risks of a spill in the waters of BC's north coast, as well as the difficulties associated with the clean up of BC's north coastline; notably, a major oil spill (or minor successive oil spills with observable cumulative environmental effects) could lead to future restrictions on oil/condensate tanker traffic to and from the new Kitimat terminal, thereby compromising the project's long-term viability (the project will depend on condensate and oil travelling to and from Kitimat to source the twin pipelines);
- Requesting concrete information by Enbridge on its efforts to meaningfully engage with all aboriginal communities whose rights might be affected by the Northern Gateway project, including strategies to obtain the free, prior and informed consent of all relevant communities and to meaningfully address the concerns of those groups that oppose the project; and
- Asking the company how it is assessing the potential implications of new regulations banning oil tanker traffic in the inside waters of BC's north coast.