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FIRST NATIONS AND THE PETROLEUM INDUSTRY
From Conflict to Cooperation

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Executive Summary

There are many signs of growing cooperation between First Nations and the oil and gas industry. Production of hydrocarbons on reserve land is economically important to dozens of First Nations. Although a few First Nations opposed the Northern Gateway, TMX, and Coastal Gas Link pipelines, most were willing to sign transit agreements that offered them substantial benefits in cash, employment, and contract opportunities. First Nation leaders now routinely join petroleum executives in public forums to encourage support for the industry. First Nations are even taking an ownership stake in the industry by investing in pipelines and other projects.

Two main factors seem to be involved in this increase in cooperation. One is the increase in organized opposition to pipeline construction. The "Tar Sands Campaign" organized by environmental alarmists in the United States and Canada has opposed all pipeline construction in an attempt to land-lock Canadian production, especially from the oil sands. Seeing their royalties and jobs threatened, many First Nations have made common cause with the petroleum industry in their own self-interest.

That self-interest has been promoted by clarification of Indigenous property rights. The duty of governments "to consult and accommodate" Indigenous people before authorizing economic development on their traditional territories, articulated by the Supreme Court of Canada in 2004, at first seemed to be used mainly for obstruction. However, as the duty was defined and limited in further court decisions, its application has become more predictable. It has become almost like a property right that First Nations can monetize through negotiations with the industry, thus encouraging partnership.

The culmination of partnership would be for First Nations to become major investors in the oil industry. There are already many small-scale examples of this, such as the purchase of a half interest in the Suncor East Tank Farm by the Fort McKay and Mikisew Cree First Nations and the investment by half a dozen First Nations in the Kineticor gas-fired electricity generator in northern Alberta. The government of Canada has promised that First Nations will get a major ownership stake in the TMX pipeline when that project is finished and returned to the private sector.

Partial ownership by First Nations would also have been a feature of the Mackenzie Valley natural gas pipeline, as well as the Northern Gateway and Keystone-XL oil pipelines, if they had gone ahead.

From the industry's point of view, an Indigenous ownership share can help to overcome political obstacles to pipeline construction. That hope is not always fulfilled, however, as shown by the failure of the Mackenzie Valley, Northern Gateway, and Keystone-XL proposals. Environmental alarmists and other objectors have shown that they do not place top priority on the economic interests of First Nations.

There are also some serious difficulties on the Indigenous side. Major pipelines that are hundreds or thousands of kilometres in length cross the traditional territories of many First Nations, raising formidable problems of collective action. Even if these can be resolved, First Nations do not have the capital to purchase, from their own resources, a large stake in major interprovincial pipelines, which now cost in excess of $10 billion to construct. An Aboriginal ownership share in major pipelines, therefore, will require some combination of carried interest by private partners, loan guarantees by public authorities, and outright government grants, perhaps in the form of concessionary purchase prices.

Carried interest by private partners can only go so far before profitability is undermined. Vehicles for loan guarantees exist in agencies such as the Alberta Indigenous Opportunities Corporation and the First Nations Finance Authority, but these bodies deal in millions of dollars, not billions. Indigenous ownership of major projects will require subsidies from senior governments of a size that may inspire political resistance, in view of recent financial catastrophes such as the Muskrat Falls project in Labrador. All things considered, Indigenous ownership in the oil industry may work better for small and medium-sized projects, where it is already becoming common, than for hugely expensive mega-projects.

Introduction

Analysts have recently commented on the growing cooperation between Indigenous peoples, especially First Nations, and the petroleum industry (Coates, 2020).[1] This cooperation has three major aspects. One is public statements of support for pipelines by the Indian Resource Council (IRC, 2018) and other Indigenous organizations and individuals, as well as public conferences jointly sponsored by the industry and Indigenous organizations (Alberta Native News, 2020; National Coalition of Chiefs, 2021).

Another aspect of cooperation that has arisen in the last dozen years is the signing of Impact Benefit Agreements, now usually called Mutual Benefit Agreements (MBAs), between First Nations and Métis associations on the one hand, and pipeline proponents on the other. The elected governments of all 20 out of the 20 affected First Nations signed MBAs for the Coastal GasLink pipeline (Flanagan, 2019b: 14). Forty-three First Nations and Metis associations out of 56 signed MBAs for the Trans Mountain (TMX) pipeline (Flanagan, 2019b: 4). Thirty-one First Nations and other Indigenous groups, representing 80 percent of the native population along the route, signed MBAs for the Northern Gateway pipeline before the federal government cancelled the project.[2]

Finally, there is growing discussion of Indigenous equity ownership as a means of participating in the oil and gas industry, which would make First Nations and oil companies outright business partners (Cameron et al., 2019). This finds its fullest expression in proposals for partial or complete Indigenous ownership of major oil and gas pipelines. Equity ownership for First Nations was part of the Mackenzie Valley, Northern Gateway, and Keystone XL pipeline proposals. According to statements from federal officials, it will also be a feature of the TMX pipeline once that

[1] From now on, when I refer to "First Nations," I will be including Métis and non-status Indian organizations that also participate in energy consultations. I will sometimes use the popular expressions "oil companies" and "oil industry" to include both oil and gas producers, since the two are often found together.

[2] Email to Tom Flanagan from John Carruthers, former President of Northern Gateway Pipelines, April 19, 2021.

project is completed and transferred from government to private ownership (Canada, 2019).

This paper is an attempt to probe more deeply into issues surrounding cooperation between Indigenous peoples and the oil industry. It will look first at the evolution of cooperation and conflict in this area, showing that there are two crucial variables. One is the status of property rights: clear rules of ownership promote cooperation by providing material benefits to First Nations as well as oil companies. The second crucial variable is the presence of outside opposition to the oil industry. Environmentalist obstruction of pipeline construction has brought not all but many First Nations together with the industry to support projects that would bring benefits to both.

Finally, I will investigate equity ownership as a means of Indigenous participation in the oil industry. The evidence suggests that while it may be useful in certain circumstances, equity ownership is not a panacea. In a market economy, ownership and influence are exercised by those with capital to invest. If would-be Indigenous partners lack their own capital, their ownership must be financed by other partners or by governments committing funds raised from taxpayers. Such arrangements, whether they take the form of loan guarantees, carried interest, or outright transfers, can be difficult to arrange. Also, Indigenous ownership is not always able to overcome political opposition to major projects, as shown by the failed Mackenzie Valley, Northern Gateway, and Keystone XL proposals. And looming over the whole discussion is the question of how extensively Indigenous people will want to invest in an industry that the government of Canada is actively trying to scale back in the name of reducing carbon emissions.

Cooperation

The 1947 oil strike at Leduc, Alberta, led to a transformation of the provincial economy (Yager, 2020: ch. 5). Exploration of the Western Canadian Sedimentary Basin, which underlies most of the province, caused a scramble for land and drilling rights, which also affected Indian reserves. Production at Pigeon Lake, a reserve fishing station for the four bands whose main reserves were located at Hobbema, began in 1952 and spread to other reserves as exploration progressed.

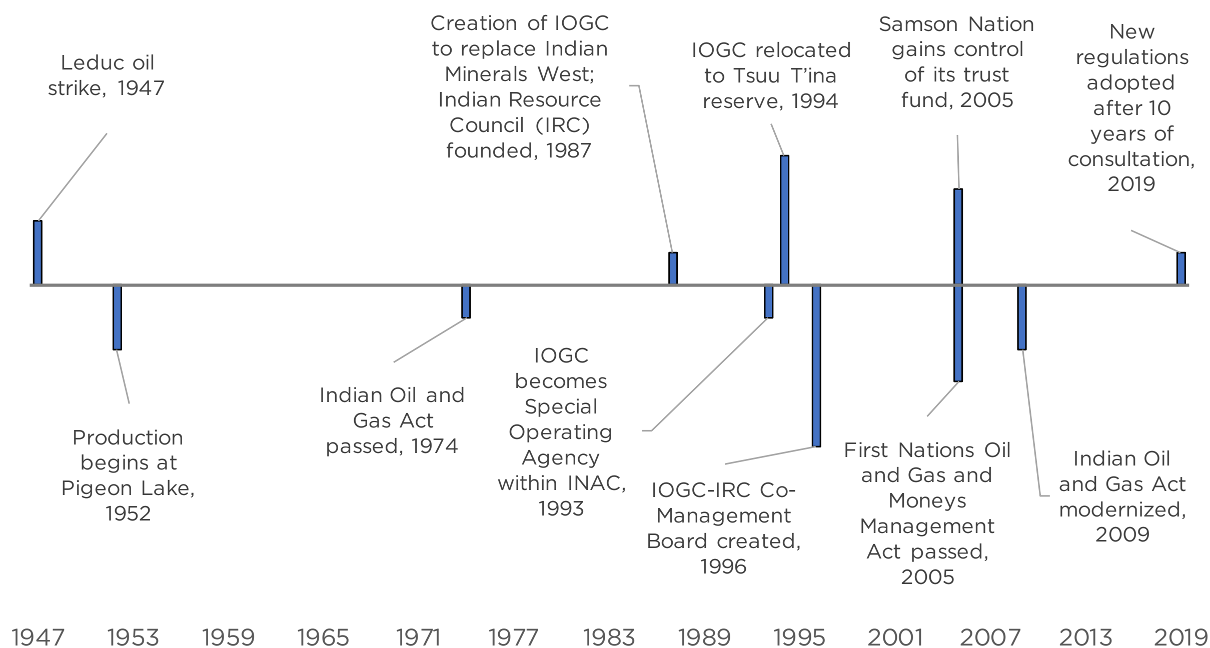
The Department of Indian Affairs and Northern Development handled this new line of business much as it had handled sales of reserve land. It obtained surrenders of underground resources, signed exploration and production contracts with oil companies, and deposited fees and royalties in the Consolidated Revenue Fund, where they were protected against loss but earned only the nominal government interest rate (IOGC, 2010).

This paternalistic approach was typical of the time. Reserves were then run by Indian agents, who controlled the finances. There was no class of educated native professionals such as lawyers and accountants to furnish community leadership in business affairs. The pass system (a process by which Indigenous people had to present a travel document authorized by an Indian agent in order to leave and return to their reserves (Nestor, 2018)), though inconsistently enforced, even made it difficult for Indians to leave their reserve.

Over subsequent decades, control over the oil industry on Indian reserves was gradually transferred to the First Nations themselves. The timeline in Figure 1 shows some of the main landmarks in this process.

The *Indian Oil and Gas Act* was passed in 1974. In 1987 Indian Oil and Gas Canada (IOGC) was created to replace Indian Minerals West within the Department of Indian Affairs, and the Indian Resource Council (IRC) was founded to advise IOGC. In 1993, IOGC became a Special Operating Agency within Indian Affairs, giving it a board of directors and a status resembling a Crown corporation. In 1994 the offices of IOGC were moved from downtown Calgary to the Tsuu T'ina reserve on the outskirts of the city and two years later the IOGC Co-Management Board was appointed so that the IRC could participate in managerial responsibility

Figure 1: Indian Oil and Gas Canada (IOGC) Timeline



Sources: IOGC, 2010; IOGC, 2019: 5-6; IRC, n.d; Yager, 2020.

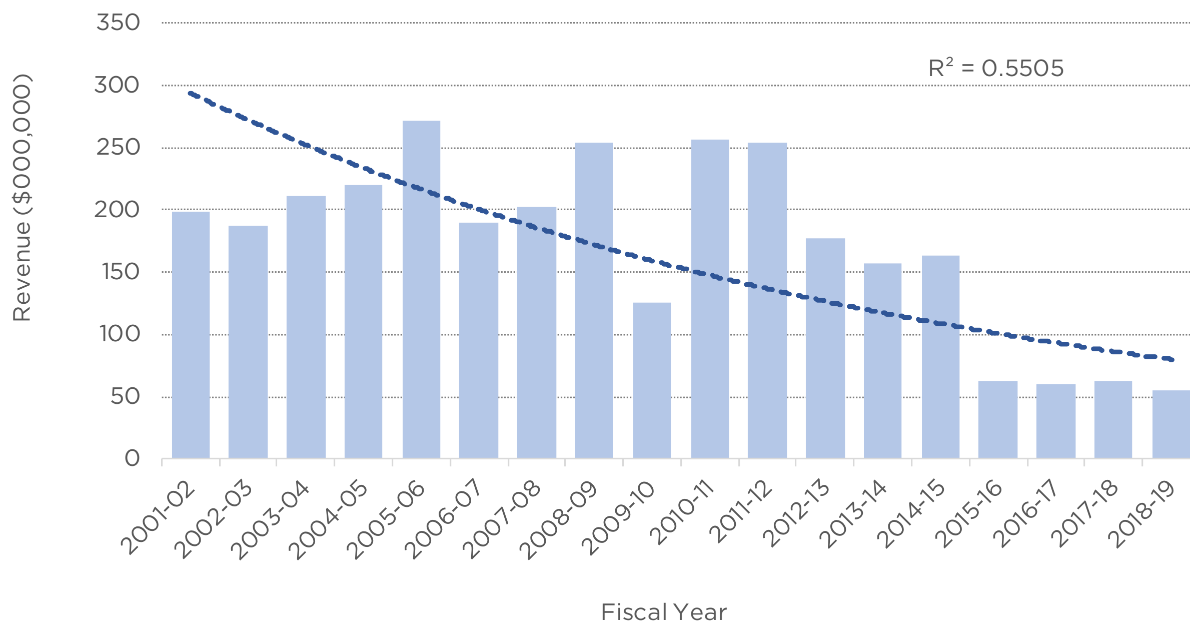
for the IOGC. It has been a long road, but today First Nations are largely in control of the oil and gas industry on their reserves. IOGC is still legally part of the federal government, but the co-management board consists almost entirely of First Nations people, and Executive Director Strater Crowfoot is a member of the Siksika Nation.

In 2005, the Samson First Nation, the largest of the four located at Hobbema, took control of its trust fund by taking it away from the Consolidated Revenue Fund and assuming responsibility for managing its own oil wealth (Hutchins, 2007: 15-16). Many First Nations have followed suit, and the contemporary value of First Nation trusts outside of government control is estimated at about $11 billion.[3] (Not all this wealth is derived from the oil industry; it also comes from other business activities as well as the settlement of land claims.)

But in spite of the successful transition to a form of self-government, IOGC is today severely challenged by conditions in the petroleum industry. Figure 2 shows the revenue earned by IOGC and transmitted to producer First Nations over the 18 fiscal years from 2001-02 through 2018-19.

[3] E-mail message from Michele Young-Crook, President and CEO, National Aboriginal Trust Officers Association (NATOA), to Tom Flanagan, February 11, 2021.

Figure 2: Revenue Distributed by IOGC to Producer First Nations, 2001-02 to 2018-19



Sources: IOGC Annual Reports.

The volatility of resource prices has led to ups and downs which make it impossible to draw a simple regression line, but there is a declining trend after 2005-06 partly caused by gradual exhaustion of the Western Canadian Sedimentary Basin. Three-quarters of First Nations' oil production now comes from Saskatchewan, which is mostly heavy oil, and the lower prices that heavy oil attract have reduced overall revenues. Meanwhile, by 2020 over 85 percent of Alberta's oil production came from the northern Alberta oil sands (Alberta, 2021), most of which underlie provincial Crown land and therefore do not create fees and royalties for First Nations.

In addition to these long-term trends, there is a shorter-term problem stemming from the collapse of oil prices in June 2014. The initial cause was increased production by Saudi Arabia, which was trying to preserve market share against the flood of shale oil from the United States (Skinner, 2015). The fall in prices in Canada was further aggravated by the change of government in Ottawa, with the new Liberal regime launching a set of policy and regulatory initiatives, including a new national energy strategy, review of the National Energy Board's role, fundamental changes to the Environmental Assessment Process, and signals from the prime minister himself that "governments might grant permits but only communities

can give permission" (Stahn, 2013). In this climate, regulatory risk was dramatically escalated for investors. These federal policies have hindered pipeline construction and driven investment out of Canada. Also, a decline in demand due to the Covid-19 pandemic depressed prices, although they had recovered somewhat by early 2021.

First Nation producers have suffered along with the rest of the Canadian industry. Their revenue in 2018-19 was only about a third of what it was five years previously. Moreover, the number of active producers has declined. In fiscal 2013-14, 30 First Nations were producing oil and 46 were producing natural gas; the corresponding numbers in 2019-20 were reduced to 23 and 34 (IOGC, *Annual Reports*).

It is not surprising, therefore, that IOGC and IRC have tried to form broader political alliances with the industry and with the governments of oil-producing provinces because revenues remain threatened by restrictive federal policies, even if international prices can rebound. IOGC and IRC have also reached out to First Nations, especially in British Columbia. Geology does not favour production there except in the northeast area of the province, but BC First Nations can earn revenue through MBAs for construction and maintenance of pipelines crossing their traditional territories.

IOGC has succeeded because property rights on Indian reserves, though limited, are clear. The federal Crown holds the underlying title under Canadian constitutional law but administers it for the benefit of the First Nation to which the reserve is allocated. It was thus apparent from the beginning that fees and royalties would go not to the province but to the First Nations through the agency of the federal government. Though perhaps not an ideal arrangement, it was clear enough that exploration and production could proceed for the mutual benefit of oil companies and the First Nations.

Conflict on the Resource Frontier

Property rights were murkier outside the Prairie Provinces. Treaties 8 and 11 had been signed in the Mackenzie Valley of the Northwest Territories, but Indian reserves had never been allocated. In British Columbia, reserves had been allocated but there had been no treaties (except for Hudson's Bay Company treaties on southern Vancouver Island and Treaty 8 in the Peace country) and no extinguishment of Aboriginal title, so First Nation rights outside reserve lands remained in existence but were not well defined in law. Quebec had received dominion over Ungava in 1898 and 1912 by Acts of Parliament but had never carried out the legislated requirement to obtain a surrender of Indian rights (*Quebec Boundaries Extension Act, 1912*). This lack of clarity about property rights in several areas led to major conflict over development on the resource frontier, starting in the 1970s.

In Quebec the flashpoint was not oil but hydropower as epitomized by the James Bay development. When in 1973 Hydro-Québec started to proceed with the project without having negotiated with the Cree and Inuit inhabitants of the James Bay region, the Cree obtained an injunction against development. The temporary injunction was overturned on appeal a week later, but the legal issue remained open for further litigation. Quebec proceeded quickly to negotiate the James Bay Agreement, approved in principle on November 15, 1974 (Diamond, 1985). That agreement, which was more generous to the native population than the Numbered Treaties had been, became a model for subsequent agreements in Quebec, the Northwest Territories, Yukon, and British Columbia, and has proved a durable basis for hydropower and other resource development in northern Quebec. The story is a case study in the importance of clarifying property rights.

Things did not go as well in the Northwest Territories. As early as the 1960s, researchers had been active in the NWT compiling oral histories to the effect that the natives of the Mackenzie Valley had not intended to surrender their aboriginal title, or had not even understood the concept of surrender, when they signed Treaty 8 in 1899-1900 and Treaty 11 in 1921. That evidence was presented to the public in the influential book, *As Long as This Land Shall Last* (1975), by the northern Oblate missionary René Fumoleau. The issue of aboriginal title became more salient after the

Supreme Court of Canada handed down its decision in Calder on January 31, 1973 (*Calder v British Columbia (AG)* SCR 313, [1973]). The decision was ambiguous, but the federal government accepted it as proving that aboriginal title in the sense of land ownership had existed in the past and still existed today if it had never been surrendered.

Even as the building of a Mackenzie Valley natural gas pipeline was discussed, the Native Indian Brotherhood had already attempted to register a caveat on public lands in the NWT (Flanagan, 2014: 95). This was an attempt to establish continuing aboriginal title, even though that title had ostensibly been surrendered in Treaties 8 and 11. On September 6, 1973, Justice William Morrow of the Supreme Court of the Northwest Territories ordered acceptance of the caveat. Though Morrow's decision was later overturned on appeal (Flanagan, 2014: 95), the federal government decided to act upon his finding that Aboriginal rights still existed in the Territories. On December 2, 1973, Prime Minister Pierre Trudeau spoke in favour of building the Mackenzie Valley pipeline to bring natural gas from the Beaufort Sea and the Mackenzie Delta to southern markets, especially the American export market (Swayze, 1987: ch. 7), but on March 21, 1974, Trudeau also made the fateful decision to appoint British Columbia judge Thomas Berger as a Royal Commissioner to investigate the conditions for building the pipeline.

Berger had been an NDP MP and MLA as well as leader of the provincial NDP before being appointed to the British Columbia Supreme Court. He was widely respected for his energy, intelligence, and integrity, but he shared the typical NDP suspicion of international corporations and resource development. He had also been counsel for the Nisga'a in *Calder* and so was virtually the architect of the modern concept of aboriginal title. Prime Minister Trudeau and Indian Affairs Minister Jean Chrétien thought they were appointing Berger to determine the environmental and legal conditions under which the pipeline should be built, but he interpreted his mandate as an investigation of whether the pipeline should be built at all (Swayze, 1987: ch. 7).

After two years of widely publicized hearings in the NWT and across Canada, Berger recommended in 1977 that no pipeline should be constructed for at least 10 years, until aboriginal title in the NWT could be settled (Berger, 1977). Shortly thereafter, the National Energy Board rejected the Mackenzie Valley pipeline in favour of the alternate Foothills proposal running from Alaska through Yukon to Alberta. But the Foothills pipeline became unviable economically because of new gas discoveries in both the United States (Harbour, n.d.) and Alberta, and the Mackenzie Valley pipeline was never built even though most First Nations in the NWT later swung in its favour and wanted to construct it on condition

that they get one-third ownership. (We will return to that episode further on because it involves later legal developments.)

The publicity surrounding the Berger Inquiry left a legacy of perceptions that impeded future pipeline proposals: That only corporations, particularly foreign-owned ones, benefited from resource development. That resource development, including pipeline construction, was dangerous to the natural environment and therefore to the aboriginal way of life. That First Nations had in effect a veto over pipeline proposals—if not legally, then practically—because these linear projects crossed the traditional territories of so many groups that some were bound to object.

The 1970s conflict over resource development in Quebec and the NWT also spilled over into Alberta. Members of the Lubicon Lake Band of northern Alberta are descended from Cree who were missed in the negotiation of Treaty 8 in 1899. The Lubicon leadership insisted that their Aboriginal title to land still existed because their ancestors had not signed the treaty, whereas the government's position was that Treaty 8, according to its wording, had extinguished all Aboriginal title in northern Alberta (Flanagan, 2015), while those who had been missed, or their descendants, could at any time adhere to the treaty.

This seemingly esoteric difference of legal interpretation led to decades of litigation, political protest, and direct action, in which the Lubicon attempted to block resource extraction in what today would be called their traditional territory. After Alberta Premier Peter Lougheed announced in 1973 that the Syncrude project in the oil sands would go ahead, the Lubicon, as part of the Isolated Communities Coalition, attempted to file a caveat on public land in northern Alberta, emulating the strategy that had proven effective in the NWT. But Premier Lougheed's government introduced legislation specifically to outlaw the registration of caveats on public land (Flanagan, 2014: 96). The Lubicon litigated throughout much of the 1980s, but never succeeded in repudiating the explicit land surrender documented in Treaty 8. Meanwhile, Alberta used its control over public lands to launch enormous developments in the oil sands. In 2018, the Lubicon finally adhered to Treaty 8 and got a reserve along with money to establish it (Canadian Press, 2018, October 24).

These 1970s episodes from Quebec, the NWT, and Alberta followed different paths to different outcomes, but they illustrate a common theme: that uncertainty over property rights impedes resource development, and that development can proceed once the uncertainty is reduced, no matter who appears to "win" or "lose" the dispute over ownership, as long as First Nations derive financial benefit. It is a real-world illustration of the so-called Coase theorem: if transaction costs are low enough, bargaining will lead to a Pareto-optimal outcome regardless of the assignment of property rights (Anderson, 2004).

Oil Sands, Pipelines, and the Duty to Consult

Commercial production in the oil sands started in 1967, and by 2006 about half of total Canadian output originated there (Cross, 2021: 13). The years 2005-08 were a period of frantic leasing activity in northern Alberta (Yager, 2020: ch. 4). Because of this explosive growth, environmentalists started to focus on the oil sands. A landmark in the opposition was a July 2008 meeting, ironically hosted by the Rockefeller Foundation (the Rockefeller fortune was earned in the oil business), which launched the "Tar Sands Campaign" (Northrop, 2008). The foundations represented at the meeting agreed to work towards a moratorium on oil sands expansion using multiple avenues of political and legal action including boycotts, litigation, and celebrity appearances. At the top of the list of recommended tactics was "Stop/Limit Pipelines and Refinery Expansion" (Northrop, 2008). The campaigners saw that while they could not stop production in Alberta, they could exploit the strategic vulnerability of the oil sands: exports outside the landlocked province were necessary to make production economically viable.

At this point political activism intersected with developments in Canadian Indigenous law. In 2004, the Supreme Court of Canada declared that governments had a "duty to consult and accommodate" First Nations before authorizing economic development on traditional territory to which there was an unsettled claim of Aboriginal rights or title (Flanagan, 2019a: 117-129). In layman's terms, the general idea was that it would be unfair—violate the "Honour of the Crown"—to unilaterally exploit natural resources on land that might become part of an Aboriginal rights settlement.

I have elsewhere called the right to be consulted a "quasi-property right" (Flanagan, 2020). A true property right includes the right to exclude others from the use of the property, whereas the courts have decided the right to be consulted does not confer a veto upon First Nations (*Coldwater First Nation v. Canada (Attorney General)* 2020 FCA 34). But in practice it may be close to a veto because consultations can be dragged out long enough to render projects uneconomic, giving proponents a strong

incentive to make concessions that would purchase access while diluting the economics of the project. The quasi-property right could be used for obstruction, but First Nations could also monetize it through negotiations with project proponents.

The setting of the 2004 *Haida Nation* decision was a transfer of forestry rights between commercial firms in Haida Gwaii off the coast of British Columbia, but it was also applicable to pipeline construction. The absence of treaties meant most of BC was covered with unsettled claims to Aboriginal rights and title. Any pipeline from the oil sands to tidewater would have to cross the traditional territory of dozens of First Nations. Making aggressive demands in the name of consultation was an ideal way of holding up proposed pipelines in order to extract concessions, including compensation or direct participation and partial ownership of a pipeline. And even if most First Nations could be satisfied, it might only take a small number of holdouts to tie up the project indefinitely.

The obstructive capacity of the right to be consulted, as expansively interpreted by the courts, quickly became apparent. By 2005, the Mackenzie Valley pipeline proposal had been resuscitated by promising a one-third equity share to the First Nations of the NWT and northern Alberta. But even though the National Energy Board and the federal cabinet approved the plan, a coalition of seven Dene Tha' bands in northern Alberta stalled it by getting a ruling in Federal Court that they had not been sufficiently consulted (Flanagan, 2019a: 126-127). This further delay delivered the coup de grâce to the project because massive shale gas development in the United States drove down the price of natural gas, rendering Mackenzie Delta gas uneconomic.

In British Columbia, environmental foundations funneled money into research and litigation to obstruct pipeline construction. The first major casualty was the Northern Gateway project, which would have brought bitumen from the oil sands to Prince Rupert to take advantage of the shortest ocean route to Asia. After years of consultations, the proponent (Enbridge) received cabinet approval, only to have that approval overturned in 2016 by the Federal Court of Appeal (FCA) on grounds of inadequate consultation. By that time, a new Liberal government opposed to Northern Gateway was in power, so the project died (Flanagan, 2017: 127). The right to be consulted did not kill the project by itself, but it led to long delays during which the political context dramatically changed.

The same strategy almost scuppered the TMX proposal to enlarge the capacity of the existing Trans Mountain pipeline, which terminates in Burnaby, BC. Opponents created so much delay, including an adverse FCA decision in 2018 (Flanagan, 2019a: 127-128), that the proponent, Kinder Morgan, was ready to give up. The project was saved only through the feder-

al government's purchase of the existing pipeline as well as the enlargement project. Also critical was a second FCA decision that gave carefully circumscribed instructions for a revamped consultation process and declared with finality that the right to be consulted is not the same as a power to veto (*Coldwater First Nation v. Canada (Attorney General)* 2020 FCA 34).

Another important test of consultation arose in the context of the Coastal GasLink pipeline. All 20 elected band councils of the First Nations along the route accepted the MBAs offered by the proponent, TC Energy, but one faction, led by the hereditary chiefs of the Wet'suwet'en Nation, remained opposed. They claimed that they, as traditional chiefs, had authority over the traditional lands of their people, while the elected band council controlled only reserve lands (Flanagan, 2019b: 13). Although their theory was never validated in court, their opposition led to a national blockade of rail lines, which the federal government finally dismantled after considerable delay. The government also offered the traditional chiefs a rather nebulous promise of discussing and delineating their claims of authority. It is noteworthy that injunctions against blockades were issued and upheld by the courts in every instance (e.g., Lindsay, 2019). The whole episode re-confirmed that no First Nation or part of a First Nation has the right to claim veto power over a linear project.

The Supreme Court's sketchy initial jurisprudence on the meaningfulness and adequacy of consultation led to 15 years of delay and confusion for natural resource projects; but subsequent decisions clarified some issues about how consultation is to be conducted, who is entitled to participate, and who makes the final decision. Recent Canadian research confirms that judicial decisions that reduce certainty decrease the value of property rights, as measured by market cap of resource companies, while judicial decisions that enhance certainty enhance that value (Keay and Metcalfe, 2021).

Although the right to be consulted initially seemed to be a license for obstruction, it has now emerged in some circumstances as a quasi-property right which strengthens the position of First Nations in negotiation. For their part, corporations will negotiate with potential partners if they know what the rules are and if they can foresee a profitable outcome. Ironically, then, the right to consultation as it has been partially clarified has created opportunities for partnership between oil companies and First Nations. Some First Nations or elements thereof may still prefer obstruction or opposition to all development on their claimed territories, but others seem ready to cooperate with the companies for mutual benefit. The Coase Theorem wins again as alliances are forming between oil companies and First Nations against the obstructive actions of environmental alarmists.

The situation, however, is far from ideal because the process is lengthy, cumbersome, and uncertain in its outcome. When a project is proposed, the proponent will try to negotiate Mutual Benefit Agreements with First Nations and other native organizations to obtain their acceptance and cooperation. The degree of Indigenous support will then have to be reviewed by the regulator (previously the National Energy Board, now the Canadian Energy Regulator), and then by the federal cabinet. After cabinet approval, appeals to the courts are still possible, as shown by the Northern Gateway and TMX sagas; and the decisions in those appeals may require large parts of the consultative process to be redone, leading to further reviews by the regulator and the cabinet. At the end of the day the cabinet may decide that a project is not necessary, regardless of the recommendation of the Canada Energy Regulator.

First Nations Equity Investments

The idea of a First Nations equity stake emerged in connection with the second attempt to construct a Mackenzie Valley natural gas pipeline (Dolha, 2002). Trans Canada Pipelines, which had been brought in by the gas producers to plan and build the pipeline, proposed the Indigenous equity share in an attempt to get support for the project.[4] Indigenous ownership then reappeared as part of Northern Gateway (O'Neill, 2014) and as a late add-on to the trans-border Keystone XL proposal (Canadian Press, 2020, September 30). Although proponents hoped that a First Nations share in ownership would make the pipelines more widely acceptable, all three projects failed because of political opposition—Mackenzie Valley because of one group of dissident First Nations in northern Alberta; Northern Gateway because of certain First Nations' opposition, which prompted Prime Minister Justin Trudeau's declaration that "the Great Bear rainforest is no place for a pipeline" (Global News, 2016, April 26; McCarthy, 2016, July 5); and Keystone XL because President Barack Obama made its cancellation his environmental legacy, which was reaffirmed by President Joe Biden as soon as he assumed office in 2021.

Interestingly, three of the four major pipeline projects that are going forward at this time—Coastal GasLink, Line 3, and Line 5—do not involve First Nations ownership. The TMX pipeline expansion, according to an official statement, will eventually involve First Nations ownership when the federal government sells it back to the private sector (Canada, 2019). The conclusion must be that a First Nations' ownership share, while perhaps desirable, is neither necessary nor sufficient to help a major pipeline project be completed.

Contrary to the difficulties that major pipelines have faced, one can find many examples of partnership investment in site-specific projects involving only one or a few First Nations. Below are some recent examples from the natural resource field. Fisheries and hydropower are included along with oil and gas because many natural resource investment projects present similar financial challenges. These examples are chosen to illus-

[4] Telephone interview with Dennis McConaghy, formerly Vice-President for Pipeline Development at Trans Canada Pipelines, March 10, 2021.

trate issues of finance; an exhaustive list of businesses with First Nations equity investment would be much longer.

- In 2009, Manitoba Hydro signed an agreement with four Cree First Nations allowing them to acquire up to a 25 percent interest in the Keeyask generating station on the lower Nelson River, which commenced operation in February 2021 (Rosen, 2021). It now appears that Manitoba Hydro and the provincial government overestimated demand for electricity and failed to control construction costs, so that the output from Keeyask is not really needed at the present time. The First Nations ownership share has not been indicted for an important role in this government failure (Wall, 2020).
- The Fort McKay First Nation and the Mikisew Cree First Nation acquired 49 percent of Suncor's East Tank Farm, which stores bitumen before it is piped out of northern Alberta. The value of their investment, announced in 2017, is about $500 million (Bird, 2017).
- In 2020, six Cree and Stoney First Nations went together on a $93 million share in the Cascades power project to be built by Kineticor Resource Corporation near Edson, Alberta. The total cost of the natural-gas-fired power plant is estimated at $1.5 billion, so the First Nations' share, while large for them, is minor in the context of the whole project (Canadian Press, 2020, September 10).
- In 2021, the Mi'kmaq Coalition of First Nations from the Atlantic Provinces acquired half of Clearwater Seafoods Canada, including all its Canadian fishing licences, for $250 million (Canadian Press, 2021).

Each of these four projects was financed in a different way, illustrating the variety of possibilities for facilitating First Nations' investments:

- The First Nations' share of the Keeyask generating project is essentially a free transfer from Manitoba Hydro, though the reality is obscured by complex loan and repayment agreements (Manitoba Hydro, 2009). The First Nations have put no money into the project, which was financed with loans from Manitoba Hydro. This is somewhat like the concept of "carried interest" as known in the investment world, except that in this case loan repayment doesn't begin until 25 years after completion of the build-out, by which time inflation will have greatly reduced the true value of the repayment.

- The Suncor Tank Farm acquisition was financed by a bond issue through RBC Capital Markets. Security for the bonds is provided by storage contracts already in place and extending over the next 25 years (Flanagan, 2019a: 69). This was a straight business deal with no government subsidy. Of course, the partnership with Suncor gives comfort to the bond purchasers.
- The First Nations' investment in the Kineticor project is financed with borrowed money backstopped by a loan guarantee from the Alberta Indigenous Opportunities Corporation (AIOC). Established by the United Conservative government in Alberta, AIOC exists to promote Indigenous investment in natural resource projects in the province and can guarantee loans up to $250 million. As with all loan guarantees, the government of Alberta is assuming some risk if the project does not perform as expected. There is an implicit subsidy to the First Nations in that the guarantee enables them to borrow at a lower interest rate.
- The Mi'kmaq Coalition's acquisition of Clearwater Seafoods is financed through the First Nations Finance Authority. This body, established by statute but administratively independent of the federal government, promotes First Nation investments by pooling risk and guaranteeing loans. So far it has not had any non-performing loans, although the federal government had to provide a $17.1 million bailout in 2020 (Canada, Crown-Indigenous Relations and Northern Affairs Canada, 2020). The Mi'kmaq Coalition is probably getting a lower interest rate than it would in an ordinary open-market transaction. Its partnership with Premium Brands Holding Corporation also helps to secure the transaction.

These four deals have some common characteristics. In each case a solvent corporation—Manitoba Hydro, Suncor, Kineticor, Premium Brands—is the managing partner and gives comfort to creditors. The number of First Nations partners is limited, with a maximum of seven in the Clearwater Seafoods acquisition. Except in the case of the Keeyask generator, a prosperous First Nation with a successful record in business—Fort McKay, Enoch Cree, Membertou—anchors the Indigenous coalition. The financial arrangements, however, illustrate a variety of possibilities—a transfer from the major partner (Manitoba Hydro); solvent First Nations using long-term contracts as security to raise their own money through a bond issue (Suncor's East Tank Farm); and loans guaranteed by an agency specializing in raising capital for First Nations (Cascade power project and Clearwater Seafoods acquisition).

Models of Indigenous ownership that have worked for site-specific projects will face challenges in scaling up for linear projects such as major pipelines. I will discuss these in the context of TMX, as Indigenous ownership has been promised for that pipeline once it is constructed and "de-risked."

One issue is numbers. A small group of First Nations, anchored by a member with a successful business record, can work together. However, a major pipeline will face large transaction costs in getting dozens or even hundreds of First Nations to cooperate. One solution is for an existing First Nations organization to take the lead, as the Indian Resource Council has done for TMX (Bakx, 2019) in spinning off Project Reconciliation, which now appears to be the leading contender to buy into the pipeline (Wapass, Fox, and Gottfriedson, 2019; Weber, 2021). There were two other attempts to form an investment coalition of First Nations to acquire a share in TMX—Iron Mountain and the Western Indigenous Pipeline Group. Iron Mountain has given up (Weber, n.d.), while the Western Indigenous Pipeline is still hopeful but seems less likely to succeed than Project Reconciliation. The result seems to be an example of Mancur Olson's conclusion about large-scale collective action projects: they do better when some existing proponent can bear the costs of organization (Olson, 1965).

A second challenge will be to find a major external partner to be the operator. Some chiefs have said that TMX should be 100 percent owned and operated by First Nations (Bakx, 2019), but the expertise to operate a multi-billion-dollar pipeline does not exist at the present time among First Nations. Kinder-Morgan sold TMX to the Canadian government; would that company want to buy it back except at a concessionary price? TC Energy and Enbridge have re-focused their investment strategy on the United States: would they want to buy a share in TMX? Maybe another Canadian pipeline company will be interested, or maybe an energy company will want to expand into pipelines. Maybe a new company can be built around TMX CEO Ian Anderson and his team, who have managed the planning and construction of TMX to date. Whatever the solution, a problem whose complexity is more than just financial is waiting to be solved.

A third challenge is the availability of capital. Energy projects tend to be large, fixed-capital assets that last for decades, take years to plan and receive regulatory approval, and more years to construct. They are thus not ideal for impatient one-off investments. The cost of projects involving Indigenous ownership has thus far been in the hundreds of millions of dollars, with Kineticor projected to be slightly higher at $1.5 billion. But the price tag of future major pipelines, if indeed any are built, will probably be an order of magnitude greater, almost certainly more than $10 billion; the cost of TMX is now estimated at $12.6 billion (Kapelos and Tasker,

Table 1: Accumulated Surplus* of Ten Wealthiest Alberta First Nations

First Nation	Accumulated Surplus ($000,000)	As of March 31, [Year]**
Samson	508.1	2020
Blood	359.3	2020
Stoney Nakoda	338.1	2018
Siksika	263.7	2019
Fort McKay	260.3	2020
Tsuu T'ina	183.6	2015
O'Chiese	176.0	2020
Bigstone Cree	161.7	2019
Mikisew Cree	140.1	2019
Whitefish Lake	137.9	2018

Source: Indigenous and Northern Affairs Canada (2019).

*Accumulated surplus is an accounting concept including physical assets and other financial instruments as well as trust funds.
**Last year reported.

2020). The potential for capital investment of that size does not exist in the world of First Nations. There is said to be $11 billion in First Nation trust funds, but there are hundreds of these funds, and those dollars are already invested. Perhaps some existing investments could be liquidated and the proceeds reinvested in a pipeline, but it is doubtful that the amount would be significant in relation to the cost of the project.

Table 1, which lists the "accumulated surplus" of the 10 wealthiest First Nations in Alberta that report such figures, illustrates the challenge. Alberta First Nations would presumably be the most interested in investing in a pipeline.

One option to the challenge of capital availability would be carried interest, in which the private-sector partner finances the First Nation's share of the investment and gradually recoups payment from the revenues generated after construction. However, this would probably work better for production investments than for pipelines; the former may generate a lot of profit after fixed costs are covered, whereas pipelines are more like regulated utilities with stable but not spectacular returns.

Another option might be loan guarantees. AIOC would probably like to help, but it is limited by statute to guarantees of $250 million. The

First Nations Finance Authority does not have a statutory limit, but would probably have a practical limit of similar size. If loan guarantees are to be used for TMX, senior governments will have to be involved—perhaps Alberta and Saskatchewan, and above all the federal government. Yet recent history, as illustrated by the fate of Muskrat Falls in Labrador (Smellie, 2020), should make governments wary of large loan guarantees for natural resource projects.

Some loans or bond issues can be guaranteed by shipping contracts. TMX says 80 percent of its capacity is now filled with 20-year contracts (Paraskova, 2021). The leaders of Project Reconciliation believe that shipping contracts will provide sufficient security to raise money to purchase the Indigenous share in TMX without recourse to loan guarantees or other public money (Wapass, Fox, and Gottfriedson, 2019). However, the cost of building TMX has skyrocketed due to delays and political uncertainty, so the value of shipping contracts might not cover the inflated cost of the pipeline. Even allowing for loan guarantees, the federal government will probably have little choice except to take a substantial write-down and offer TMX at a concessionary price to whatever consortium of First Nations emerges as the buyer. In one sense, the federal government deserves to absorb this cost because federal negligence allowed delays to escalate the cost of TMX, but taxpayers will ultimately bear the burden.

Concluding Remarks

Clarification of property rights plus recognition of a common enemy in the extreme elements of the environmental movement has led to growing cooperation between First Nations and the oil industry. This is a welcome development from several points of view. The oil industry is Canada's leading private-sector source of high-paying jobs and procurement contracts for Indigenous people (Coates, 2020: 16). Higher levels of cooperation are likely to foster increasing numbers of such jobs and contracts. And cooperation is good for the industry as well, because a cooperative atmosphere tends to reduce transaction costs and encourage the completion of energy projects. Cooperative hiring and training arrangements also help enlarge the pool of available workers to supplement the labour force in remote areas where the industry has to fly in outside workers.

While court decisions regarding consultation initially generated more questions than answers, they have finally produced a degree of clarity that enables project development. Even before going to the regulators with the idea of a project, wise developers go first to affected First Nations. They discuss their idea of what they would like to do and seek input and advice from the community; they do not just tell the communities what they are going to do. Clarifying Indigenous ownership may help create positive incentives for approving and completing pipelines and other projects that in the past have often been delayed or even abandoned due to opposition by First Nations.

Obstacles to First Nations' equity participation, however, should not be overlooked, especially for hugely expensive projects such as interprovincial or international pipelines. Transaction costs will mount if dozens of First Nations are involved. Shortage of capital on the part of First Nations may require either risky loan guarantees by senior governments or outright transfers at the ultimate expense of taxpayers. And the record shows that equity participation by First Nations, though politically useful, is not necessarily enough to guarantee approval of major projects. But even if First Nations' ownership of interprovincial pipelines faces is fraught with difficulties, there are many other opportunities for profitable Indigenous investment in the oil and gas industry, including production from specific fields, local pipeline and storage facilities, and electrical power generation. Such projects will usually be a better fit for the scale of First Nations' capital resources and managerial capacity.

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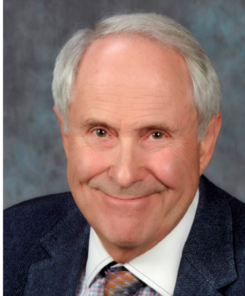

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