



### **JACK'S RANT:**

*The sinister plot disguised as 'national interest'.*

In his January 26, 2012 speech to the World Economic Forum, Prime Minister Stephen Harper said that it will be Canada's "national priority to ensure that we have the capacity to export our energy products ... to Asia." He is talking about Enbridge's Gateway pipeline. Nearly half of the \$100 million upfront cash for the Enbridge project is coming either directly or indirectly from Sinopec, the giant Chinese state-owned oil company, putting Canada's national priority in close harmony with China's national priority.

Harper's use of the words "national priority" follow closely on the use of the words "national interest" by Tom Flanagan, the PM's former Chief of Staff. Flanagan recently said that the Gateway pipeline is so important that Parliament should invoke the Federal Government's declaratory power - Section 92 (10)(c) of the 1867 Constitution - to declare this project to be in the national interest. Apart from the fact that s. 92(10)(c) doesn't actually use the words "national interest" (it says "general Advantage of Canada"), Mr. Flanagan's suggestion is strange, and perhaps sinister.

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### **UPCOMING EVENTS:**

**February 15** : Getting It Right: Employment Law for First Nations - Presented by Leah Mack and Berry Hykin at the Sto:lo Resource Centre in Chilliwack, BC.

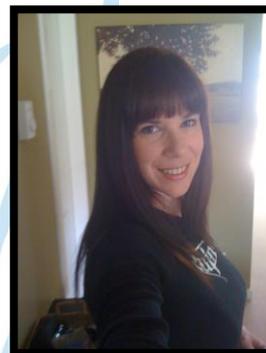
**February 16:** Indian Act Tax Exemptions: Business After Bastien & Dubé – Presented by Jack Woodward and Berry Hykin at the Sto:lo Resource Centre, Chilliwack, BC.

### **New to the W&Co Team: Jessica Robinson**

On January 30<sup>th</sup> Jessica Robinson joined our legal support team. Jessica has extensive experience in senior administrative positions. She is both a knowledgeable and dedicated Legal Assistant and a highly skilled Executive Assistant. Jessica has been highly recommended, one such reference having said, "I am very grateful to have had the opportunity to work with such a sharp and energetic person like Jessica and despite selfish reasons to not wanting her to move on to another firm, I could positively say that she would be a great asset to any firm."

Among Jessica's many interests and hobbies is her passion for fitness!

Jessica will be providing assistance to Heather Mahony, Alana Degrave, Leah Mack, Jenny Biem and Leigh Anne Baker.



Jessica Robinson

Welcome Jessica!

It is strange because s. 92(10)(c) has been called "anomalous" by Professor Hogg (the leading Canadian expert in Constitutional Law), and it has been used only once in the last 50 years. Most people have never heard of it, and if they knew about it would agree that it conflicts with the principle of federalism. But it is sinister because of the impact Mr. Flanagan seeks to achieve with respect to aboriginal rights.

Flanagan says that aboriginal claims are a threat to the Gateway pipeline, and he proposes a solution to this threat. He says that the federal government "does have the power to extinguish aboriginal title legislatively and to impose a settlement." This statement is simply untrue. As Professor Hogg says: "S. 35 now protects aboriginal and treaty rights from extinguishment by federal legislation." Short of extinguishment, however, the constitutional rights of aboriginal peoples can indeed be "infringed" if justified for objectives found to be compelling and substantial (*Sparrow*). The Supreme Court of Canada said that such infringement can be justified "in order to pursue objectives of compelling and substantial importance to that community as a whole" (*Delgamuukw*). This is likely what Mr. Flanagan is attempting to achieve. So the advice being given to Mr. Harper by Mr. Flanagan, and apparently meeting with approval, is that Canada should pass federal legislation which would elevate the Gateway pipeline to a status which would allow aboriginal interests along the route to be infringed in the "national interest."

Would this be a successful strategy by Canada? I think not. It is a bootstraps argument. Canada cannot overcome the constitutional protection provided for aboriginal and treaty rights simply by saying that pet projects are important. Only the courts can weigh the evidence and decide if the advantages of the project balanced against the disadvantages of the project, provide sufficient justification for the proposed infringement. When it comes to protecting the West Coast from the threat of a tanker spill, no amount of federal legislation can take away the court's power to look at the facts and decide for itself if the potential infringement can be justified. That will require a trial. Mr. Flanagan proposes a shortcut, hoping that aboriginal objections to Gateway can be crushed by Harper's majority in Parliament. But this sinister plan won't work. It was to protect aboriginal people from exactly such a danger that aboriginal rights were entrenched in section 35, nearly 30 years ago. ❖

*Jack Woodward*



May 2008 – Beaver Lake Cree Nation files legal action

## Beaver Lake Cree defend treaty rights in court

More than 3 ½ years after Beaver Lake Cree Nation commenced its historic case against the expansion of the tar sands industries, the band's lawyers presented arguments in Alberta Court of Queen's Bench defending the right to see the legal action go to trial. In a three-day hearing beginning January 30<sup>th</sup>, David Rosenberg Q.C. argued against the motion to strike filed by Canada and Alberta and the claims that the lawsuit is "unmanageable" and "frivolous."

In June 2009, Canada and Alberta presented pre-trial motions seeking to put a halt to the litigation rather than filing Statements of Defence. The provincial government stated that Alberta should get costs "forthwith and in any event of the cause." Alberta also said that the BLCN should have gone to the Energy Resources Conservation Board instead. The federal government said it should not be named as a defendant in the case.

Much of the funds needed to cover the cost of the hearing were raised on behalf of BLCN by RAVEN (Respecting Aboriginal Values & Environmental Needs), and members of the UK-based Toops Chambers legal team assisted *pro bono* with drafting the argument.

Madame Justice Beverly Brown reserved judgment. There is no deadline for issuing a decision. ❖