



Tom Flanagan

How First Nations Benefit from **PIPELINE CONSTRUCTION**



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by Tom Flanagan

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Executive summary

The highly visible opposition of some British Columbia First Nations to pipeline construction has created the impression that all Indigenous people are opposed to resource development. That impression, however, is false. Forty-three First Nations and other Indigenous groups support the proposed Trans Mountain pipeline, while only 12 signalled opposition in the *Tsleil-Waututh* litigation. All 20 First Nations along the route of the Coastal GasLink pipeline, which has been planned to feed LNG exports from Kitimat, endorse that proposal, apart from some internal disagreement within the Wet'suwet'en.

First Nations have good economic reasons to support pipelines because their right to be consulted has enabled them to negotiate lucrative mutual-benefit agreements (MBAs) with the proponents. Although many details remain confidential for business reasons, such an agreement typically offers a First Nation several million dollars up front, plus tens of millions over the life of the pipeline. First Nation supporters of Coastal GasLink will also receive cash payments from British Columbia's resource-revenue sharing policy. Beyond these cash payments, MBAs also include valuable guarantees of employment, job training, and contract set-asides, which in the long run may be worth more than the cash.

The First Nations who negotiate MBAs generally have three characteristics in common: their populations are small, their locations are remote, and their incomes are much lower than the regional average. The mean family income of First Nations supporting these pipelines is half or less than that of the provinces of Alberta and British Columbia in which they are situated. Their average Community Well-Being Index is also 20 points or more lower, on a scale from 1 to 100, than the average in their province. If you went looking for people who could benefit from more economic opportunity, you would immediately notice these First Nations. Yet they do not have the same chances for hospitality industries and real-estate development as urban First Nations. Natural resource development is their best, perhaps their only way, to escape poverty. For them, pipelines could become lifelines.

In contrast, the smaller number of First Nations who oppose pipelines are mostly located on the coast and/or near Vancouver, where they have other economic opportunities. The *Tsleil-Waututh* and Squamish First Nations, who were prominent in the opposition to Trans Mountain, are active in real-estate development. Squamish also has a lucrative contract with a small LNG export facility. And *Tsleil-Waututh's*

opposition has been funded for the last decade by the Tides Foundation, which also subsidizes a broad array of environmentalist organizations opposed to Trans Mountain and other pipelines.

Ironically, the opportunities created for many First Nations by pipeline proposals are being blocked by a smaller number of more fortunately situated First Nations. This is a general problem of long, linear projects such as pipelines, railways, highways, and electric-power transmission lines. Proposals, especially for pipelines designed to bring hydrocarbons to the coast for export, are of no value unless they can be completed from beginning to end.

The right to be consulted, which First Nations employ to negotiate mutual-benefit agreements, has been articulated by the courts in the context of individual proposals such as mines and oil wells, forestry clear-cuts, and ski resorts. The courts have not yet faced up to the complexity of long, linear projects involving dozens of First Nations. Analogous problems in the wider economy are resolved by governments' power of expropriation with compensation for easements or other takings. Existing provincial legislation, however, does not apply to "lands reserved for Indians" (*Constitution Act, 1867*, s. 91(24)). Some combination of federal legislation and judicial decisions will probably be required to break the impasse. Otherwise a small number of First Nations, in concert with green activists and NIMBY politicians, may continue to frustrate the hopes of many more First Nations for a better standard of living.

A Tale of Two Pipelines

Opposition by Canadian and international organizations, supported by some First Nations, has been instrumental in blocking proposed oil pipelines through British Columbia. Events such as mass protests fronted by Indigenous people have understandably created a public impression that all, or almost all, First Nations are opposed to the construction of new pipelines. That impression, however, is oversimplified to the point of inaccuracy. In fact, the data show that many more First Nations support rather than oppose new pipelines. Moreover, the First Nations who support pipelines suffer heavy losses when construction is blocked and oil and gas is landlocked. Impact benefit agreements (IBAs) or mutual benefit agreements (MBAs) for proposed pipelines are worth, in the aggregate, hundreds of millions or even billions of dollars to First Nations, who could use this money to improve the standard of living of their members. This study attempts to provide evidence-based analysis of the losses to First Nations that occur when pipeline proposals are impeded as well as the gains they could receive when pipelines are constructed.

It is essentially a tale of two pipelines, the Trans Mountain¹ oil pipeline expansion planned to bring Alberta oil to Burnaby, British Columbia, for export to Asia; and TransCanada's Coastal GasLink pipeline designed to bring natural gas from British Columbia to the LNG Canada plant at Haisla territory near Kitimat. These two were chosen for study because considerable information about the First Nations involved with the projects is in the public domain and both have been approved by the relevant regulatory authorities (although both may still be blocked by a combination of political and judicial factors).

Other pipeline projects are less suitable for this kind of study at present. The Mackenzie Valley gas pipeline proposal, which would have had 30% native ownership, was killed by repeated delays during which declines in the price of gas made the pipeline uneconomic. Northern Gateway seems dead now that the Liberal government of Justin Trudeau has turned against it, and a full list of supportive First Nations was never released. The Pacific Trail natural gas pipeline is still just a proposal, which will not go ahead unless and until Chevron builds its liquefaction

1. A note on terminology: Trans Mountain was owned by the pipeline company Kinder Morgan until the expansion was blocked by the Federal Court of Canada, after which it was purchased by the government of Canada. I usually call it Trans Mountain but sometimes refer to it as Kinder Morgan when discussing past events.

plant, also at Kitimat. The Eagle Spirit oil pipeline proposal spearheaded by Calvin Helin is even more inchoate. There has as yet been no application to the National Energy Board; and, although it claims to have all the necessary support from First Nations along the projected route, the names of those First Nations have not been released. Thus Trans Mountain and Coastal GasLink are the two most well-defined projects for analysis.

Data Limitations

Research on impact benefit agreements (IBAs), or mutual benefit agreements (MBAs) as they are now often called, is complicated by confidentiality. It is difficult to learn details about benefits, or even which First Nations and other Indigenous groups have signed agreements. Both the pipeline companies and the First Nations believe this confidentiality is a commercial necessity.

Stephen Harper's Conservative government tried to introduce an element of disclosure with the *Extractive Sector Transparency Measures Act* (2014). The Act was aimed mainly at payments that Canadian oil and mining companies make to foreign governments, but it also impinged upon Canadian IBAs. It required payments over \$100,000, including those to First Nations, to be publicly reported. Both Indigenous leaders and resource companies were opposed to being included in the bill, claiming that IBAs were private business transactions (Oleniuk, 2015).

In any case, section 29 of the Act exempted aboriginal governments from application of the Act for two years from proclamation, that is, until June 1, 2017. As now interpreted, the Act does not impose any reporting obligation on First Nation governments. Companies have to report certain types of payments over \$100,000 to First Nations, but not the details of IBAs as such (Government of Canada, 2017a). All payments become part of First Nation budgets, which, under the *First Nations Financial Transparency Act* (2013), are supposed to be reported to Ottawa and posted online in the First Nation Profiles maintained by Crown-Indigenous Relations and Northern Affairs Canada (formerly Indigenous and Northern Affairs Canada). But the reporting rules do not require IBA and MBA payments to be identified as such, so the public is still largely in the dark as to the details of such agreements. However, enough information has leaked out in the media to provide a general picture of the benefits, including cash payments as well as opportunities for business development and job training.

Another limitation on the data exists because, especially in British Columbia, the First Nations involved with pipeline proposals are mostly very small, often fewer than a thousand people, and Statistics Canada does not publish income data on small communities. For example, income statistics from the 2016 census are available for only nine of the 43 First Nations that signed agreements in support of the Trans Mountain proposal (Statistics Canada, 2018). Using whatever information is available, I will paint statistical group portraits of First Nations that support and oppose pipeline construction, but the pictures will be a little blurry as a result of deficiencies in the availability of data as well as sharp situational differences in location and proximity to towns and cities.

Trans Mountain Pro and Con

Trans Mountain claims that it will share “in excess of \$400 million” with Indigenous communities through Mutual Benefit Agreements.² However, the period of time over which these benefits would be received has never been made public. There is, after all, quite a difference between \$400 million spread over the decades-long life of a pipeline and \$400 million paid up front. However, the perceived value flow of the MBAs was obviously exciting enough to induce 43 Indigenous groups to sign them.

The company describes the MBAs as including “pipeline construction, education and jobs training, skills enhancement, business opportunities or improved community services and infrastructure.”³ Public statements have not included any mention of ownership for Indigenous partners, although a 10% equity share was reported to be a feature of the Northern Gateway IBAs (*Terrace Standard*, 2016). The company’s public information is not very detailed, but additional information can be gleaned from statements by First Nation representatives.

An internal dispute within the Peters Band has lifted the curtain on one MBA. The Peters Band is a small community, part of the Stó:lō Nation, located on the lower Fraser River near the town of Hope. The Indian Register listed 182 names as of October, 2018, of whom only 30 were residing on the Peters reserve in the 2016 census. There has been a long-running fight over membership, so a large number of people who have Indian status and are listed on the Register are not members of the Peters First Nation and cannot vote in band elections. Forty-two First Nation members voted in a plebiscite in December 2015 on approval of a Mutual Benefit Agreement with Kinder Morgan—25 in favour, 17 against (Jackson, 2017).

The annual financial statements filed by the Peters Band (INAC, 2017) show reception in 2014/15 of \$606,000 from Kinder Morgan for “capacity building,” that is, hiring consultants to analyze the company’s proposal. Another payment of \$2,586,420 came from Kinder Morgan next year. This was a pre-payment on the MBA, said to be required to obtain the band’s approval. The same year, the band government distributed \$1,932,400 to First Nation members. The payout was said to be \$30,000 apiece to the more than 60 members. The 2016/17 financial statements also record “other revenue” of \$1,079,270. The source of the revenue is not identified, but the Peters Band does not appear to have enterprises other than its connection with the Trans Mountain pipeline that could generate an amount of that size.

2. Personal communication from Info Trans Mountain via e-mail to author (October 3, 2018).

3. Personal communication from Info Trans Mountain via e-mail to author (October 3, 2018).

In addition to the upfront payments, the Band is supposed to receive \$500,000 a year for the future life of the project. Given that the existing pipeline started carrying oil in 1953, that lifetime could be many years. The total value of the MBA has been estimated at \$15 million over a 20-year period (Jang, 2017), although it is not clear whether that amount is in constant or nominal dollars. Although the Peters Band chose not to invest but to disburse most of its early revenue from Kinder Morgan in payments to individual members, it also put some aside for collective purposes. The band's accumulated surplus was \$332,259 in fiscal 2013/14 and \$1,436,572 in 2016/17. This increase of about \$1.1 million in three fiscal years must have been largely the result of payments from Trans Mountain.

Some information about other MBAs has also come out. The audited financial statements of the Tk'emlúps te Secwepemc (Kamloops Indian Band) show an MBA payment from Kinder Morgan of \$3,141,671 in 2016. The Whispering Pines/Clinton Band received \$440,000 in 2016/17, plus \$300,000 to distribute to holders of Certificates of Possession who would be affected by pipeline construction. The chief has publicly stated that the MBA would be worth between \$10 and \$20 million over a 20-year period (Beaumont, 2018). The Ditidaht First Nation on the West coast of Vancouver Island is said to have received "a sum of money" for signing its MBA (Beaumont, 2018). I could not find an itemized amount in the nation's financial statements, although it may be contained in the large "Other Revenue" category (\$2.2 million in fiscal 2017/18).

The available information is far from complete but it suggests the following picture: First Nations signing MBAs with Trans Mountain can expect to receive millions of dollars in cash payments over a period of two decades or more, the exact amount depending on the length of the pipeline in their territory. Some would be paid upfront at the time of signing, the rest in annual payments after the project was up and running. In addition there would be benefits, impossible to quantify accurately at this point but probably worth more than the cash payments, of employment, job training, and contract set-asides. The sum total of all these benefits would be very worthwhile for those First Nations—the large majority—that are small and relatively poor.

The precise number of communities that have signed MBAs with Trans Mountain is not quite clear. At the end of 2016, after years of work, much of which was personally conducted by company president Ian Anderson, Trans Mountain claimed 51 signatories. After a referendum conducted by the Stó:lō Nation in April 2017, nine bands withdrew, although one of these subsequently returned to the fold. Trans Mountain now claims to have 43 Indigenous partners, though a news story in April 2018 identified only 42, based on filings with the National Energy Board. Since the company will not explain the discrepancy, I will use the list of 42 published by the CBC as the basis of further analysis (Barrera, 2018).

There are some good reasons that the number may be hard to specify. Some First Nations consist of more than one reserve, and different residential communities within the First Nation may have different majority opinions. Also, members living off reserve often have different views than those living on reserve. Moreover, members sometimes challenge the process by which chief and council have made decisions, as is now happening with Coastal GasLink. Some First Nations have both an *Indian Act* government and a traditional governance of hereditary chiefs, and there may be differences between the two. Given the long period over which negotiations have been conducted, elections may change the chief and members of council, leading to new negotiating positions. And communities may sign conditional agreements hinging on future developments.

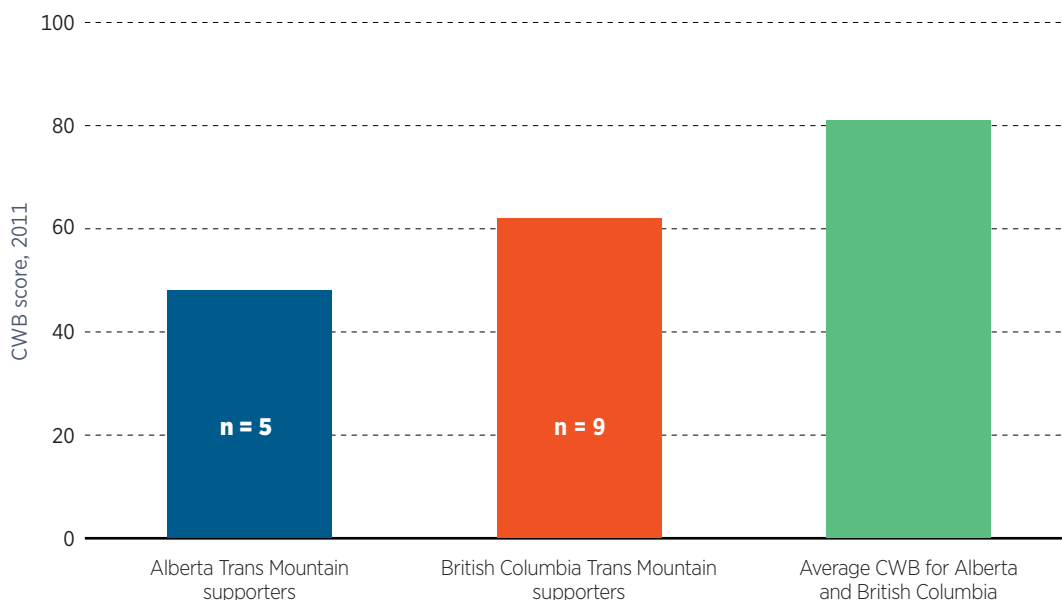
The 42 signatories may be broken down as follows: seven Alberta First Nations; three other Alberta Indigenous organizations (non-status Indians not now recognized under the *Indian Act*); 28 British Columbia First Nations; two British Columbia Metis organizations; two British Columbia non-status Indigenous organizations. In Alberta, the projected path of the pipeline runs more or less directly west from Edmonton to the British Columbia border. Five of the ten signatories are located quite close to the route; the other five are farther away, but the route might cross traditional-use areas and have an impact during the construction phase. Generally speaking, getting agreement in Alberta was not as contentious as it was in British Columbia, perhaps because dozens of Alberta First Nations already participate in the oil industry, with many pipelines crisscrossing both reserves and traditional territories.

There is a striking and important geographical pattern of support for MBAs in British Columbia. Ten First Nations located on Vancouver Island, with none opposed, signed on to MBAs. The pipeline route, whose terminus was to be at Burnaby on Burrard Inlet, does not cross any of their land reserves, but there might be an impact on traditional fishing rights from increased tanker traffic on what is now called the Salish Sea (previously the Strait of Georgia and the Strait of Juan de Fuca). Seven Interior Salish nations on the upper Fraser and Thompson rivers also accepted MBAs, as did eight Stó:lō bands. But the Stó:lō were divided, as another eight of their bands rejected MBAs and joined the litigation that ultimately blocked the pipeline (*Tsleil-Waututh v. Canada*, 2018). The Coastal Salish Tsleil-Waututh and Squamish nations were the most opposed of all, especially to increased coastal shipping, and led the litigation.

The First Nations who supported the pipeline and signed MBAs can be characterized as small, rural, inland, and not well off. Of course, as with all generalizations, there are some exceptions. Tk'emlúps te Secwepemc, located within the city of Kamloops, has developed a large and successful residential real-estate business; Enoch Cree borders Edmonton and hosts a major casino; the Esquimalt First Nation is located near Victoria; and Tzeachten is only 100 kilometres from Vancouver. But most of the supportive First Nations are relatively remote from urban areas and the associated economic opportunities.

Many of these First Nations are so small that Statistics Canada does not publish income data for them. The Community Well-Being (CWB) index, which is an aggregate of income, housing, education, and employment (INAC, 2015), also cannot be calculated. However, the available data do give a general sense of how far these First Nations lag behind average Canadian levels. **Figure 1** shows the average Community Well-Being (CWB) index for the nine supportive First Nations from British Columbia and five from Alberta for which it could be calculated in 2011, compared to the average CWB of 81 for both Alberta and British Columbia in that census year. (Tk'emlúps te Secwepemc is not included in any of these figures and tables because its large number of non-Indian residents distorts statistics for the First Nation.) The group portrait shows First Nations that, while not always desperately poor, are well below the general standard of living in their provinces and could certainly benefit from the economic opportunities associated with the Trans Mountain proposal. They support the pipeline because they see it as their best chance to climb out of poverty, and they do not perceive Canada offering them other opportunities.

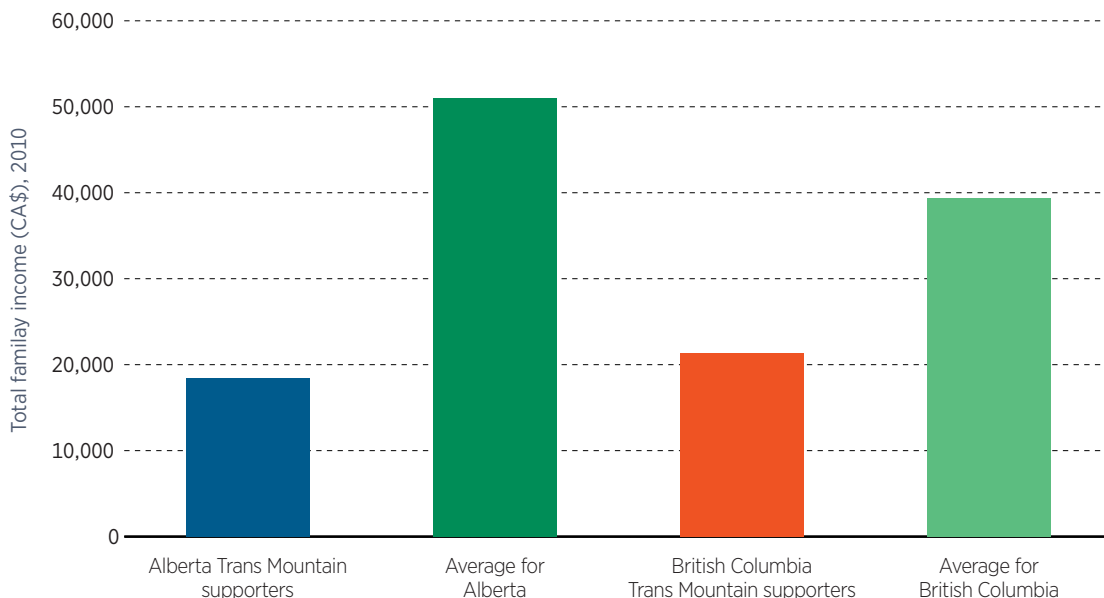
Figure 1: Mean 2011 CWB indices for Alberta and British Columbia First Nations supporting the Trans Mountain Pipeline compared to the average CWB for Alberta and British Columbia



Sources: Barrera, 2018; Government of Canada, 2017b.

Figure 2 paints the same picture another way, showing average total family income in 2010 for supportive First Nations in the two provinces, compared to average provincial levels. The gap was greater in Alberta than in British Columbia because province-wide Alberta incomes were higher, but in both provinces First Nation incomes were much lower than average.

Figure 2: Mean 2010 total family income (CA\$) for Alberta and BC First Nations supporting the Trans Mountain Pipeline compared to the provincial average



Source: INAC, 2017.

Table 1 presents a slightly different and more recent version of the same portrait. With many gaps due to missing data, it compares 2015 median after-tax household income for supportive First Nations with the same statistic for the surrounding census district. In eight of the nine cases for which the statistic could be calculated, First Nation income was between a half and a third lower than the income of the surrounding census district. The only case where the disparity was less than that was the Alexander First Nation, located near Edmonton, where the First Nation’s income was about a quarter lower than that of the surrounding census district.

All three statistical indicators point to the same conclusion, showing that First Nations who supported the Trans Mountain pipeline by signing MBAs are much less well off than the general population of the province in which they live. Those who want to block the pipeline are blocking an important development opportunity for people who want and need to improve their economy and well-being so they can approach the standard of living of most other Canadians. That pipeline opponents have been well-funded by environmentalist foundations (Morgan, 2019) helps explain this paradox.

Other research has shown that remote location is negatively correlated overall with economic development for First Nations (Flanagan, 2019: 53), even though non-Indigenous people working in remote natural-resource developments can earn very high incomes. The goal of public policy should be to make these high-income opportunities more accessible to Indigenous people.

Table 1: Household income (CA\$) of First Nations supportive of Trans Mountain

First Nation	Registered population ¹	Median after-tax household income (\$), 2015	Income (\$) in surrounding census district, 2015	Ratio (%)
Alberta				
Alexander FN	2,267	59,136	80,153	73.8%
Alexis Nakota				
Sioux FN	2,065	51,022	83,671	61.0%
Enoch Cree N	2,737			
Ermineskin T	4,833	49,660	98,604	50.4%
O'Chiese	1,439	53,710	99,152	54.2%
Paul FN	2,159			
Samson Cree N	8,891			
Samson Cree N 137		46,737	93,688	49.9%
Samson Cree N 137a		NA		
Nakcowinewak ²				
British Columbia				
Ashcroft IB	286	NA	71,293	
Canim Lake IB	614	NA	64,736	
Cheam FN	547	NA	71,866	
Ditidaht FN	780			
Esquimalt	321	NA	73,679	
Halalt FN	216	NA	67,529	
Hwiltsum FN ²				
Kelly Lake Cree N ²				
Kwikwetlem FN	114	NA	79,421	
Lake Cowichan FN	21			
Lower Nicola IB	1,271			
Malahat FN	348	NA	67,529	
Matsqui FN	263	52,177	79,421	65.7%
Pacheedaht FN	284			
Penelakut FN	982	35,289	67,529	52.3%
Peters FN	165	NA	71,866	
Popkum FN	12	NA	71,866	
Beecher Bay	262			
Seabird Island FN	1,029	43,292	71,866	60.2%
Semiahmoo FN	99	NA	79,421	
Shxw'ow'hamel FN	199			
Simpco FN	727			
T'souke FN	263	NA	73,679	
Tzeachten	540	47,453	71,866	66.0%
Union Bar IB	134			
Whispering Pines IB	181	NA	71,293	
Yale FN	175	NA	71,866	
Pauquachin FN	404			
Nicomien FN	133	NA	71,293	

Notes: [1] Registered Population is from Indian Register, October 2018. [2] Not a recognized First Nation.

Source: Statistics Canada, 2016.

In a more focused study, 15 of 21 First Nations with the highest CWB scores in Canada were found to be located in or near a city (Flanagan and Harding, 2016). But it is also possible for remote First Nations to succeed by participating in Canada's natural resource economy. In Alberta, the Fort McKay First Nation thrives by selling services to oil-sands companies. In British Columbia, the Osoyoos First Nation is not nearly as remote as Fort McKay, but it is not near any cities or large towns. It achieved prosperity first by engaging in specialized agriculture (growing grapes), then exploiting its beautiful location for tourism.

What remote First Nations can do depends on their location, but natural resource development, especially oil and gas, mining, and forestry, offer opportunities to many. Wages in the natural-resource sector tend to be high. The average employment income for a First Nations job holder in 2015 was about \$51,500. For First Nations persons employed in the extraction of oil and gas, the income was almost three times as high as that, and four times as high in the pipeline sector (Belzile, 2018: 23). And beyond these earnings of those employed on the pipeline, the company offers training opportunities, contract set-asides, and grants to the community. For many of the small, remote, and relatively poor First Nations willing to sign MBAs with Trans Mountain, the pipeline could become a foundation for long-term prosperity.

On the other hand, 12 recognized First Nations and two other Indigenous organizations were strongly enough opposed to Trans Mountain to have their names listed as complainants in the litigation that ended up blocking the pipeline, *Tsleil-Waututh Nation v. Canada*. These fourteen are listed below in **table 2**. As with the supporters, the first thing to notice about the declared opponents is their geographic location. Only two could be considered upstream on the Fraser River—the Coldwater (not fully opposed) and Upper Nicola First Nations, in the general area of Merritt. Eight of the opponents are bands of the Stó:lō Nation located in the lower Fraser valley. And the two most dogged opponents, the Tsleil-Waututh (TWN) and Squamish Nations, are situated on the north shore of Burrard Inlet. The Trans Mountain pipeline does not cross their reserve lands but would lead to an increase in tanker traffic in the inlet fronting their reserves. Also, the green agenda of keeping oil in the ground is popular with coastal First Nations as it is generally with coastal inhabitants of British Columbia. Any costs involved in opposing Trans Mountain are at least partially defrayed by American environmentalist foundations and their Canadian intermediaries (Krause, 2019).

Their location within the Vancouver metropolitan area gives TWN and the Squamish Nation exceptional economic opportunities not available to other First Nations along the projected Trans Mountain route. TWN owns Takaya Developments in partnership with the Aquilini Group. Its Raven Wood community on the North Shore already has about 1,100 housing units and plans are to build it out to over 1,500 (Tsleil-Waututh Nation, 2018a). The Squamish Nation hosts numerous businesses and

Table 2: Population of First Nations in British Columbia opposing the Trans Mountain pipeline

First Nation	Registered Population ¹	First Nation	Registered Population ¹
Tsleil-Waututh N (Sal.)	597	Squiala FN (St.)	222
Squamish N (Sal.)	4,278	Tzeachten ² (St.)	540
Coldwater IB (I. Sal.)	863	Yakwekwioose B (St.)	74
Aitchelitz FN (St.)	42	Skwah (St.)	652
Skowkale FN (St.)	266	Ts'elxwéyeqw T ³	
Shxwhá:y Village (St.)	438	Upper Nicola (I. Sal.)	977
Soowahlie FN (St.)	384		

Notes: [1] Registered Population is from Indian Register, October 2018. [2] Tzeachten has also been listed as a supporter. [3] Not a recognized First Nation.

Sources: *Tsleil-Waututh Nation v. Canada*; INAC, 2017.

shopping malls, and has long aspired to build high-end housing at the north end of the Lion's Gate Bridge.⁴ The Squamish and Tsleil-Waututh are also co-partners, along with the Musqueam Band, in the MST Development Corporation, which manages real estate in the Vancouver area reputedly worth a billion dollars (Bula, 2016). Both the Squamish and TWN can envision a promising economic future without the Trans Mountain pipeline.

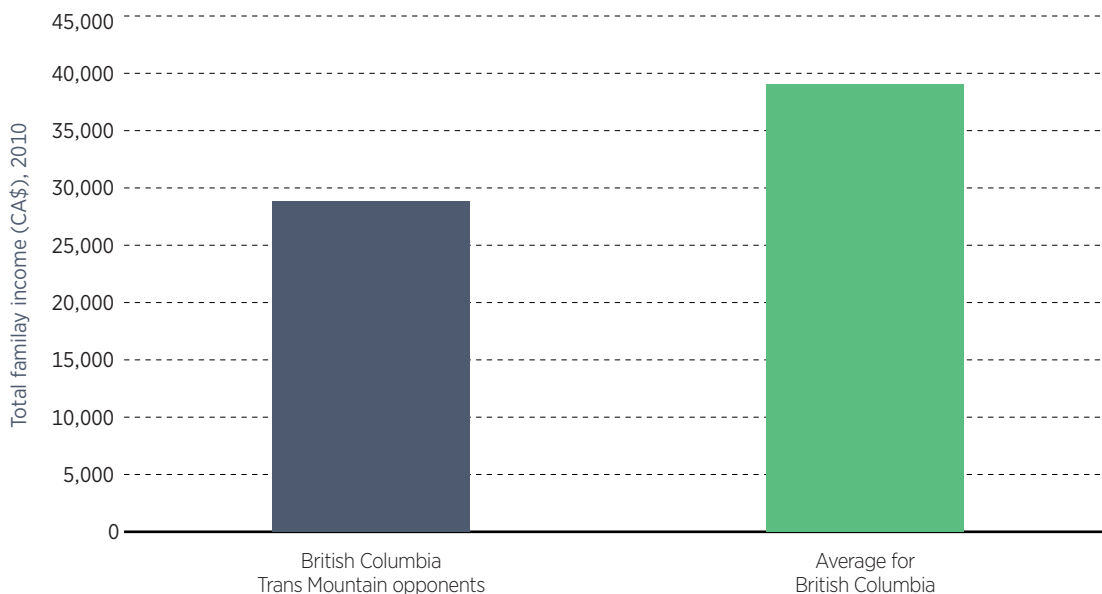
The Squamish Nation also has another lucrative opportunity with the Woodfibre LNG project, approved by the Squamish Council in November 2018. The three MBAs that it has negotiated with Woodfibre, FortisBC, and the provincial government provide for cash payments of \$225.65 million over 40 years plus various land transfers and employment programs (Penner, 2018). The Squamish Nation was working on this while the Trans Mountain project was also under negotiation. Compared to Woodfibre, Trans Mountain was of minor economic importance to the Squamish Nation.

Outside the Metropolitan Vancouver Area, the economic status of the opposing First Nations is not much different from that of the supporters. The average 2011 CWB for the four opposing First Nations for whom the figure has been published is 67, but two of these (Skowkale and Tzeachten) have large numbers of non-members living on reserve, which may inflate their scores. **Figure 3** shows average total family income in 2010 (reported in the 2011 census) for opponent First Nations compared to the average total family income for all residents in that year in British Columbia. The

4. Full disclosure: I was briefly hired as a consultant to the Squamish Nation regarding their real-estate development plans (Galloway, 2009).

comparison of 2015 median household income with surrounding census districts is already contained in table 1. The general picture is that the Tsleil-Waututh and Squamish Nations are in a class by themselves because of their location in the Metropolitan Vancouver area. The other First Nations opposing Trans Mountain appear to be demographically and economically similar to those supporting it, except that they tend to be closer to Vancouver.

Figure 3: Mean 2010 total family income for BC First Nations opposing the Trans Mountain pipeline compared to the provincial average



Source: INAC, 2017.

Coastal GasLink

On October 2, 2018, TransCanada announced that it would proceed with its Coastal GasLink pipeline, first proposed in 2012, to feed the LNG Canada plant at Kitimat. Coastal GasLink will run about 670 kilometres from Dawson Creek to Kitimat, carrying natural gas from the Montney shale field for liquefaction and export. Part of the announcement was that TransCanada had signed IBAs with all 20 First Nations located along the proposed route. These 20 supporters are listed below in **table 3**.

Unlike the situation with Trans Mountain, there has not yet been hostile litigation from First Nations. The only visible Indigenous opposition is from some of the hereditary chiefs within the Wet'suwet'en Nation. The elected government of the Wet'suwet'en Nation signed the IBA with Coastal GasLink, but the hereditary chiefs of some clans remain opposed. For several years, one clan maintained a roadblock on the Morice River Bridge near Houston, while another blockade was established in late 2018. Coastal GasLink needs to cross the river to do construction work on its approved route, and so it secured an injunction to take down the blockades. On January 7, 2019, the RCMP arrested 14 protesters in an effort to enforce the injunction (Jeong, 2019), and the traditional chiefs subsequently agreed with the RCMP to keep the road and bridge open so that work crews could get to their destination (Smart, 2019). A recent archeological discovery of stone tools in the area turned out to be hoax, so it should not cause further delay (Kane, 2019).

The story, however, may not be over, because jurisdictional issues between the elected council and the hereditary chiefs are unresolved and hereditary chiefs remain opposed to the pipeline. At the time of writing, criminal contempt charges against the 14 protestors had been dropped, but there were plans for a trial over the motion to make the interim injunction permanent (Trumpener, 2019; Canadian Press, 2019). Legal counsel for traditional chiefs may well raise issues going beyond the adequacy of consultation. The area in question is claimed by the Wet'suwet'en as part of their traditional territory. In its 1997 *Delgamuukw* decision over an action brought by hereditary chiefs, the Supreme Court of Canada ruled that Gitksan and Wet'suwet'en aboriginal title is still in existence, though it did not delineate the area over which that title exists. Counsel may argue that the Wet'suwet'en actually own the area along the Morice River and that hereditary chiefs are the rights holders, so that Coastal GasLink cannot operate there without their permission, no matter how much consultation has taken place. As a slightly different collateral argument, counsel will probably say that, while the elected chief and council have jurisdiction over reserve land, it is only traditional chiefs who have jurisdiction over traditional Wet'suwet'en territory

Table 3: First Nations in British Columbia supporting the Coastal GasLink

First Nation	Registered population ¹	Median after-tax household income (\$), 2015	Income (\$) in surrounding census district, 2015	Ratio
Stellat'en FN	553			
Saik'uz FN	968			
Cheslatta Carrier N	363			
McLeod Lake IB	567		77,165	
Saulteau FNs	1,089			
Kitselas FN	682	57,337	72,882	78.7%
West Moberly FNs	321		88,782	
Lheidli T'enneh FN	447			
Nadleh Whut'en IB	563			
Burns Lake IB	128		73,311	
Blueberry River FNs	505		88,782	
Halfway River FN	287		88,782	
Doig River FN	314		88,782	
Wet'suwet'en FN	256			
Yekooche FN	237		75,209	
Nee Tahi Buhn IB	151			
Skin Tyee FN	186			
Witset FN	2,050			
Nak'azdli Whut'en	1,979			
Haisla N	1,931			

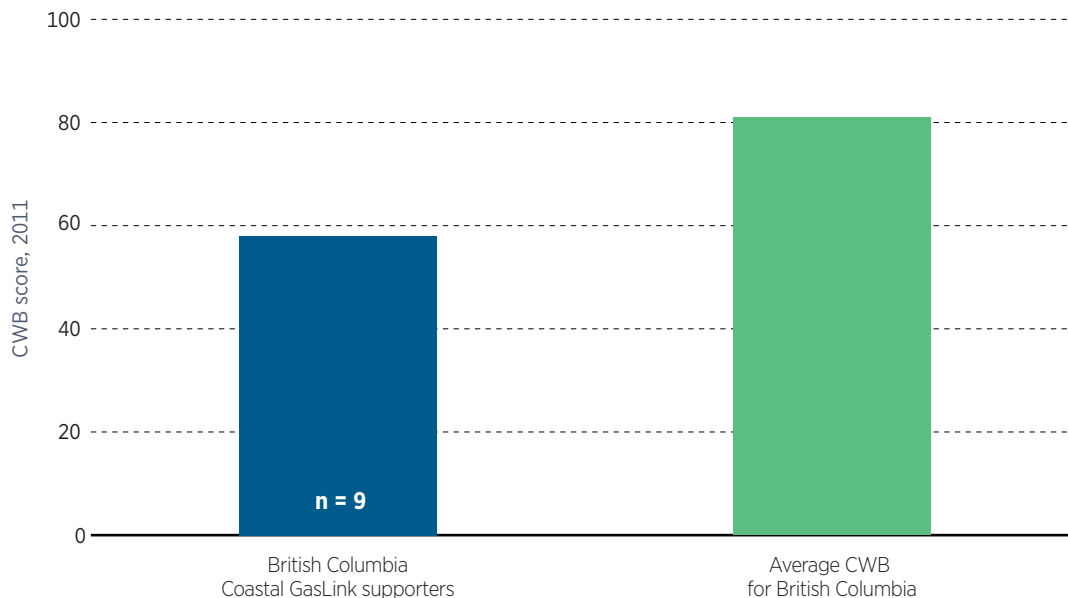
Note: [1] Registered Population is from Indian Register, October 2018.

Sources: Coastal GasLink, 2019; Statistics Canada, 2016.

(McIvor, 2019). If the court is receptive to either or both of these arguments, a legal marathon of the type that helped derail the Northern Gateway, Trans Mountain, and Mackenzie Valley pipelines may still ensue.

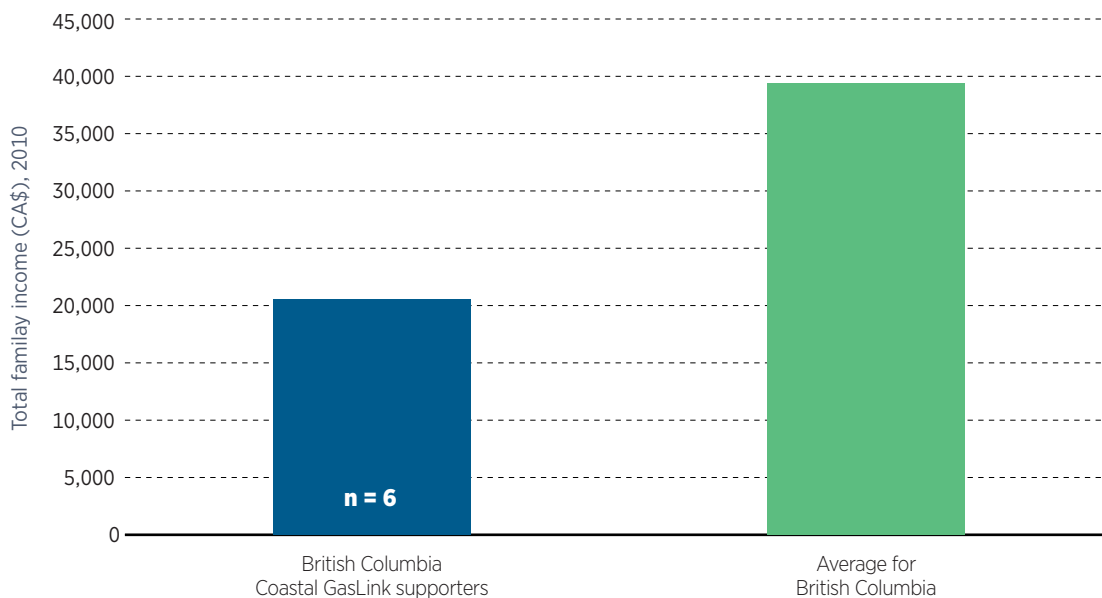
Most of the 20 First Nations supporting Coastal GasLink are, like most of the 42 supporters of Trans Mountain, remotely located, small in population, and in need of economic opportunity. **Figure 4** shows the average 2011 CWB (data available for nine) of these groups compared to the provincial average for British Columbia. **Figure 5** shows the mean total family income (n = 6) in 2010 in comparison to the same statistic for the entire province. There is no doubt that these First Nations can benefit from the economic opportunities that will be created by the IBAs. Haisla's chief councillor Crystal Smith described it this way: "First Nations in northern B.C. have a real opportunity to work together to build benefits for each of our communities, which respects Aboriginal rights and title, separate from the political realm. This announcement from Coastal GasLink is an example of that opportunity" (Hoekstra, 2018).

Figure 4: Mean 2011 CWB Indices for BC First Nations supporting the Coastal GasLink pipeline compared to average CWB for British Columbia



Source: Government of Canada, 2017b.

Figure 5: Mean 2010 total family income for BC First Nations supporting the Coastal GasLink pipeline compared to the provincial average



Source: Statistics Canada, 2016.

Benefits from TransCanada to First Nations appear to be mainly in the realm of employment and contracting, which also lead to future opportunities in a variety of fields. The company's formal announcement of Coastal GasLink stated:

TransCanada is pleased to announce that its Coastal GasLink Pipeline Project is conditionally awarding \$620 million in contract work to northern British Columbia (B.C.) Indigenous businesses for the project's right-of-way clearing, medical, security and camp management needs. The Project anticipates another \$400 million in additional contract and employment opportunities for Indigenous and local B.C. communities during pipeline construction. (Coastal GasLink, 2018)

However, Coastal GasLink differs radically from Trans Mountain in that the government of British Columbia is also supplying substantial cash benefits to supportive First Nations. These are in line with the resource revenue-sharing policy adopted by the province in 2008 (Coates, 2015: 18–19). **Table 4** shows the provincial “Project Payments” and “Additional Payments” to the 15 First Nations for whom information was publicly available at the time of writing.⁵ The payments are made in stages from the beginning to the end of pipeline construction. The average aggregate amount is about \$2.2 million, with the highest being \$6.0 million and the lowest, \$457,000.

In addition, the agreements require the province to provide “Ongoing Benefits” in the amount of \$10 million (inflation-adjusted) a year for the working life of the pipeline, to be divided among the supporting First Nations according to a formula not yet determined. **Table 5** shows the estimated current value of \$10 million a year inflation-adjusted at 2% *per annum* for time periods of 20, 30, and 40 years, and for discount rates of 2%, 4%, and 6%.

The present value of inflation-adjusted Ongoing Benefits ranges between five and ten times the value of the other benefits paid up front, depending on the projections made about the future. This seems like a better deal than the partial ownership offered in connection with Northern Gateway. Instead of the tolls that would come with an equity share and that might depend to some degree on business conditions, the First Nations will receive contractually guaranteed and inflation-adjusted payments that are independent of business conditions and involve no risk of capital losses.

Considering both the up-front payments and the Ongoing Benefits, the provincial payments are substantial amounts of money for these small and remote First Nations. The total 2018 Registered Indian population of the 15 First Nations whose agreements

5. Five First Nations were still negotiating at the time of writing (Tania Venn, Communications Manager, British Columbia Ministry of Indigenous Relations and Reconciliation, via e-mail to author, January 28, 2019).

Table 4: Payments (\$) from Government of British Columbia to First Nations Supporting Coastal GasLink, 2018

First Nation	Project payment	Additional payment	Total payment
Doig River FN	1,170,000	175,500	1,345,500
Halfway River FN	3,030,000	406,000	3,436,000
Kitselas FN ¹	1,500,000		1,500,000
Lheidli Tenneh FN	1,240,000	248,000	1,488,000
McLeod Lake IB	3,380,000	338,000	3,718,000
Moricetown B (Witset)	4,990,000	998,000	5,988,000
Nee-Tahi-Buhn B	2,100,000	420,000	2,520,000
Saik'uz FN	1,910,000	286,500	2,196,500
Saulteau FNs	3,260,000	652,000	3,912,000
Skin Tyee B	2,330,000	466,000	2,796,000
Stellat'en FN	2,530,000	379,500	2,909,500
Ts'il Kaz Koh FN (Burns Lake)	830,000	124,500	954,500
West Moberly FNs	2,010,000	201,000	2,211,000
Wet'suwet'en FN	2,320,000	464,000	2,784,000
Yekooche FN	390,000	78,000	468,000
Total	32,990,000	5,237,000	38,227,000
Mean	2,199,333	374,071	2,548,467

Note: [1] Sum of "Initial Base Funding" and "Ongoing Base Funding."

Source: British Columbia, 2018.

Table 5: Present value (\$ millions) of Coastal GasLink on-going benefits under various assumptions

Years	2%	4%	6%
20	\$196.1	\$160.9	\$134.2
30	\$294.1	\$220.8	\$171.2
40	\$392.2	\$270.0	\$196.3

Sources: Spreadsheet by research assistant Shamus Hardie; British Columbia, 2018.

with the province have been published is 8,236. This means that the present value of the provincial agreement lies between \$28,500 and \$52,300 per capita, depending on assumptions about the future. But the money is paid to First Nation governments, not to individuals. The present value to a First Nation of average size (= 550) lies between \$15.7 and \$28.8 million. This is a major benefit to a small community, especially considering that the individual members and families also stand to gain from new jobs, job training, and contract set-asides.

Discussion

Direct benefits from pipeline impact benefit agreements (IBAs) and mutual benefit agreements (MBAs) are substantial, both to First Nation governments and to individual members. Cash benefits from the pipeline proponent and/or government typically amount to a few million dollars up front and perhaps \$10-to-20 million or even more in further payments over the usable life of the pipeline; these can help First Nation governments provide better facilities and services to their members. The individual benefits to members involve jobs, job training, and contract set-asides, which can help them raise their employment income and all that goes with it—better housing, health care, and education for their children—thus building a platform for future prosperity. The total impact is significant for First Nations whose membership in most cases is only a few hundred people.

I have argued elsewhere that the right of First Nations to be consulted on resource development projects amounts to a quasi-property right (Flanagan, 2019: 117). A full-scale property right would encompass the right to exclude, and the courts have held that the right to be consulted does not extend that far; but in practice obtaining voluntary consent is so useful that development proponents will pay significant sums to obtain it. IBAs and MBAs monetize this quasi-property right for the benefit of First Nation signatories.

First Nations who sign onto these pipeline agreements are often in dire need of economic opportunity. By any measure, their standard of living and community well-being are much lower than those of most other Canadians. Remote location forecloses many options, such as casinos, hotels, shopping centres, industrial parks, and residential real estate, which other First Nations are using to improve their economies. For most of these rural First Nations, the development of natural resources is the only viable path to economic improvement.

Both federal and provincial government policies toward pipeline construction are crucial in enabling First Nations to monetize their quasi-property right and get the benefit of IBAs and MBAs. The federal government has jurisdiction over interprovincial and international pipelines, leading to approval of Trans Mountain by the National Energy Board (NEB) and the federal cabinet. Because Coastal GasLink lies entirely within the province of British Columbia, the relevant regulatory authority was the BC Environmental Assessment Office.

But regulatory approval is only part of the process because it can be undone by subsequent political events. After Northern Gateway had received approval from the NEB and the federal cabinet of Stephen Harper, the new federal cabinet of Justin

Trudeau cancelled the pipeline by prohibiting oil-tanker traffic off the northern coast of British Columbia. The provincial government of British Columbia delayed the Trans Mountain pipeline for years by making environmental and fiscal demands. Vancouver and Burnaby, creatures of the province, then supported the *Tsleil-Waututh* litigation that has impeded Trans Mountain. On the other side, British Columbia signed separate MBAs with the Coastal GasLink First Nations, substantially enriching what TransCanada offered and in effect subsidizing the pipeline. The province also did not attempt to interfere with enforcement of the injunction to clear the blockage at the Morice River. Provincial intervention might have resulted in litigation causing serious delays, but the provincial government wanted the project to proceed.

The point is that the quasi-property right of First Nations to be consulted does not operate in a pure free-market context. In a game of *political* economy, it cannot be monetized without the active cooperation of at least one and sometimes two governments. As a result of factors largely outside their control, First Nations may gain substantial benefits, as in the case of Coastal GasLink, or fail to benefit, as in the case of Trans Mountain. In British Columbia thus far, the 20 Coastal GasLink supporters look as if they will actually receive benefits; on the other hand, there are 43 Trans Mountain supporters whose economic development hopes are being stymied by political opposition, not to mention the dozens of First Nations who wanted Northern Gateway to proceed. In the case of these oil pipelines, losses are also imposed on other First Nations who would not be eligible for IBAs, namely the many oil-producing First Nations in Alberta and Saskatchewan who are being deprived of access to their best market. Because First Nations receive higher royalties than other producers, their oil production is the first to be shut during glut conditions, meaning that First Nations' losses are proportionally the greatest (Schmidt, 2019). In the present state of play, the right to be consulted is creating advantages for only a minority of First Nations.

The Trans Mountain story also points to another difficulty for First Nations who would like to capitalize on the benefits from pipeline construction. The jurisprudence surrounding the duty to consult was originally developed from complaints by particular First Nations about projects affecting their reserves or traditional territories. The courts have never really developed the law to deal with long, linear corridor projects, such as pipelines, that cross the lands of dozens of First Nations (Flanagan, 2019: 124–125). To take the case of Trans Mountain, 43 First Nations (or other Indigenous organizations) were satisfied with consultations conducted by Kinder Morgan, the National Energy Board, and the federal cabinet to the point that they signed MBAs with the company. Twelve First Nations and two other Indigenous organizations who were not satisfied chose litigation to stop construction of the pipeline and succeeded in the Federal Court of Canada, so that the federal cabinet has ordered another round of consultation, which will also be challenged in court as inadequate (Rabson, 2018).

Can a minority of First Nations forever stop a majority of First Nations who would like to proceed with the project? At the present time, neither the courts nor the Canadian political class have a clear answer to this question.

Outside the world of Indigenous rights, Canadian law deals with such issues through expropriation. The provinces all have statutes allowing the expropriation of land to allow infrastructure to be built. Opponents can bargain for the best deal, receive fair-market compensation as determined by an independent tribunal, and even take their case to court, but they cannot stop a development forever. Majorities cannot run roughshod over minorities, but they can proceed as long as fair compensation is paid. Indigenous law in its present state lacks such balancing mechanisms; it gives little guidance as to how First Nation majorities can proceed against the opposition of First Nation minorities, who may be encouraged and financed by non-Indigenous political actors whose priority is not promoting Indigenous well-being but blocking natural-resource projects. Development of such law should be considered a high priority if First Nations are ever to derive the full value of their right to be consulted.

Up to this point, political leadership has been lacking. Even when governments have not actively blocked pipelines, they have been reactive, allowing aggrieved parties to set the agenda in judicial proceedings. Positive federal leadership accompanied by legislation will probably be necessary to end the blockade of pipelines that is depriving so many First Nations of their best economic opportunities.

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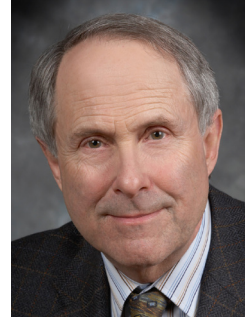
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Acknowledgments

The author wishes to thank the Lotte & John Hecht Memorial Foundation for its generous support of this project. Thanks are also due to Shamus Hardie for research assistance and to the two reviewers of this paper for their many helpful comments. As the author has worked independently, the views and conclusions expressed in this paper do not necessarily reflect those of the Board of Directors of the Fraser Institute, the staff, or supporters.

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Date of issue

2019

ISBN

978-0-88975-552-9

Citation

Tom Flanagan (2019). *How First Nations Benefit from Pipeline Construction*. Fraser Institute. <www.fraserinstitute.org>.

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