

**YINKA DENE
ALLIANCE**



Nadleh Whut'en



Wet'suwet'en



Saikuz



Tl'azt'en

Yinka Dene Alliance

Submission to the United Nations Special Rapporteur on the
Rights of Indigenous Peoples

*Request for Intervention of the Special Rapporteur Concerning the Conduct
of the Governments of Canada and British Columbia in Relation to the
Proposed Enbridge Northern Gateway Pipeline*

September 2013

The Yinka Dene Alliance

1. The Yinka Dene Alliance (“YDA”) is a coalition of six Carrier Sekani First Nations whose territory in northern British Columbia, Canada, comprises 25 percent of the territory through which a proposed oil sands pipeline known as the Enbridge Northern Gateway Pipeline (the “Pipeline”) would travel. All YDA nations are members of the Carrier Sekani Tribal Council.
2. The YDA First Nations are:
 - Nadleh Whut’en
 - Nak’azdli
 - Takla Lake
 - Saik’uz
 - Wet’suwet’en
 - Tl’azt’en
3. Our territories are found in the headwaters of the Fraser, Skeena and Mackenzie/Arctic watersheds. A map displaying YDA territories and the proposed route of the Pipeline is reproduced in Appendix I.¹
4. The First Nations people of YDA have occupied our territories since time out of mind. Archaeological records demonstrate our occupation of our territories dating back more than 5,000 years.

Enbridge’s Northern Gateway Pipeline proposal threatens our lands and waters

5. Enbridge proposes to construct a 1,177 kilometre twin pipeline to move oil sands bitumen from Bruderheim, Alberta to the Pacific port of Kitimat, British Columbia, where tankers would then ship it to overseas markets.²
6. One of the twin pipelines would move 525,000 barrels per day of oil sands bitumen from Alberta to the British Columbia coast. The second pipeline would move 193,000 barrels per day of condensate, a toxic natural gas by-product used to thin heavier oil products for transport by pipeline, in the opposite direction from the coast to the oil sands in Alberta.³
7. The Pipeline would cross approximately 50 First Nations’ territories and traverse over 1,000 rivers and streams, including many fish-bearing streams of critical importance to Indigenous peoples such as the headwaters of the Fraser River (crossing the Stuart, Endako and Salmon

¹ The map also displays the traditional territories of First Nations that have signed the *Save the Fraser Declaration*, which is discussed later on in this submission.

² See for example Enbridge Northern Gateway Pipelines, “Project at a Glance” (2013), online: <<http://www.northerngateway.ca/project-details/project-at-a-glance/>>.

³ *Ibid.*

Rivers) and the headwaters of the Skeena River (crossing the Sutherland, Morice and Bulkley watersheds).

8. Construction of the Pipeline would cause environmental disruption, but of particular concern to YDA is the serious risk of a spill from the Pipeline. From the beginning of 2005 to September 30, 2012, Enbridge reported 558 spills from its pipelines with a total volume of more than 15.5 million litres. Between two and seven pipeline spills per year were over 100 barrels.⁴
9. Based on Enbridge's estimated spill return period (i.e. years per spill) for the Interior Plateau area where YDA territory is located, observers calculate that the probability of a medium to large spill from the Pipeline within its first 50 years of operation is 45.4 percent.⁵
10. The impacts of such a spill would be catastrophic for our people. More than a year after Enbridge's July 2010 pipeline spill into the Kalamazoo River in Michigan, for example, approximately 60 kilometres of water and sediment and 80 hectares of wetlands were still contaminated with oil sands crude.⁶
11. The serious risks posed by the Pipeline have been recognized by the government of British Columbia, which has stated that:

Although a spill of dilbit [diluted bitumen] may not be likely in any particular location of the project at a particular time when considered in isolation, the possibility of a spill is very real, as Enbridge's track record demonstrates; the potential for devastating effects on watercourses is obvious; and there is serious reason to question NG's [Northern Gateway's] ability to respond effectively to a spill.⁷

12. The nature of the project and the scope and gravity of the risks have made the Pipeline a subject of unprecedented controversy and opposition.

⁴ Northern Gateway Pipelines Limited Partnership, "Spill Statistics for Enbridge's Liquids Pipelines System (2005-2012)", online: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624798/879696/B153-1_NGP_Response_to_Undertaking_U_46_-_A3C8D2.pdf?nodeid=879789&vernum=0&redirect=3>.

⁵ Affidavit of Dr. Shane Rollans (August 2012), online: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/625023/842313/844113/Marsh,_Kelly_-_Letter_of_Comment_-_A2X1U3.pdf?nodeid=844228&vernum=0&redirect=3> at page 5.

⁶ Natural Resources Defense Council *et al.*, "Pipeline and Tanker Trouble" (November 2011), online: <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/695692/775718/D66-3-10_-_Living_Oceans_Society,_Raincoast_Conservation_Foundation_and_ForestEthics_-_Attachment_H_-_Pipeline_and_Tanker_Trouble_Report_-_A2K2D2.pdf?nodeid=775630&vernum=0&redirect=3> at page 8.

⁷ British Columbia, "Joint Review Panel – Argument of the Province of British Columbia" (May 2013), online: <<http://www.ceaa-acee.gc.ca/050/documents/p21799/89809E.pdf>> at paragraph 114.

Unceded Aboriginal rights and title

13. Since time immemorial the people of YDA have maintained a strong connection to the lands, waters and animals in our traditional territories and deeply integrated that connection into the laws we have used to govern ourselves.

14. Flowing from our relationship to our traditional territories and based in our own laws, we exercise rights in relation to the lands and natural resources upon which we rely. These rights are also recognized in the Canadian legal system and constitutionalized through section 35(1) of the *Constitution Act, 1982*, which reads:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.⁸

15. Among the Aboriginal rights constitutionally protected in Canadian law is Aboriginal title, which the Supreme Court of Canada describes in *Delgamuukw v. British Columbia* as “the right to the land itself”, noting that Aboriginal title is “grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law”.⁹

16. Canadian law also recognizes our distinct legal order and constitutionally affirms our right to self-government, as evident in the British Columbia Supreme Court’s ruling in *Campbell v. British Columbia (Attorney General)*:

History, and a review of the authorities, persuades me that the aboriginal peoples of Canada... had legal systems prior to the arrival of Europeans on this continent and that these legal systems, although diminished, continued after contact. Aboriginal laws did not emanate from a central print oriented law-making authority similar to a legislative assembly, but took unwritten form... [a review of the jurisprudence] demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws" in the Dicey constitutional sense.¹⁰

17. Yet while none of our lands have ever been surrendered by force or negotiated agreement to the government of Canada or the province of British Columbia, those governments nevertheless claim full legal authority over our traditional territories and decision-making in relation to resource development. This is unfortunately common in British Columbia, where attempts to negotiate treaties were historically the exception rather than the rule.

⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 1, s. 35(1).

⁹ *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at paragraphs 138 and 147.

¹⁰ *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123 at paragraphs 85-86.

Aboriginal Affairs and Northern Development Canada, a department of the Canadian government, summarizes the situation as follows:

The *Royal Proclamation of 1763* decreed that First Nations should not be disturbed in their use and enjoyment of the land. It also declared that only the Crown could acquire land from First Nations, and only through treaty-making. The *Royal Proclamation* set the framework for negotiation based on co-operation rather than conquest. Treaty making soon became the main mechanism for defining the relationship between First Nations and other Canadians. However, the last of the historical treaties was signed in 1923. At that time, the federal government made it a criminal offence for a First Nation to hire a lawyer to pursue land claims settlements. Consequently, treaties were never concluded with First Nations in some parts of Canada, including most of BC. The only treaties to be completed in the province were the Douglas Treaties on Vancouver Island, and Treaty 8 in the northeast corner of BC. With so few treaties in BC, the claims of BC's First Nations have never been negotiated. The result is uncertainty with respect to land and resource ownership, use and management.¹¹

18. In recognition of the need to reconcile assertions of federal and provincial authority with the pre-existing sovereignty of First Nations, the governments of Canada and British Columbia began negotiating modern treaties with many First Nations in British Columbia in the 1990s. The Carrier Sekani Tribal Council ("CSTC"), of which all YDA nations are members, has been in negotiations to conclude a treaty since 1994 and is at stage four of a six-stage negotiation process.¹²
19. The Canadian and British Columbia governments cannot carry on "business as usual" in the absence of a treaty. Our Aboriginal rights and title are constitutionally protected, and the Supreme Court of Canada has also affirmed that Canadian and provincial governments have a duty to consult and accommodate us when contemplating conduct that may adversely affect our rights or title.¹³ Courts have held that the duty to consult and accommodate First Nations extends to strategic, higher level decisions and should be engaged and carried out at the earliest opportunity, before preliminary decisions are made that create momentum to allow a project.¹⁴

Failure of the Canadian government to consult and accommodate

20. Enbridge released its preliminary information package on the Pipeline in 2005.¹⁵

¹¹ Aboriginal Affairs and Northern Development Canada, "Fact Sheet: British Columbia Treaty Negotiations" (2010), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100016299/1100100016300>>.

¹² BC Treaty Commission, "Carrier Sekani Tribal Council", online: <<http://www.bctreaty.net/nations/carrier.php>>.

¹³ See for example *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

¹⁴ See for example *Squamish Nation v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at paragraphs 74, 83, 92; *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204 at paragraphs 164-166.

¹⁵ Gateway Pipeline Limited Partnership, "Preliminary Information Package – Enbridge Gateway Project" (October 2005), online: <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/2075.pdf>.

21. From early on, our people clearly and strongly expressed our view that the Pipeline represents a serious risk to our territories. In 2006 the CSTC published the *Carrier Sekani Tribal Council Aboriginal Interests & Use Study on the Enbridge Gateway Pipeline*, attached as Appendix II, which concluded that the impacts of the Pipeline on the rights and way of life of Carrier Sekani people would be numerous and serious. The study, which was submitted to the Canadian government, called for a First Nations-led review process of the Pipeline proposal, as well as meaningful involvement in the decision-making process of provincial and federal regulatory bodies, before any further exploratory or regulatory work could be conducted.¹⁶
22. In addition to the Aboriginal Interests and Use Study, beginning in 2006 the CSTC and its member nations sent numerous letters to agencies of the Canadian government and Enbridge advising of the CSTC nations' unceded title and rights along proposed pipeline route, noting that Enbridge's preliminary information package was prepared without CSTC input and asserting that, given the Pipeline's potential impacts, full involvement of CSTC nations from the earliest stages was required, including an equal role in discussions regarding the design and planning of the Pipeline assessment process itself.¹⁷
23. Ignoring our requests, in September 2006 Canada unilaterally announced its decision to assess the Pipeline proposal by way of a joint review panel ("JRP") selected by the Canadian government pursuant to federal environmental assessment legislation. The JRP is "joint" because its assessment is undertaken by two federal agencies, the Canadian Environmental Assessment Agency and the National Energy Board. The JRP assessment also constitutes the environmental assessment of the province of British Columbia.¹⁸ The JRP was tasked with assessing the potential impacts of the Pipeline and making a recommendation to Canada, which would then make a decision on whether to approve the Pipeline proposal.
24. While Enbridge temporarily put the Pipeline proposal on hold in November 2006 as a result of the withdrawal of investors, in June 2008 Enbridge reinitiated the proposal and Canada proceeded with the same JRP process.

¹⁶ Appendix II, *Carrier Sekani Tribal Council Aboriginal Interests & Use Study on the Enbridge Gateway Pipeline*, at pages 96-97.

¹⁷ See for example Appendix V: 2006-02-20 Carrier Sekani Tribal Council to National Energy Board re Joint Review Panel; 2006-07-05 Carrier Sekani Tribal Council to National Energy Board re Northern Gateway pipeline assessment process; 2009-02-04 Nadleh Whut'en to Canadian Environmental Assessment Agency re Northern Gateway pipeline assessment process; 2010-01-26 Yinka Dene Alliance to Canadian Environmental Assessment Agency re Northern Gateway pipeline assessment process.

¹⁸ For a summary of that issue, see Murray Rankin, "B.C. Pipeline Review Needed to Restore Legal Powers" (August 2012), *Times Colonist*, online: <<http://www.timescolonist.com/opinion/letters/b-c-pipeline-review-needed-to-restore-legal-powers-1.14659>>.

25. The three members of the JRP were selected by Canada with no involvement of First Nations, despite numerous requests.¹⁹ The review panel members all have backgrounds in the resource industries, despite requests for members to be selected based on expertise in areas such as Aboriginal rights and salmon ecosystems. None of the panel members are from British Columbia.²⁰
26. Rebuffing our demands for involvement in the basic design of the Pipeline assessment process and for direct and early consultation between Canada and First Nations on the Pipeline, Canada instead offered us the opportunity to comment on the terms of reference for the JRP process that it had imposed. Canada refused to engage in any review of the Pipeline outside the JRP process, rejecting proposals by YDA nations for a parallel Aboriginal review forum,²¹ including a detailed First Nation Review Process Framework submitted by Nadleh Whut'en.²²
27. Canada gave the JRP a mandate to receive evidence on Aboriginal rights and title,²³ stating that it would rely on the information collected by the JRP "to the extent possible".²⁴ Canada proposes to then conduct consultation with First Nations about the final report of the JRP before making a decision on the Pipeline.²⁵
28. There are two interrelated and crucial flaws with this approach. First, the possibility for Canada to substantively consult and cooperate with First Nations is postponed until the end of the process. The JRP simply received information about Aboriginal peoples in the context of a hearing; it did not have a mandate to negotiate or cooperate with First Nations to reach agreement on how Aboriginal decision-making authority would be recognized and applied in relation to the Pipeline. There is no possible opportunity for such substantive engagement until the point at which Canada proposes to consult First Nations about the JRP report, which would occur *after* the JRP has made its recommendation on whether or not to approve the Pipeline.

¹⁹ See for example Appendix V: 2006-02-20 Carrier Sekani Tribal Council to National Energy Board re Joint Review Panel.

²⁰ See for example "B.C. Pipeline Review Needed to Restore Legal Powers", *supra*.

²¹ See for example Appendix V: 2009-02-24 Canadian Environmental Assessment Agency to Nadleh Whut'en re Northern Gateway pipeline assessment process, at page 2. For a summary of some comments and proposals by Nak'azdli and Nadleh Whut'en, together with the response of the federal government, see *Approach to Crown Consultation for the Northern Gateway Project* (February 2009), online: <<http://www.ceaa-acee.gc.ca/050/documents/40955/40955E.pdf>> at pages 34-37, 56-59.

²² Appendix V: 2008-12-15 Nadleh Whut'en to Enbridge proposing First Nation Review Process Framework.

²³ *Agreement Between the National Energy Board and the Minister of the Environment Concerning the Joint Review Panel of the Northern Gateway Pipeline Project*, online: <<https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/384008/591959/A1R4D5 - Joint Review Panel Agreement.pdf?nodeid=591960&vernum=0>> at section 8.

²⁴ *Approach to Crown Consultation for the Northern Gateway Project*, *supra* at page 1.

²⁵ *Ibid* at page 4 (see "Phase IV").

29. This is clearly not consultation and accommodation at the earliest opportunity, nor is it consultation and accommodation that extends to strategic, higher level decisions such as the design of the Pipeline assessment and consultation process itself. Furthermore, consultation after the JRP recommendation is issued inevitably creates a very serious risk that so much momentum will have built up to approve the Pipeline that consultation between Canada and First Nations on the merits will be effectively meaningless.
30. Secondly, in any event Canada does not intend to discuss how Aboriginal decision-making authority can be recognized and applied in relation to the Pipeline, rather Canada states that consultation will be carried out on the JRP report and that the purpose of the consultation is not to consider “new or additional” information on Aboriginal rights which was not before the JRP.²⁶ This focuses Canada’s Aboriginal consultation about the Pipeline on a report from a process that did not incorporate or acknowledge the decision-making authority of First Nations over their unceded traditional territories. In other words, Canada proposes to consult and accommodate First Nations about the results of a review process that did not comply with Canada’s duty to consult and accommodate First Nations.
31. The JRP concluded its hearings at the end of May 2013 and its report and recommendation is expected in December 2013. As a result of the crucial flaws in the design and conduct of the JRP process described above, YDA nations elected not to participate in the JRP process. YDA has instead been busy independently preparing an evidentiary submission on the Aboriginal rights of its people and the threats to those rights posed by the Pipeline, which YDA expects to submit directly to Canada in autumn 2013.
32. Compounding the flaws with the JRP process itself is the Canadian government’s vocal support for the Pipeline and marginalization of opposing views, including those of First Nations, even at the time that the JRP hearings were ongoing. This demonstrates bias and in YDA’s view strongly indicates that the outcome of Canada’s proposed after-the-fact “consultations” are a foregone conclusion.
33. In January 2012 Canadian Minister of Natural Resources Joe Oliver wrote an open letter in which he stated that, for the Canadian government, “the choice is clear” that Canada must act to access new markets and expand trade with the Asia-Pacific economies for commodities such as oil.²⁷ Mr. Oliver elsewhere stated bluntly that: “Gateway, in our opinion, is in the national interest”.²⁸ Mr. Oliver asserted in his open letter that:

²⁶ *Ibid* at page 8.

²⁷ Joe Oliver, “An open letter from the Honourable Joe Oliver, Minister of Natural Resources, on Canada’s commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada’s national economic interest” (January 2012), online: <<http://www.nrcan.gc.ca/media-room/news-release/2012/1/3520>>.

²⁸ Nathan Vanderklippe, “Ottawa Energy Strategy Targets Diverse Marketplace” (July 2011), *Globe and Mail*, online: <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ottawa-energy-strategy-targets-diverse-marketplace/article590827/>>.

“Unfortunately, there are environmental and other radical groups that would seek to block this opportunity to diversify our trade... These groups threaten to hijack our regulatory system to achieve their radical ideological agenda.”²⁹

34. That the Canadian government views First Nations as one of the “radical” groups, whose opposition to oil sands projects such as the Pipeline it dismisses as attempts to “hijack” the regulatory process, is evident in the Canadian government’s internal confidential document entitled “Pan-European Oil Sands Advocacy Strategy”, attached as Appendix III. This document, which was released pursuant to a request under Canada’s access to information laws, describes Canada’s public relations strategy to promote the oil sands and, troublingly, explicitly labels “Aboriginal groups” as the Canadian government’s “adversaries” in that campaign.³⁰
35. When specifically discussing the Enbridge Pipeline, Mr. Oliver has publically stated that, if consultation and accommodation with First Nations “breaks down”, then Canada is prepared to shift “into the next stage” of seeking to justify the scope and content of its consultations with First Nations in order to move ahead with approval.³¹ This position is troubling in the extreme given that Canada has yet to actually consult with us about the impact of the Pipeline on our rights and title, and strongly indicates that Canada will have made up its mind if and when it seeks to consult with YDA.

Failure of the British Columbian government to consult and accommodate

36. Although the federal government has primary responsibility for approving or rejecting the Pipeline, the British Columbia government will also be responsible for issuing permits necessary for the Pipeline to proceed. Consequently, over the last two years YDA has contacted the Premier of British Columbia on a number of occasions in order to arrange discussions about the Pipeline at a government-to-government level.³² In its correspondence with the Premier, YDA has highlighted the importance of such discussions to establish “a holistic decision-making process that addresses the Province’s authority in respect of the Enbridge project and the governance rights and responsibilities of the Yinka Dene Alliance nations”.³³ A meeting with the Premier has not occurred as requested and no government-to-government process has been established.

²⁹ Joe Oliver, *supra*.

³⁰ Appendix III at page 3.

³¹ Gordon Hamilton, “Oliver sells benefits of oilsands development” (January 2012), *Vancouver Sun*, online: <http://www.charity-charities.org/news.php?artid=1416038>.

³² Appendix V: 2011-09-21 Yinka Dene Alliance to Premier Christy Clark requesting meeting; 2013-05-17 Yinka Dene Alliance to Premier Christy Clark requesting meeting; 2013-06-04 Yinka Dene Alliance to Premier Christy Clark re Enbridge provincial permit applications, requesting meeting; 2013-07-26: Yinka Dene Alliance to Premier Christy Clark re not proceeding to decision on Enbridge provincial permit applications, requesting meeting.

³³ Appendix V: 2013-06-04 Yinka Dene Alliance to Premier Christy Clark re Enbridge provincial permit applications, requesting meeting.

37. In May 2013 the province, which is an intervenor in the JRP process, took the position that it does not support approval of the Pipeline and argued that the JRP should recommend that Enbridge's proposal for the Pipeline be rejected by the Canadian government.³⁴ The province based its conclusion on its concerns about the risks of a spill in light of "the challenges posed by the pipeline route, the nature of the product being shipped, the conceptual nature of [Enbridge's] plans to date and Enbridge's track record".³⁵
38. YDA welcomes the province's view on the Pipeline, which is consistent with the decision of YDA nations that the Pipeline represents an unacceptable risk for our people. However YDA is greatly concerned that, despite British Columbia's public opposition to the Pipeline, the province has nevertheless begun approving applications that would allow Enbridge to access YDA lands to conduct preparatory work for the Pipeline.
39. In spring 2013 Enbridge submitted applications to the province to obtain two-year land tenures and related permits to perform geotechnical work in Nak'azdli territory to better inform the proposed location of the Pipeline, including the drilling of boreholes and cutting of trees.³⁶
40. The province requested information from Nak'azdli about the impacts on Nak'azdli's rights from the geotechnical work contemplated in the permits (i.e. the bore holes and tree-cutting), but refused to discuss the impacts of the actual Pipeline on YDA nations until after the JRP issues its recommendation.³⁷ In other words, the province was willing to talk about the permits, but not the Pipeline that the permits would help to advance. The province has consistently maintained in correspondence and telephone conversations that the operational permits have "no relation to" the higher level decisions about the Pipeline that have yet to be made.³⁸
41. YDA has clearly communicated to the province that it must not issue any regulatory approvals to advance the development of the Pipeline in YDA territory until the province has heeded YDA's repeated requests for meaningful discussion about establishing a decision-making process for the Pipeline that recognizes the governance rights and responsibilities of

³⁴ "Joint Review Panel – Argument of the Province of British Columbia", *supra* at paragraph 6.

³⁵ *Ibid* at paragraph 116.

³⁶ For a summary see Appendix V: 2013-04-26 Enbridge to Nak'azdli re provincial permit applications.

³⁷ Appendix V: 2013-05-15 British Columbia (Ministry of Forests, Lands & Natural Resource Operations) to Nak'azdli re Enbridge provincial permit applications; 2013-07-10 British Columbia (John Rustad, Minister of Aboriginal Relations and Reconciliation) to Yinka Dene Alliance re provincial permit applications, meeting after JRP recommendation; 2013-07-23: British Columbia (Ministry of Forests, Lands & Natural Resource Operations) to Nak'azdli re proceeding to decision on Enbridge provincial permit applications.

³⁸ Appendix V: 2013-07-10 British Columbia (John Rustad, Minister of Aboriginal Relations and Reconciliation) to Yinka Dene Alliance re provincial permit applications, meeting after JRP recommendation, at page 2.

YDA nations.³⁹ YDA has stated that it is “disingenuous for the Province to maintain that the Applications are somehow distinct from the larger Project” and argued that referring development application for the Pipeline to YDA nations on a piecemeal basis “does not allow for any consideration of the real concerns that we have in relation to the larger Project”.⁴⁰

42. Despite YDA’s opposition and the lack of meaningful consultation, the province has now issued the permits to Enbridge for the Stuart River and Salmon River areas of Nak’azdli territory.⁴¹

Yinka Dene law bans the Pipeline

43. In the face of the federal and provincial governments’ refusal to respect and engage with our views on the Pipeline, we have continued to rely on our own laws. Through an interconnected system of noble titles, resource territories called *keyohs*, and ceremonies called *balhats* (sometimes known as *potlatches*), our people have governed our relationships to each other and our lands and resources since prior to the arrival of Europeans in our territories.⁴² Our laws are tied to our inherent rights to the land. These rights and the law that supports them were the basis of the Carrier Sekani Declaration and Claim of 1982, submitted to the Canadian government to initiate lands claims and treaty negotiations.⁴³
44. From our legal order we draw the authority to steward human use of, and interaction with, the lands and natural resources in our traditional territories in order to maintain healthy communities, lands, waters and animals for current and future generations. We have used this authority to spearhead the *Save the Fraser Declaration*, attached as Appendix IV, which bans the Enbridge Pipeline and other similar oil sands projects from our territories as a matter of Indigenous law and has been signed by representatives of over 160 First Nations.
45. The YDA nations have also signed on in support of the *Coastal First Nations Declaration*,⁴⁴ which bans oil tankers throughout the North Coast of British Columbia, and the

³⁹ Appendix V: 2013-06-04 Yinka Dene Alliance to Premier Christy Clark re Enbridge provincial permit applications, requesting meeting; 2013-07-26 Yinka Dene Alliance to Premier Christy Clark re not proceeding to decision on Enbridge provincial permit applications, requesting meeting.

⁴⁰ Appendix V: 2013-07-26 Yinka Dene Alliance to Premier Christy Clark re not proceeding to decision on Enbridge provincial permit applications, requesting meeting, at page 2.

⁴¹ Appendix V: 2013-07-23 British Columbia (Ministry of Forests, Lands & Natural Resource Operations) to Nak’azdli re proceeding to decision on Enbridge provincial permit applications; 2013-08-19 British Columbia (Ministry of Forests, Lands & Natural Resource Operations) to Nak’azdli re proceeding to decision on further Enbridge provincial permit applications; 2013-09-25: British Columbia (Ministry of Forests, Lands & Natural Resource Operations) to Nak’azdli notifying that provincial permits issued to Enbridge.

⁴² Our system of governance is briefly summarized in Appendix II at pages 13-14.

⁴³ Carrier Sekani Tribal Council, *Declaration and Claim* (April 1982), online: <<http://www.carriersekani.ca/about-cstc/another-test-sub/>>.

⁴⁴ *Coastal First Nations Declaration*, online: <<http://wcel.org/sites/default/files/file-downloads/Coastal%20First%20Nations%20Tanker%20Ban%20Declaration.pdf>>.

International Treaty to Protect the Sacred from Tar Sands Projects,⁴⁵ which commits signatories to mutual defence and protection of lands affected by oil sands projects, including the Pipeline.

46. Through these instruments, we have exercised our legal authority to protect our communities by prohibiting oil sands pipelines that endanger the health of the lands and waters that make up our home.
47. Drawing from the legal authority expressed in these instruments, and relying on our unextinguished Aboriginal rights and title, YDA is also using its own laws to respond to the province's decision to process Enbridge's applications for operational permits in the territory of YDA nations without having meaningfully engaged with YDA about the Pipeline.
48. YDA has issued a cease and desist order to Enbridge instructing Enbridge to refrain from undertaking any work in YDA territory in relation to the Pipeline.⁴⁶ YDA nations have erected "no trespassing" signs in areas where we anticipate Enbridge will go to attempt to perform work contemplated in the operational permits, and YDA has published similar notices in local newspapers.⁴⁷ Lastly, should Enbridge ignore all those measures, YDA has prepared trespassing tickets which officers of YDA nations are prepared to issue to Enbridge workers on the ground.
49. YDA has informed both Enbridge and British Columbia that persons defying the trespassing notices or tickets do so in violation of our laws, which we are prepared to enforce.

Canada and British Columbia have breached international law

50. YDA is of the view that the governments of British Columbia and Canada have breached the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") in a number of significant ways.
51. For reference, the provisions of UNDRIP that will be referred to read as follows:

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions...

Article 18

⁴⁵ *International Treaty to Protect the Sacred from Tar Sands Projects*, online: <http://www.protectthesacred.org/international_treaty>.

⁴⁶ Appendix V: 2013-06-26 Yinka Dene Alliance to Enbridge cease and desist letter.

⁴⁷ For a summary, see Martin Louie *et al.*, "Opinion: message from First Nations to Enbridge? No trespassing" (July 2013), *Vancouver Sun*, online: <<http://www.vancouversun.com/business/bc2035/Proposed+pipeline+barrier+benefit/8613295/story.html>>.

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them...

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process...

52. YDA has been denied a role by both the federal and provincial governments in decision-making in relation to the Pipeline and those governments have paid no heed whatsoever to YDA's own Indigenous decision-making mechanisms, contrary to UNDRIP article 18.
53. The federal government failed to consult and cooperate in good faith with YDA in order to obtain the consent of YDA nations prior to establishing its seriously flawed review and decision-making process for the Pipeline, breaching UNDRIP article 19. The provincial government similarly failed to cooperatively develop an appropriate decision-making process, as evidenced by the fact that it is approving Enbridge's operational permit applications without having discussed the overall Pipeline with YDA at all. The approach of both governments does not provide a fair process that considers our laws, traditions, customs and land tenure systems in order to recognize and respect our rights in relation to making decisions about the Pipeline, in contravention of UNDRIP article 27.

54. It is not disputed that we have never ceded our rights or title to our homelands through war or treaty. Canadian courts have recognized the existence of Aboriginal title and rights and the Canadian and British Columbian governments are engaged in treaty negotiations with us to agree upon and define the extent of same. Yet neither the federal or provincial governments will recognize our Aboriginal title or governance authority as determining factors in deciding whether the Pipeline will pass through our homelands. This violates both our right to own, use and control our traditional territories expressed in UNDRIP article 26, and our right under UNDRIP article 4 to exercise self-government authority in relation to a matter of critical importance to protecting the health of our homelands and future generations of our people.
55. The actions of the federal and provincial governments risk exposing our lands and our people to a dangerous oil sands pipeline to which we have resolutely said no, which threatens other UNDRIP rights such as our right to be secure in our means of subsistence (article 20), our right to maintain and strengthen our spiritual relationship with the lands and waters in our territories (article 25), and our right to conservation and protection of the environment (article 29).
56. YDA is in agreement with the Special Rapporteur's finding that:

The Declaration and various other international sources of authority, along with practical considerations, lead to a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent. Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices. Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights.⁴⁸

57. YDA has unambiguously refused its consent for the Pipeline to cross YDA traditional territories, and the Pipeline does not fall within the "narrow scope of permissible exceptions to the general rule" that are described by the Special Rapporteur.⁴⁹ At the most basic level, YDA has shouted "no" to the Pipeline and the Canadian and British Columbian governments are breaching international law by continuing to push the Pipeline forward through to their own processes without listening.

⁴⁸ *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples* (July 2013), online: < <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-24-41-2013>> at page 9.

⁴⁹ *Ibid* at page 10 *et seq.*

Request for intervention by the Special Rapporteur

58. The Canadian government has marginalized our views and the provincial government is ignoring our requests to engage, while Enbridge is preparing to begin preliminary work for the Pipeline in YDA territories without our authorization. At this critical juncture, the Special Rapporteur can play an important role in assisting YDA to uphold our rights and give expression to the decision-making authority that flows from our laws and unceded title.
59. YDA respectfully calls upon the Special Rapporteur to intervene by communicating to the governments of Canada and British Columbia that they are in violation of UNDRIP as a result of their behaviour in relation to the Pipeline, and by making recommendations as to the steps required to bring those governments into compliance with international law.
60. YDA is seeking that its decision to disallow the Pipeline in YDA territories be recognized and respected by the Canadian and British Columbian governments. YDA is of the view that compliance with UNDRIP in these circumstances requires nothing less than acknowledgment by both governments that YDA and other First Nations have clearly refused consent for Enbridge's proposed Pipeline, and that the Pipeline must be rejected on that basis. Canada has breach UNDRIP by refusing to recognize and meaningfully incorporate YDA's decision-making authority into its decision-making process for the Pipeline. British Columbia has violated UNDRIP by issuing permits to Enbridge before any discussion of the Pipeline has occurred with YDA at all. YDA respectfully asks the Special Rapporteur to make findings and recommendations in that regard.
61. The Enbridge Northern Gateway Pipeline proposal is an issue of grave concern to YDA and, as indicated by the *Save the Fraser Declaration*, the *Coastal First Nations Declaration* and the *International Treaty to Protect the Sacred from Tar Sands Projects*, to a large number of other First Nations as well. YDA believes that the intervention of the Special Rapporteur will have a significant impact in preventing further injustice by applying pressure on the federal and provincial governments to meaningfully engage with us and address the role of our decision-making authority in relation to the Pipeline.
62. YDA warmly extends an invitation to the Special Rapporteur to meet to discuss these issues during the Special Rapporteur's official visit to Canada in October 2013. YDA is aware that CSTC extended a meeting invitation to the Special Rapporteur in March 2013 to address a number of issues, including the Pipeline.⁵⁰ Conscious of the Special Rapporteur's busy schedule, YDA is happy to discuss the possibility of combining a meeting that focuses specifically on the Pipeline with a more broadly-focused meeting with CSTC. In order to discuss the details of such a visit please contact YDA coordinator Geraldine Thomas-Flurer using the contact information provided in the covering letter for this submission.

⁵⁰ Carrier Sekani Tribal Council, "CSTC Invites Dr. James Anaya, UN Special Rapporteur on Indigenous Issues" (March 2013), online: <<http://www.carriersekani.ca/news/cstc-invites-dr-james-anaya-un-special-rapporteur-on-indigenous-issues/>>.