# Will governments use legal tools to support development, or let small dissident groups prevail?

*MLI Senior Fellow Dwight Newman writes that opposition to Chevron's proposed Pacific Trail pipeline raises vital issues for major resource and infrastructure projects. Where projects have support from Aboriginal communities but are blocked by a small minority, governments need to understand their legal options.*

***Dwight Newman***

Vandalism by masked perpetrators against gas pumps at several Chevron stations in Vancouver earlier this fall as a protest against Chevron's Pacific Trail pipeline is just one example of a possible new kind of challenge for Pacific Trail and other major pipeline projects. An emerging critical national discussion of the so-called "social licence to operate" in recent weeks partly highlights the same kinds of challenges outside the law. The term, until quite recently accepted at face value by the media, is being exposed in many instances as a synonym for mob rule.

The question arises: Where a resource project receives extensive support, will a few holdout dissenters be able to block it? Or will governments use the legal tools available to them to back resource development where appropriate?

The Pacific Trail Pipeline (also known as the KSL line) will transport natural gas from northeastern British Columbia to an LNG export terminal at Kitimat. Chevron has already received support from 15 of the 16 First Nations along the pipeline's 460-kilometre route.

Chevron also has support from significant parts of the leadership and membership within the last First Nation, the Wet'suwet'en Nation. However, some specific clans within that Nation, such as the Unist'ot'en clan, have withheld their support and have even erected protest camps along the route. This puts Chevron in the position of trying to continue to negotiate with the Wet'suwet'en Nation. But those negotiations have to take place in the face of division between different streams of leadership within that community.

At a time when major Supreme Court of Canada decisions appear to have increased the title claims of Aboriginal communities, some might think that Chevron is unfortunately up the creek without a paddle.

However, as Ken Coates and I show in a recent analysis of this summer's landmark Supreme Court of Canada decision in the Tsilhqot'in Aboriginal title case, published by the Macdonald-Laurier Institute, the legal position on these issues is actually more nuanced and balanced than sometimes realized. As just one example, the Tsilhqot'in decision provides for the possibility of overriding Aboriginal title for the sake of a compelling public interest where a specific legal test for that override is met.

It is constructive and proper that Chevron is continuing to try to find a negotiated solution, and we have to hope that a positive solution can be found.

However, those negotiations should be shaped not only by claims of extensive Aboriginal title claims but also by the reality that governments could choose to override Aboriginal title where they do so for the sake of a compelling public interest.

A pipeline like Pacific Trail that first received environmental approval in 2008 and that has attracted support from the great majority of Aboriginal communities along its route is surely a candidate for full governmental support. Anything less cheapens the broader public interest and cheapens the value we attach to the 15 Aboriginal communities who are supporting the project.

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There are, to be sure, complex political dynamics around any such suggestion, and the situations where it applies need to be carefully considered. However, legally speaking, the possibility of a government override comes from the very same legal sources as the recognition of Aboriginal title does.

British Columbia has some very challenging questions to sort through. September's historic meeting between the BC Cabinet and BC First Nations – and Premier Christy Clark's speech recognizing Aboriginal title – are the beginning of a larger process that is a phase of a larger reconciliation project.

Within these larger processes, there must be recognition that overwhelming support for certain projects must carry some weight.

It is proper that all have a chance to express their view and advocate for their rights. But the question is whether one divided community – much of which has actually supported the project – should stop a project from which Canada generally and many other Aboriginal communities will gain clear benefits. And the broader question is how much weight governments allow to be held by small numbers of dissenters who assert themselves beyond the law.

The prospects for broader societal attitudes on reconciliation with Aboriginal communities, Canada's attractiveness as a destination for much-needed investment capital, and Canada's future as a resource superpower offering prosperity to both non-Aboriginal and Aboriginal communities may all hinge on how governments answer these questions.

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