

# CESME

# Lakehead University

Ring of Fire: Voisey's Bay Replay  
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# 'Time-warp' - is it over?

- April 12 2013 Gallagher's Resource Rulers wrap-up:
- *April 01 marks a new era for northern Ontario*
- *New prospecting regulations in force*
- *Court of Appeal has issued new treaty directives*
- *Ipperwash Inquiry recommendations clearly apply*
- *Legal foundations finally in place for certainty, taking-up under treaty, access to resources (project development?)*
- *Time for all parties / critics to make these proposals work*
- *Ontario may have finally started-on the long road back!*

**PROJECT MAPLE  
'95**





May 16 2000  
National Post

## Provide jobs or face disruption: chief

### Tells business heads to give natives equal opportunities

BY ROBERT FIFE  
Ottawa Bureau Chief

OTTAWA • Phil Fontaine, Chief of the Assembly of First Nations, challenged Canada's business leaders yesterday to hire and train aboriginals or risk increased civil disobedience in the fisheries, forestry and other resource sectors.

In a major speech to a forum on natural resources, Chief Fontaine said there is a widespread misconception that aboriginal people are anti-industry or anti-development.

Native people are not against development of resources but are tired of being ignored by resource sector industries that rarely make the effort to employ or train natives for the well-paid jobs, he said. Mr. Fontaine noted, for example, that only 4% of aboriginal people are employed in the resource sector even though unemployment rates

on reservations run between 40 to 80% and more than half the native population is under age 25.

"You can imagine what it is like for First Nation citizens to stand at the edge of their communities and see, only hundreds of feet away, a thriving forest business or a mining operation or a petroleum refinery, without their involvement," Mr. Fontaine told senior business executives at the forum organized by Summa Strategies, an Ottawa-based lobbying firm owned by Doug Young, the former Liberal defence minister.

Mr. Fontaine called on business leaders, such as Gwyn Morgan, CEO of Alberta Energy Corp., David Emerson, CEO of Canfor Corp., and John Risely, of Clearwater Fine Foods Inc., to recruit and train young natives in their sectors.

Failure to do so will almost certainly result in greater civil disobedience by natives in blocking logging operations and flaunting the law by fishing out of season, Mr. Fontaine warned.

"Politically, there is frustration in our communities at the slow pace

of change. Some of our people are becoming more assertive and feel they must assert their rights now. We are seeing this in the east with the fishery situation ... we see it on the east and west coast with the logging situation."

Mr. Fontaine applauded oil companies in Fort McMurray, northern Alberta, which have hired more than 1,000 natives, while Syncrude has more than \$60-million of business with aboriginal firms. He urged governments and resource companies to put a portion of lease fees or royalties into an aboriginal economic development fund.

With Robert Nault, the Indian Affairs Minister, in the audience, Mr. Fontaine also criticized the federal government for its slow pace in helping natives gain self-government. In particular, he complained that Ottawa provides only \$80-million for native economic development while it spends more than \$1-billion annually on social assistance for Canada's 600,000 treaty Indians.

"It is not because we want to be on welfare. It is not because we



Phil Fontaine, Chief of the Assembly of First Nations.

want social assistance as our source of revenue. We want the things you want for yourselves and your children and your grandchildren. We want to be able to hope for a better future for ourselves."

Mr. Nault acknowledged that Ottawa isn't "reacting quickly enough to help First Nations get involved in the economy" but said there are

ongoing negotiations in Cabinet to provide more funds for economic development.

"Our social assistance budget will double in the next 10 years if we don't change our way of working together," he said. "That is the debate that is going on internally with me and Mr. Martin and others."

National Post

# ‘Honourable Management’

- [211] Ontario must respect those rights and manage changes to them in accordance with the honour of the Crown and s. 35 of the *Constitution Act, 1982*. Ontario cannot take up lands so as to deprive the First Nation signatories of a meaningful right to harvest in their traditional territories. Further, honourable management requires that Ontario, as the government with authority to take up in the Keewatin Lands, must consult with First Nations and accommodate their treaty rights whenever they are sufficiently impacted by the taking up. As noted above, Ontario accepts these constitutional obligations. (Keewatin v Ontario)

# Recent Mining Soundbites

- Oct 11 : It's off to Court for Cliffs:

*The ruling we got has jeopardized it ... a possible showstopper ... we decided to do it but I don't think it's the solution ... if Ontario wants this project now they've put up a heck of a roadblock to it. (Cliffs VP)*

- Oct 25 : Mining firm sues province of Ontario for \$110 million:

*Ontario failed in its obligations ... thereby causing NSR the damages and losses pleaded (para 52)*

# Recent Political Soundbites

- Sept 13: *It is a dispute between two private sector companies ... they believe they can work their way through this particular challenge. I am pleased to hear that. (MM)*
- Nov 07: *I have had very frequent, very serious and frank discussions with both Cliffs and Noront. (Disputes about roads) are squarely within provincial jurisdiction. (ROF MP)*

# Recent Native Soundbites

- Nov 15: ‘Minimal Consultation’ with First Nations on Ring of Fire:
- “... (NAN) calls the province’s proposed Ring of Fire development corporation a “Father Knows Best” approach ... hasn’t had any contact from the province about its plan...This is normal, a normal policy for this government. You pretend to consult and you do minimal consultation, then you defer that responsibility to the Industry (DGC)



# Recent Environmental Soundbites

- Oct 10: Danger Ahead for the Ring of Fire:
- *The government's long held rule has been to establish planning controls before projects can be built. But infrastructure such as highways and transmission corridors are already on the drawing board ... little analysis or public debate of their effect on the environment or their benefits for First Nations (Env. Comm.)*

# ‘Time-warp’ - it’s not over

- ROF Secretariat   ≡ role ≡ Development Corp
- Litigation continues to be the ROF hallmark
- Premier’s open letter garnered this headline:  
*Ontario Appeals to Ottawa For Help*
- Anishinabek Nation responds - mining revenue decree - Robinson Huron Treaties
- Voisey’s Bay: federal funding only arrived after serious progress was realized on the native file

# *Lawyers, Lawyers Everywhere*

- Republic of Mining calls it a 'soap opera'
  - NAN calls it 'Father Knows Best'
  - I've called it 'Ontario's Mining Albatross'
- 
- Project players are still actively 'digging a hole'
  - NAN is not engaged: 'elephant in the room'
  - Unless progress occurs: 'Leave it to Beaver'!

# Target

Aboriginals

Governments

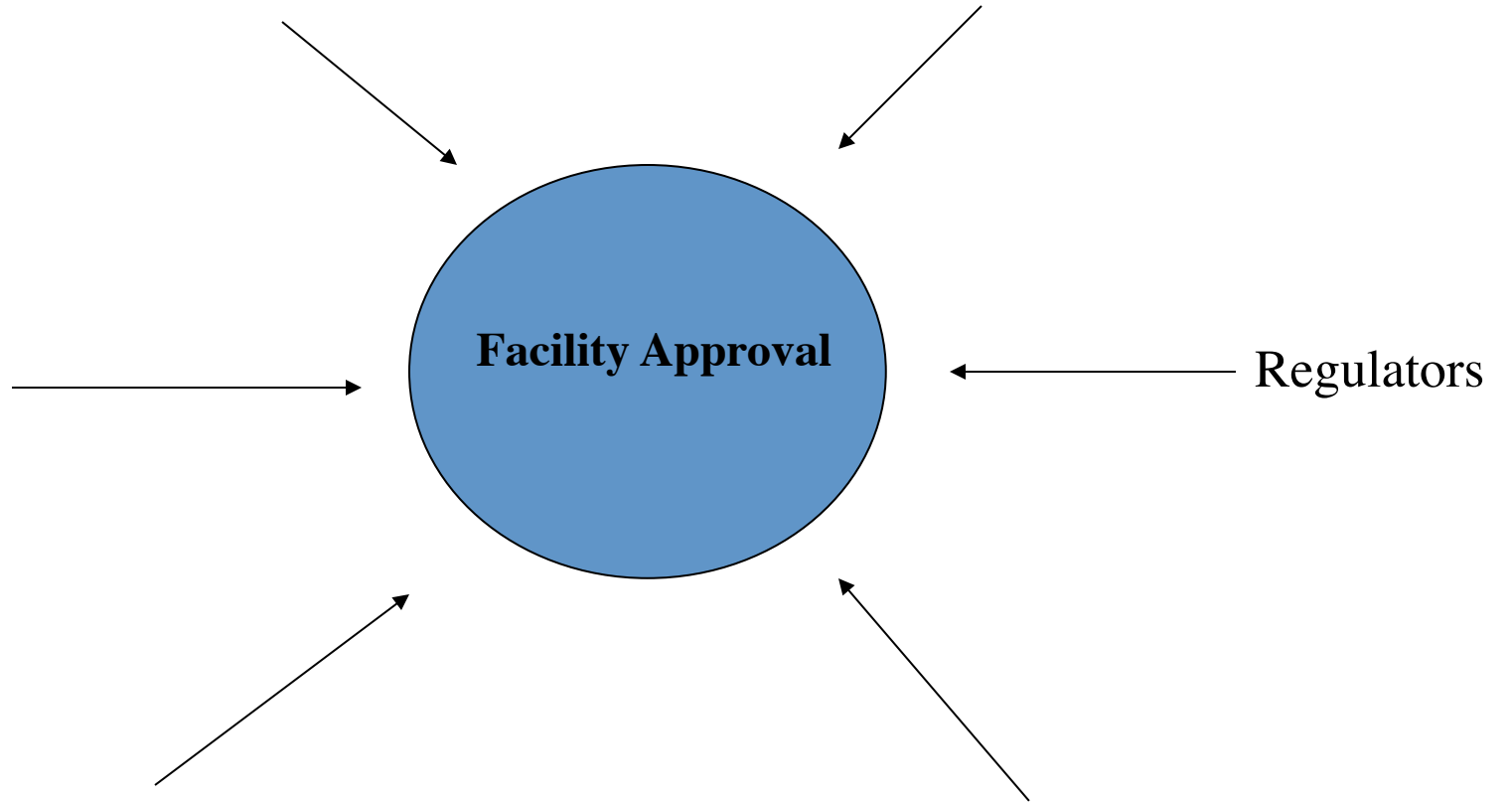
Courts

**Facility Approval**

Regulators

Environmentalists

General Public





# Can. Environmental Assessment Act

- ‘Environmental Effects’: *any change the project may cause, including health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons...*
- This definition affords natives a) fully-funded access to the b) regulatory process c) as a legal right - where they will on occasion align with eco-activists in opposing projects.

# Matawa's legal win #179

- Matawa prevailed in arguing that expert evidence is indeed required to understand the EA issues.
- Court's logic makes this a prime example as to why natives win: expert affidavits '*relevant & necessary*'
- In 2005, another (procedural) native win inflicted major delay, cost, and loss of momentum on the Mackenzie Valley Pipeline Project.
- That project now a museum exhibit in Yellowknife!

# Mining Commissioner's ruling

- *- if Cliffs' application before this tribunal is unsuccessful, it might have to abandon its ambitions in the Ring of Fire rather than be held hostage to CCC / KWG's demands.*
- Held: *As a result, CCC should not be forced to share its right to use the surface.*
- These two rulings put ROF in project 'death zone'!

# Apex of Native Empowerment

- Legal wins at 188 but native leadership missing in action in terms of ‘commercializing’ their advantage.
- No significant engagement nationally on resources: infrastructure / resource revenue / issues / outcomes.
- Massive resource projects are twisting in the wind.
- Finance minister worried about balancing the books.
- Governments are right to be concerned over future prosperity and need to be accorded room to move.



# The House CBC March 24

- Q. Solomon: Have you set up a meeting date with Stephen Harper yet?
- A. Alteo: *No I have not set up a meeting date with Stephen Harper. To be abundantly clear, resolution to these big issues is not going to be something that the prime minister and I will work out. Firstly, I am not the head of First Nations government. My role is to support them. It's up to the Prime Minister to 'make good' on the express political will made both last January and in the budget and get on with transforming the relationship and not repeating the kind of patterns that we've experienced. (26 min/mk)*

# Voisey's Bay Replay

- ROF today very high overlap to Voisey's Bay
- Strategies and tactics: a slow motion replay
- Comparison of the projects is hugely relevant
- Proponents at a similar stage: court challenges
- The critical phase where the key alliances gel
- Common denominator: a de facto 'poison pill'
- Inco rode out major world-wide consolidation of mining takeovers - in hindsight Voisey's Bay was its poison pill - only taken over thereafter!

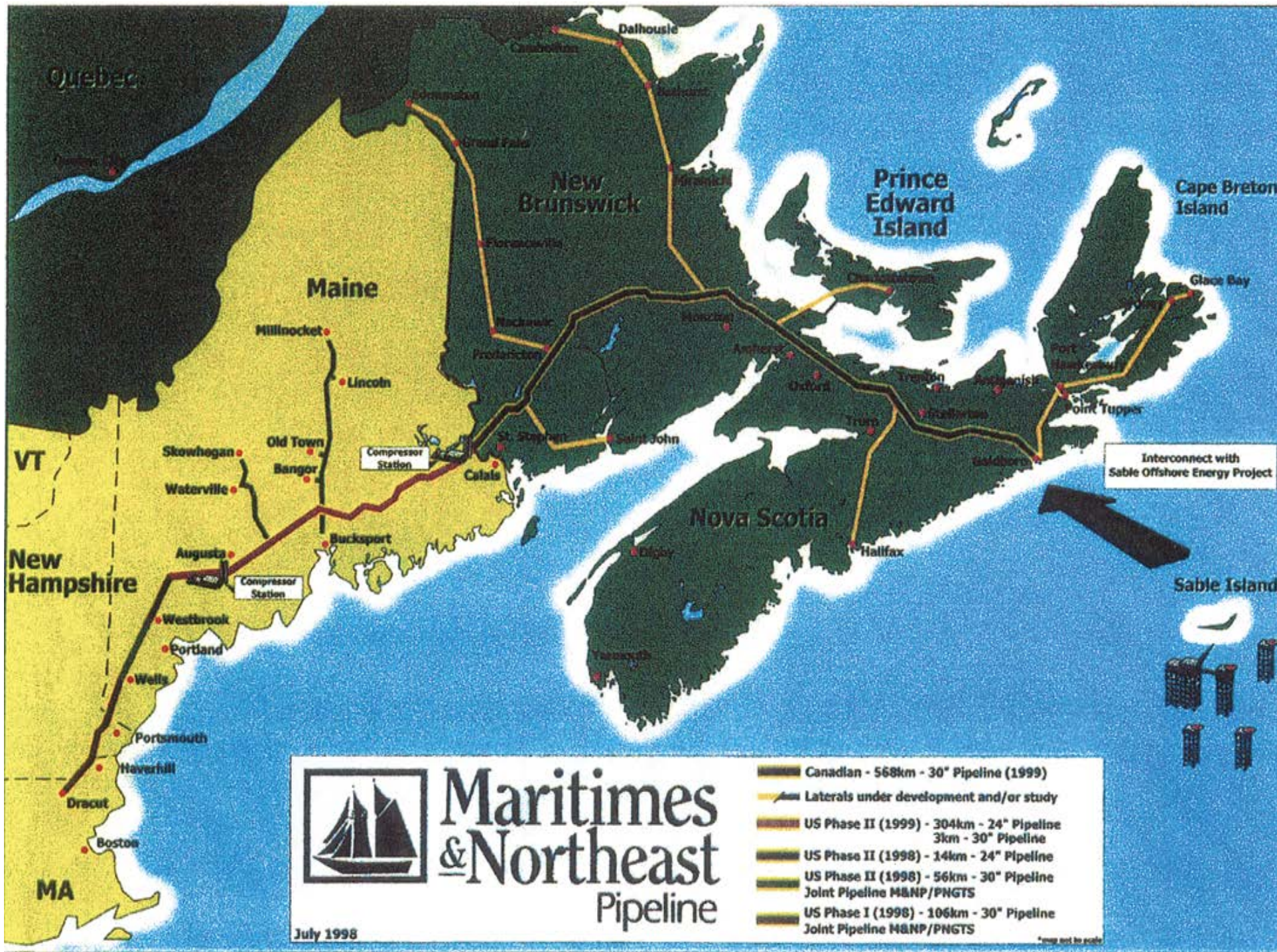
## ROF: Stuck With Each Other

- *When a development deal was finally reached in June 2002, it was a product of adjusted expectations and a gradual evolution of trust. Repeated and interrupted negotiations had seen proposals revised, views changed, and as a result, a different type of project. (Nickel on the Big Land pg 48)*

# Maritimes & Northeast Pipeline

- “Angry Chiefs Want Project Stopped!” (Halifax headline)
- *\$1.7 billion pipeline awoke natives politically and for the first time brought aboriginal rights to the fore in provincial politics. (B. Christmas)*
- Joint onshore/offshore review panel had recommended a formal Protocol as a condition for NEB approval:  
*Protocol to define aboriginal roles and responsibilities for cooperation and studies in monitoring.*

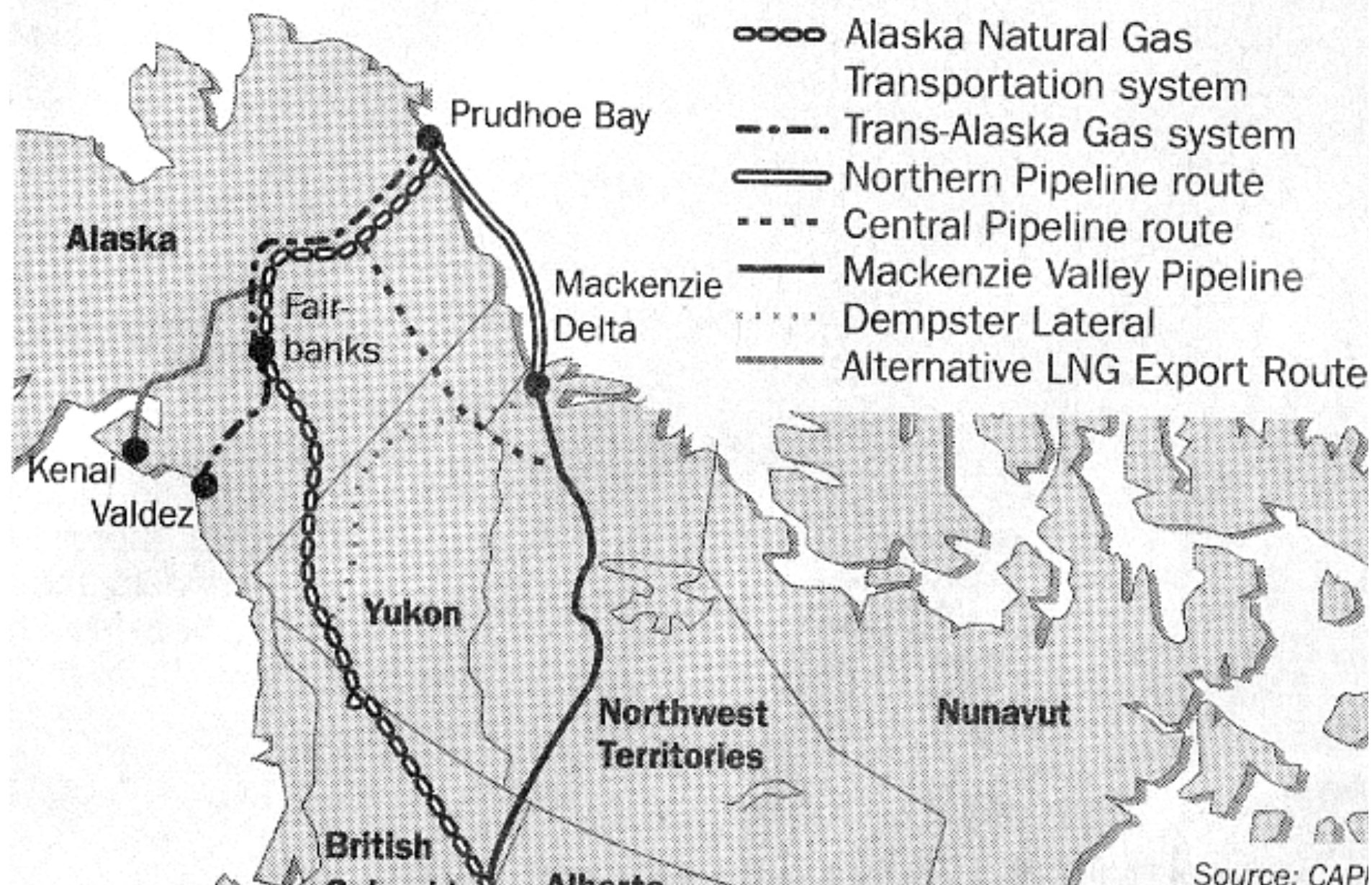






- M&NEP was unable to conclude a Protocol and filed its proposed terms with NEB citing *best efforts* - license was granted by NEB on said basis ...
- 1<sup>st</sup> win: Mi'kmaq won standing to challenge NEB license
- 
- 2<sup>nd</sup> win: Mi'kmaq won again: the review panel *expected agreement on a Protocol ... NEB approval was invalid - had breached the rules of procedural fairness in denying proper native consultation ... NEB re-determination ordered.*
- Commissioning delayed - M&NEP found itself facing a de facto aboriginal veto - last minute costly negotiations.

# Proposed rival pipelines



# Dene Tha' 2006

- *Whether other native groups have similar claims which could produce multiple claims is speculative and is not a basis for granting this stay.*
- *Court must be reluctant to tell an applicant that they cannot come to this court and cannot determine the issues, venue and remedies to which they say they are entitled because it is more convenient for their opponent that they litigate elsewhere and at a different time.*



## Innu & LIA v. Voisey' s Bay (1997)

- Construction of road and airstrip (to mine site) commenced before the environmental review got underway.
- Ministerial permits were quashed as environmental review was held to be paramount. Innu strategists then rushed to Miramichi at the height of tensions at Burnt Church and read out this ruling to senior NB ministers and officials.
- Court of Appeal added its voice calling upon industry and governments to heed the legal changes afoot in the land:  
*The Inuit and Innu may also be viewed as representing general vital interests .... understandably preoccupied with protection from adverse environmental effects. (C. J.)*

## Recent Voisey's Bay Soundbites

- *For a mining company, the development of Voisey's Bay was perhaps as complicated a scenario as anyone could dream up. The way ahead was unclear. Clashing views and competing stakeholder issues created barriers. It would take great effort on the part of all stakeholders to bring them down. (Nickel on the Big Land - retrospective)*
- *"Voisey's Bay gets aboriginal support: sources" (headline)*
- Bottom line: Once you get natives onside - demonstrably - then and only then will the other project impediments start to resolve - allowing for solutions, traction, momentum, and success. Natives are the Keystone in any project pipeline.

# Dhaliwal' s Letter to Canadians

## (Feb 20 2001)

- *Treaty rights assure the Mi'kmaq equitable access for the purpose of earning a moderate living... to go back to court again and again, when we have been admonished to negotiate not litigate, would be short sighted ... the treaty right affirmed and upheld in Marshall applies to hunting, fishing, and gathering more broadly.*
- Here's government telling Canadians where the future direction of resource management practices is headed; expect broad accommodation of treaty & aboriginal rights.

*‘Bay Street Still Laughing at Tree Huggers’*  
(National Post headline July 16 2004)

- *Many analysts just don't have the background or the resources to quantify social and environmental risks. There haven't been too many accounting or MBA programs offering courses on science or social issues.*
- Moreover the litigator's tool box has outlived its usefulness - injunctions today invite confrontation.
- Litigation pre-empts reconciliation for government
- Litigation denies 'social licence' for proponents.
- Litigation buys a protest either way (win or lose).

# Evolution

- Relationship assumptions have been totally transformed:
- 1960s: aboriginal peoples simply taken-for-granted
- 1970s: tokenism, hockey games, sweaters, trips
- 1980s: VP community visits (cheque-signing ceremony)
- 1990s: advent of aboriginal liaison officers *help natives find a place in our industry*
- 2000: legal winning streak / resource protests / momentum
- 2013: unprecedented rise in aboriginal empowerment: *requires reconciliation of Crown-Native-Industry rights via Consultation and Accommodation protocols, Joint Ventures and Impact & Benefit Agreements (IBAs)*

# Important Precedents

- Both Ekati and Voisey's environmental review boards recommended to government that IBAs be concluded.
- In Voisey's case, Canada agreed saying: *conclude IBAs on a priority basis ... prior to the beginning of the project.*
- M&NEP's harmonized review recommended: *a Protocol as a condition of pipeline commissioning.*
- INAC Minister decreed on BHP's Ekati mine: *Final cabinet approval is subject to satisfactory progress on Environmental Agreement & Impact Benefit Agreements.*

## Next Moves

- Comprehensive Consultation Policy is needed
- Matching IBAs (Impact Benefits Agreements)  
Proponents with Matawa = Ontario with NAN
- Ontario needs to show vision and leadership as the (sole) provincial signatory to Treaty 9
- Cliffs departure: use it as a 'fresh start' date
- Provincial funding still missing - Feds later on
- Bottom line: Protocols / IBAs / revenue sharing

# Copyright Declarations

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- Cartoon / Photo slides copyright of artists / media.
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