Duty to Consult with Whom?

When TC Energy began their work on the Coastal GasLink pipeline in 2012, few thought the project would ever become so contentious.[1] Since it began, the project has been the subject of anger and frustration. Of late, many pipeline advocates are frustrated because opposition to the pipeline remains strong, despite TC Energy signing agreements with all elected Indigenous[2] leadership along the pipeline's route.[3] While the parties involved all agree consultation between affected groups is important, there is confusion about who the parties to that consultation must be. Cases from the Supreme Court suggest that for unceded lands like the Wet'suwet'en land on the pipeline's path, the Crown must consult with a group's hereditary leadership.

The Coastal GasLink Pipeline and Protests[4]

TC Energy began designing the Coastal GasLink pipeline in 2012.[5] Since then, they have engaged in environmental, regulatory, and community assessments, working toward the pipeline's construction.[6] The pipeline's route begins in Dawson Creek, B.C., near the Alberta-B.C. border, and ends in Kitimat B.C., on the pacific coast. Once completed, the pipeline will move natural gas for processing by LNG Canada, which in turn plans to convert the natural gas into liquid natural gas for export.[7]

The pipeline passes through the traditional territories of several Indigenous groups. Much of this land is unceded, meaning that the Indigenous groups residing there did not sign treaties with the Canadian government. In much of Canada, Indigenous groups signed treaties with the Canadian (or British or French) governments. These treaties listed the rights and obligations of both parties. However, in some parts of Canada, and large parts of B.C., the Crown did not negotiate treaties with the Indigenous groups living in the area.[8] As a result, control over the lands is sometimes contested. Land where treaties were not signed are called "unceded lands," as opposed to "treaty lands."

The Wet'suwet'en are one such Indigenous group on the pipeline's path who have not signed a treaty with the Government. Their hereditary leaders, the traditional leaders of their community, oppose the pipeline. They have organised protests and blockades along its route, opposing both the pipeline and the lack of consultation with hereditary leadership.[9]

The Duty to Consult

The duty to consult is an unwritten constitutional principle, identified by the Supreme Court of Canada in the 2004 *Haida Nation* case.[10] It requires the Crown to consult with Indigenous peoples when it undertakes action which may impair their rights. The duty to consult is rooted in another unwritten constitutional principle, the Honour of the Crown, which demands that the Crown act honourably in its dealings with Indigenous peoples.[11] The Honour of the Crown arises because of the Crown's assertion of sovereignty over lands previously occupied by Aboriginal peoples.[12] The Supreme Court has held that section 35 of the *Constitution Act, 1982*[13] includes the Honour of the Crown, making it a

constitutional obligation.[14]

The duty to consult arises anytime the government undertakes action which could negatively affect Aboriginal peoples' rights.[15] Because the Supreme Court has ruled that section 35 of the *Constitution Act, 1982* includes this duty, the government cannot easily avoid it: they must consult with Indigenous groups. Crown failure to engage in adequate consultation can result in courts requiring the Crown to pay financial damages, engage in consultation, or stop the act in question.[16]

The duty to consult applies both when the Crown knows and when it ought to have known of an existing Aboriginal right.[17] As such, any rights held by Indigenous peoples, either through treaty or otherwise, are constitutionally protected. The government must consult if it plans actions which may negatively impact these rights.

The duty to consult also applies to potential but not yet recognized Aboriginal rights.[18] For example, while an Indigenous group is arguing in court for legal recognition of a land claim, the Crown must still observe the duty to consult. This is important because receiving legal recognition for Aboriginal rights, either by negotiating treaties or proving their existence in court, is a costly and time-consuming process. The trial for the *Tsilhqot'in Nation* case, wherein the Tsilhqot'in Nation sought legal recognition of a land claim, began in 2002 and remained before the courts until 2014.[19] Without protection for their right to control the land throughout this process, government action in the meantime could diminish the right's value.[20] For example, logging operations could deforest the land before the court resolves the case. The duty to consult protects potential rights by requiring the Crown to consult with affected Indigenous groups even before their rights are legally recognized.[21]

The Supreme Court has said that the duty to consult involves balancing the interests of Indigenous groups with Crown interests, and "thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations."[22] By placing a procedural safeguard over the rights of Indigenous groups, the duty to consult can assist in reconciling these sometimes competing interests.

The extent of consultation required by the duty to consult exists on a spectrum.[23] At the low end of the spectrum, it may only require the Crown to provide notice of its plans and discuss them with the affected group.[24] At the high end, it may require the Crown to "accommodate" the Indigenous groups' concerns.[25] This can involve creating a process for consideration of local submissions, a formal decision-making process with Aboriginal participation, or written reasons explaining why the Crown reached its decision.[26] Where on this spectrum the Crown's duty falls depends on two factors:

- The potential damage the action would cause to the Aboriginal right.
- The quality of the Indigenous groups' claimed right.[27]

The higher quality the groups' claim, and the greater the potential damage, the stronger the duty to consult.[28] Determining if the consultation is adequate in each case is very difficult,

and depends primarily on the facts of the case.[29]

Importantly, the Supreme Court has held that the duty to consult does not grant Indigenous groups a "veto power" over Crown decisions.[30] If a court finds the consultation to be adequate, a project can proceed "without the consent of the Indigenous group."[31]

The Crown Must do the Consulting

The duty to consult applies only to the "Crown." The Crown is the executive branch of Canada's federal and provincial governments.[32] It implements and enforces government law and policy. The actions of Ministers and the Prime Minister are Crown action.

The duty to consult does not fall within the legislative, or law-making, branch of government.[33] The Supreme Court decided this point in a 2018 case, *Mikisew Cree v Canada*. There, two proposed federal laws potentially impacted the Mikisew Cree First Nation's rights to hunt, fish, and trap. The Mikisew Cree First Nation argued that the legislature must consult with them, in accordance with the duty to consult, throughout the law-making process. The Supreme Court decided the legislature need not consult with Indigenous groups while making laws. Instead, other unwritten constitutional principles, shield the law-making process from the duty to consult.[34] One such unwritten constitutional principle is the separation of powers, which demands that each branch of government not interfere unnecessarily in the other branches' activities.[35] The Supreme Court found that requiring the legislature to consult could violate these other principles. For example, it may require the court to interfere in the law-making process to ensure the legislature was consulting adequately.[36]

The result of *Mikisew Cree* is that only the Crown is subject to the duty to consult. The Crown can delegate procedural elements – such as determining the precise route of a pipeline – to others, but the obligation to meet the duty falls only on the Crown.[37] As the Supreme Court has put it, the Crown holds "ultimate responsibility for ensuring consultation is adequate".[38] The Court in *Mikisew Cree* said that if the law created by Parliament harmed the Mikisew Cree's rights, they could challenge the law in court later.[39]

With Whom Must the Crown Consult?

Anytime Crown action threatens an Indigenous groups' rights, the Crown must consult with the group holding those rights. This can become confusing and create issues when the land in question is unceded. On these lands Indigenous groups often operate with two different governance structures: elected leaders and hereditary leaders. Elected leaders are the band councils and chiefs elected to lead First Nations under the *Indian Act*.[40] The *Indian Act* is federal legislation that governs "Indian" status, bands, and reserve land. The *Indian Act* raises issues far beyond the scope of this article, relating both to its oppressive history and its form today. For the purposes of this article, the most important part of the *Indian Act* is that it imposes a uniform governance structure on First Nations communities across Canada. The elected chiefs and councils, whose existence is prescribed by the *Indian Act*, are known as elected leaders.

Hereditary leaders are the historic leaders and representatives of Indigenous communities. Their powers, duties, and governance structure are unique to the group in question. The Wet'suwet'en hereditary leaders, for example, are leaders of Houses. Their community has 13 such Houses.[41]

The Supreme Court has not explicitly stated with which of these two kinds of leadership the Crown must consult when dealing with unceded land. However, John Borrows, a University of Victoria Law Professor and Canada Research Chair in Indigenous Law, suggests that when the claim is based on unceded land the Crown's duty to consult is with the group's hereditary leaders.[42] Part of his reasoning rests on the fact that hereditary leaders have brought two of the most important Aboriginal rights cases, *Delgamuukw* and *Tsilhqot'in*.[43] This view aligns with the Wet'suwet'en peoples' own legal system, where hereditary leaders are responsible for negotiating on the groups' behalf.[44]

Conclusion: Coastal GasLink and the Duty to Consult

The distinction between hereditary and elected leaders helps explain much of the debate surrounding the Wet'suwet'en People and the Coastal GasLink pipeline. This debate emerges in part from the disagreement between their elected and hereditary leaders as to the desirability of the pipeline. While most Wet'suwet'en elected leaders have signed agreements with Coastal GasLink indicating their acceptance of the pipeline, many hereditary leaders remain opposed, largely for environmental reasons.[45]

As Borrows argues, there is precedent in major Supreme Court of Canada cases that suggests the Crown must consult with hereditary leaders for projects, like the Coastal GasLink pipeline, which potentially impact Aboriginal rights on unceded land. The Crown has recently begun the consultation process by signing a Memorandum of Understanding with Wet'suwet'en hereditary leaders.[46] While this Memorandum does not resolve the hereditary leaders' opposition to the pipeline, it suggests that a process of consultation is underway. If Borrows' view is correct then perhaps the appropriate parties are now at the bargaining table.

[1] See "About Coastal GasLink", *Coastal GasLink* (last visited 26 May 2020), online: <www.coastalGasLink.com/about/>.

[2] This article will use both "Aboriginal" and "Indigenous" language. "Aboriginal" language is used when referring to rights under the *Constitution Act, 1982*, as that is the language of section 35. "Indigenous" language is used the rest of the time. For more on terminology see Chelsea Vowel, *Indigenous Writes: A Guide to First Nations, Métis & Inuit Issues in Canada* (Winnipeg: Highwater Press, 2016), 8-13.

[3] See "Costal GasLink Signs Agreements with 100 Per Cent of B.C. Elected Indigenous Bands Along the Pipeline Route" *Coastal Gaslink Media Advisory* (13 September 2018), online: <www.tcenergy.com/announcements/2018/2018-09-13coastal-gaslink-signs-agreements-with-100-per-cent-of-b.c.-elected-indigenous-bands-along-the-pipeline-route/>.

[4] The issues surrounding the Coastal GasLink pipeline go far beyond the duty to consult. Perhaps the key current legal issue concerns Indigenous groups' access to the protections offered by section 35 of the *Constitution Act, 1982*. See *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264. This decision is controversial. See also Bruce McIvor, "Wet'suwet'en Reading List" *First Peoples Law* (6 May 2020), online: <www.firstpeopleslaw.com/index/articles/458.php>; "The invisible thread? The Coastal GasLink decision and why we must do more to recognize the application of Indigenous law" *West Coast Environmental Law* (15 January 2020), online: <www.wcel.org/blog/invisible-thread-coastal-gaslink-decision-and-why-we-must-do-more-recognize-application>; John Borrows, "Wet'suwet'en and the Coastal GasLink Pipeline Injunction Case" (17 March 2020), online (video): <https://youtu.be/nPDcSpBjpBY>.

[5] About Coastal Gaslink, *supra* note 1.

[6] *Ibid*.

[7] *Ibid*.

[8] See Kate Gunn & Bruce Gunn, "Recognition without Reconciliation?: The New Rights Policy for BC Treaty Negotiations," *First Peoples Law* (18 September 2019), online: <www.firstpeopleslaw.com/index/articles/412.php>.

[9] See "Wet'suwet'en chiefs, blockades and Coastal GasLink: A guide to the dispute over a B.C. pipeline", *The Globe and Mail* (9 March 2020), online: <www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-coastal-GasLink-pipeline-rcmp-explainer/>.

[10] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35

[11] *Ibid* at para 16. See also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42.

[12] See *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24 .

[13] *Constitution Act, 1982*, Schedule B to the *Canada Act* 1982 (UK), c 11, s 35.

[14] *Taku River*, *supra* note 12.

[15] See *R v Kapp*, 2008 SCC 41 at para 6. See also *Haida Nation*, *supra* note 10.

[16] See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 37.

[17] *Haida Nation, supra* note 10 at para 35.

[18] *Ibid*.

[19] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 7 .

[20] See Peter W Hogg, *Constitutional Law of Canada*, vol 1, 5th ed (Scarborough: Thomson, 2007) (loose-leaf 2010 supplement) at 28.8(j).

[21] For a more detailed analysis of the duty to consult, see Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729; see also Stephen M. Young, "The Deification of Process in Canada's Duty to Consult: Tsleil-Waututh Nation v Canada (Attorney General)" (2019) 52:3 UBC L Rev 1065.

[22] *Haida Nation*, *supra* note 10 at para 14.

[23] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34 .

[24] *Haida Nation*, *supra* note 10 at para 43.

[25] *Ibid* at paras 43-44.

[26] *Ibid* at para 44.

[27] *Ibid* at para 43.

[28] *Ibid* at para 39.

[29] See Hamilton & Nichols, *supra* note 21 at 735.

[30] *Haida Nation*, *supra* note 10 at para 48.

[31] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 83.

[32] *Haida Nation*, *supra* note 10 at para 53.

[33] See *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 32.

[34] *Ibid*.

[35] *Ibid* at para 35. See also *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 27-31; *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 20.

[36] *Mikisew Cree*, *supra* note 33 at para 35.

[37] *Haida Nation*, *supra* note 10 at para 53.

[38] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 22; *Haida Nation*, *supra* note 9 at para 53.

[39] *Mikisew Cree*, *supra* note 33 at para 43.

[40] *Indian Act*, RSC 1985, c I-5.

[41] See Office of the Wet'suwet'en "House Groups" (last visited 25 May 2020), online: <www.wetsuweten.com/culture/house-groups/>; See Office of the Wet'suwet'en "Clan System" (last visited 24 June 2020), online: <www.wetsuweten.com/culture/clan-system/>.

[42] See John Borrows, "Wet'suwet'en and the Coastal GasLink Pipeline Injunction Case" (17 March 2020), online (video): <https://youtu.be/nPDcSpBjpBY>.

[43] *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC); *Tsilhqot'in*, *supra* note 19.

[44] Borrows, *supra* note 42. See also Kate Gunn & Bruce McIvor, "The Wet'suwet'en, Aboriginal Title, and the Rule of Law: An Explainer" *First Peoples Law* (13 February 2020), online (blog): <www.firstpeopleslaw.com/index/articles/438.php>.

[45] See Ian Austen, "Canadian Police Move Against Pipeline Blockades, Arresting Dozens", *The New York Times* (10 February 2020), online: <www.nytimes.com/2020/02/10/world/canada/gas-pipeline-protests.html>. See also "Why 2 different kinds of Wet'suwet'en leaders support and oppose the gas pipeline", *CBC News* (19 February 2020), online: <www.cbc.ca/news/indigenous/blockade-railway-mowhak-wet-suwet-en-1.5467234>.

[46] See Brett Jang, "Wet'suwet'en hereditary chiefs to sign deal that entrenches their governance system in B.C.", *The Globe and Mail* (13 May 2020), online: <www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-chiefs-to-sign-deal-that-entrenches-their/>. See also Memorandum from British Columbia, Canada, Wet'suwet'en Nation (14 May 2020), online (pdf): <www.wetsuweten.com/files/SIGNED_MOU_BC,_CANADA_AND_WETSUWETEN_MAY_14,_2020.pdf>.