

Indigenous Law, the Common Law, and Pipelines

By: Kent McNeil

Matter Commented On: *Coastal GasLink Pipeline Ltd. v Huson*, [2019 BCSC 2264 \(CanLII\)](#)

The extent to which Indigenous law is part of Canadian law along with the common law and civil law has become a major issue over the past two decades. Judges have been reluctantly wading into the matter, expressing somewhat inconsistent opinions. A recent example is in *Coastal GasLink Pipeline Ltd. v Huson*, [2019 BCSC 2264 \(CanLII\)](#), involving an application by a pipeline company for an interlocutory injunction.

Members of the Wet'suwet'en Nation in British Columbia oppose construction through their territory of a natural gas pipeline that would terminate at Kitimat on the West Coast (Shiri Pasternak, "[No, those who defend Wet'suwet'en territory are not criminals](#)", *The Globe and Mail* (12 February 2020)). They set up blockades on service roads to prevent the project from proceeding, leading to the injunction application, which Justice Marguerite Church of the BC Supreme Court granted.

In defence of their actions, the Wet'suwet'en protesters relied upon Indigenous law and Wet'suwet'en governance authority. They argued that "the plaintiff is in their traditional territory in violation of Wet'suwet'en law and authority and their efforts in erecting the Bridge Blockade were to prevent violations of Wet'suwet'en law" (*Huson* at para 51). This argument should have brought the relevance of Wet'suwet'en law directly before the court. However, Justice Church refused to acknowledge that Indigenous law is part of Canadian law, unless explicitly incorporated. It is only evidence of the Indigenous legal perspective. She stated:

As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence, or statutory provision.

There has been no process by which Wet'suwet'en customary laws have been recognized in this manner. The Aboriginal title claims of the Wet'suwet'en people have yet to be resolved either by negotiation or litigation. While Wet'suwet'en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law.

Indigenous laws may, however, be admissible as fact evidence of the Indigenous legal perspective, where there is admissible evidence of such Indigenous customary laws. (at paras 127-29, citations omitted)

On the other hand, the Federal Court has been more open to accepting Indigenous law as part of Canadian law without the kind of explicit recognition Justice Church had in mind. For example, in *Pastion v Dene Tha' First Nation*, [2018 FC 648 \(CanLII\)](#), Justice Sébastien Grammond stated:

Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. Chief Justice McLachlin of the Supreme Court of Canada wrote, more than fifteen years ago, that 'aboriginal interests and customary laws were presumed to survive the assertion of sovereignty.' (at para 8, quoting *Mitchell v MNR*, [2001 SCC 33 \(CanLII\)](#) at para 10)

He went on to point out that, ever since the famous case of *Connolly v Woolrich*, (1867) 11 LCJ 197, 17 RJRQ 75 (Que SC), decided the year Canada became a nation, "Canadian courts have recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law, particularly in matters involving family relationships" (*Pastion* at para 8).

While most of the judicial attention regarding Indigenous law has been in relation to family matters, courts have acknowledged the relevance of Indigenous law in other contexts as well. For example, as far back as the early 1990s the Federal Court acknowledged that *Indian Act* bands that chose their band councillors "according to the custom of the band" (*Indian Act*, [RSC 1985, c I-5](#)), the validity of which is acknowledged by section 2(1) of the Act, are acting in accordance with Indigenous law that has effect in Canadian law.

Another prominent example of the application of Indigenous law occurred in *Tsilhqot'in Nation v British Columbia*, [2007 BCSC 1700 \(CanLII\)](#), the first Canadian case in which the Supreme Court of Canada, on appeal, issued a declaration of Aboriginal title. One issue at trial was whether Aboriginal title and rights are vested in the Tsilhqot'in Nation as a whole or in individual *Indian Act* bands. In other words, who are the proper title and rights holders (Kent McNeil, "[Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority](#)" (2021) 57:1 Osgoode Hall LJ 127)? On this issue, Justice David Vickers concluded:

... the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact [with Europeans] and at sovereignty assertion [by the Crown]. (at para 470)

Importantly, while in Tsilhqot'in society individual bands are regarded as "the caretakers of the lands" under their authority, "the caretakers have no more rights to the land or the resources than any other Tsilhqot'in person" (at para 468). Justice Vickers' use of the term "rights" here is significant because he was referring to the situation under Tsilhqot'in customs and traditions, both before and after European contact and Crown assertion of sovereignty. In other words, those customs and traditions contained laws that gave rise to rights. The existence of these rights that every Tsilhqot'in person had (and has) throughout Tsilhqot'in territory revealed in turn that title had to be vested in the whole nation. These conclusions were based on evidence of the customs and traditions, including Indigenous law, of the Tsilhqot'in people. Justice Vickers confirmed the

existence of Tsilhqot'in law by stating: "Tsilhqot'in people were a rule ordered society. Various Tsilhqot'in elders testified about dechen ts' edilhtan (the laws of our ancestors). Chief Ervin Charleyboy testified that there are laws against taking the property of others, and against creating a disturbance in a community" (at para 431).

Justice Vickers' holding that title is vested in the entire Tsilhqot'in Nation was challenged by the province of British Columbia upon appeal to the BC Court of Appeal. Justice Groberman, writing the unanimous decision, rejected the province's argument and affirmed Vickers J's ruling on this point. Like Justice Vickers, he found that "the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot'in people. The Tsilhqot'in Nation, therefore, is the proper rights holder" (*William v British Columbia*, [2012 BCCA 285 \(CanLII\)](#) at para 150). Commenting on the arguments presented by British Columbia, Justice Groberman observed:

In my view, the position taken by British Columbia does not take adequate account of the Aboriginal perspective with respect to this matter. I agree with the trial judge's conclusion that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself. (at para 149)

As revealed in Justice Vickers' judgment, the Aboriginal perspective and viewpoint on this matter are to be found in Tsilhqot'in law.

This issue of the proper holder of Tsilhqot'in rights and title was not raised or argued in the Supreme Court of Canada (*Tsilhqot'in Nation v British Columbia*, [2014 SCC 44 \(CanLII\)](#)). The declaration of the Tsilhqot'in's Aboriginal title by the Court therefore affirmed the opinions of the lower courts that the nation as a whole is the proper rights holder. As we have seen, those opinions were based on Tsilhqot'in law contained in Tsilhqot'in customs and traditions.

What are the implications of this case law for Justice Church's statement in *Huson* that, "[a]s a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence, or statutory provision" (at para 127)? Her position seems to be that Indigenous law does not exist *as a matter of law* until it is acknowledged as such by a treaty, statute, or court decision. This extreme positivist attitude is at odds with the common law. The rules of the common law do not suddenly come into existence because a legislature or court acknowledges them. Often, lawyers follow established practice that they regard as legally binding without legislative or judicial affirmation. Only when disputes arise that end up in court are judicial rulings made that create binding precedents. But when judges decide cases, they always apply the law retroactively to the time when the facts of the case before them arose. In other words, the judges are declaring what the law was at the time the facts arose, not at the time the judgment is handed down. They are applying what they regard as existing law. They do not do this in a vacuum. Instead, they rely on prior precedents, analogous cases, legal principles, and what might be called "the logic of the

law” (Kent McNeil, “[Indigenous Rights Litigation, Legal History, and the Role of Experts](#)” (2014) 77:2 Sask L Rev 173).

So when a Canadian court acknowledges the existence of Indigenous law, it is not suddenly creating that law or giving it legal force that it did not enjoy before. This is clear in the *Tsilhqot’in Nation* case. The Tsilhqot’in customs and traditions that gave rise to the rights of every Tsilhqot’in person to use land and access natural resources throughout Tsilhqot’in territory existed before the arrival of Europeans in Tsilhqot’in territory and continued after Crown assertion of sovereignty. That was demonstrated by evidence presented at trial. Justice Vickers and the BC Court of Appeal then relied on that evidence of Tsilhqot’in law to reach another legal conclusion, namely that Aboriginal title and rights were and are vested in the entire Tsilhqot’in Nation. This was all affirmed by the Supreme Court of Canada without any need to explicitly incorporate this Tsilhqot’in law into Canadian law by court declaration, as Justice Church seems to have thought is required. Indigenous law exists and is followed in Indigenous communities. It is part of Canadian law and can be applied by Canadian courts without being specifically incorporated into Canadian law by treaty, statute, or judicial decision.

However, because Canadian judges generally are not familiar with Indigenous law the way they are with the common law and civil law (in Quebec), they need evidence in order to understand and apply it. This requires testimony by experts, such as Elders and Indigenous knowledge-keepers who understand a nation’s laws and are authorized to speak about them, and anthropologists and other scholars who have studied a particular nation’s legal order and become familiar with it. This requirement of evidence of Indigenous law is simply a practical matter – it does not mean Indigenous law is any less part of the domestic law of Canada than the common law and civil law. Evidence through the testimony of experts is similarly required for proof of foreign law and international law because Canadian judges are not expected to be familiar with them.

In sum, Indigenous law exists in much the same way the common law does. It is living law grounded in Indigenous customs and traditions. It does not need to be validated by treaty, legislation, or judicial pronouncement to be part of Canadian law. But to be applied by Canadian courts, evidence of Indigenous law has to be presented through testimony by Elders, knowledge-keepers, and other experts. Indigenous law, while it may contain common features in the way European legal systems do, can vary greatly in detail from one nation to another. It is an expression of the self determination of Indigenous nations and of the rich diversity of their cultures.

Indigenous opposition to pipelines across their territories continues. For example, the land defenders of the Secwepemc Nation around Kamloops in the interior of British Columbia have built tiny houses and set up camps to protest the Transmountain expansion, running from Alberta to Burnaby across their territory (Boston Laferté, “[Secwepemc set up new camp in hopes of halting TMX construction, leads to five arrests](#)”, *The Martlet* (23 October 2020); and see the land defenders’ website [here](#)). Where pipelines and other projects are concerned, courts need to take account of the Indigenous laws that apply in those territories. Judges cannot rely simply on the common law and legislation while ignoring applicable Indigenous law. While it is up to Indigenous nations to present and explain their law to the courts, judges need to acknowledge its

validity, place it on par with the rest of Canadian law, and determine how it applies to resolve whatever conflict is before the court.

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