# Wet'suwet'en dispute over pipeline deal illustrates complexities of Indigenous law

The Wet'suwet'en elected council made an agreement with Coastal GasLink over its proposed pipeline, but hereditary chiefs argue it doesn't have authority off reserve.

DERRICK PENNER (HTTPS://VANCOUVERSUN.COM/AUTHOR/DEPENNER) Updated: January 11, 2019

Wet'suwet'en First Nation hereditary chiefs have reached a deal with the RCMP to open a blockade preventing Coastal GasLink pipeline employees to do survey work in their territory, but they haven't dropped their outright opposition to the project.

And their dispute over whether the elected Wet'suwet'en band council had the authority to sign an impact and benefits agreement on behalf of all the First Nations people remains an open question that highlights the complexity of Indigenous law.

Coastal GasLink's efforts to secure agreements with all 20 elected Indigenous governments along its entire 670-kilometre right of way were heralded by Premier John Horgan as an example of getting it right when it comes to First Nations consultation.

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The pipeline's path starts near Dawson Creek in B.C.'s northeast and runs to tidewater at Kitimat, terminus for the $40-billion LNG Canada development it is intended to serve.

The Wet'suwet'en opposition, however, illustrates how in many cases in British Columbia, the relations between First Nations band councils, which are creations of the federal Indian Act, and the pre-existing and historic hereditary systems of governance are still being sorted out, said an Indigenous legal scholar, Val Napoleon.

The difference, Napoleon said, is that hereditary systems are the larger, historic legal, social and economic orders that First Nations lived by that covered the entire territory of specific groups. Elected band councils have authority delegated by the federal government over activities on specific reserves.

Historically, most Indigenous people were "non-states," Napoleon said, meaning that their authority was distributed among family, house or clan-based groups that are determined matrilineally.

Hereditary chiefs come from specific families, but don't directly inherit positions, Napoleon said. They earn their positions, and authority, through their ability to uphold the integrity of their land and their rules for social order.

In the case of the Wet'suwet'en, its hereditary system consists of 12 houses that are organized in five different clans governing different parts of the total historic Wet'suwet'en territory.

"What we have here is a dispute over the extent of authority of a band council to make decisions beyond reserve boundaries," Napoleon said. "And people are arguing that (the elected councillors) don't have that authority under Wet'suwet'en law."

"That's the other important issue here," Napoleon said. "Indigenous law hasn't gone away, but it has been undermined and there are gaps in what we've been doing and others are doing to rebuild it."


An Indigenous-led march in downtown Vancouver in support of the Wet'suwet'en, who have set up of a checkpoint and camp in opposition to the TransCanada Coastal GasLink pipeline on Jan. 8, 2019. *NICK PROCAYLO / PNG*

Napoleon noted that it was Gitxsan and Wet'suwet'en hereditary chiefs who brought the landmark Delgamuukw case forward to the Supreme Court of Canada, which resulted in a decision that established that First Nations still have Aboriginal title to their historic territories.

That principle and the roles of hereditary governance were further upheld in the Supreme Court of Canada's 2014 Tsilhqot'in decision.

"Part of the problem here is that Wet'suwet'en law is still invisible to many," Napoleon said. "So they can't figure out what the proper relationship is between these laws and Canadian law and they can't figure out what's a legitimate process to deal with these disputes."

In theory, "there is a very credible argument" that the Wet'suwet'en hereditary system is still the "customary government" with authority over matters in their larger, off-reserve territory, said B.C. lawyer Jack Woodward, who specializes in Indigenous law.

Woodward said he isn't familiar with the Wet-suwet'en situation, so he was speaking in abstract terms.

The Tsilhqot'in decision established that First Nations reserves are small entities within larger Aboriginal territories, Woodward said, and that the reserves' band councils, designated under the Indian Act, have jurisdiction over activities on reserve.

However, "it is unclear who has jurisdiction over areas of Aboriginal title or unproven Aboriginal title," Woodward said.

Matters are complicated further, Napoleon said, by the fact that elected band chiefs and councillors also belong to family houses and have their places in the hereditary system, often as hereditary chiefs.

So depending on the First Nation, it isn't always as clearcut as either being part of the hereditary system or the elected council.

“You also have to be specific about the types of agreements (companies) have and the extent to which those agreements authorize band councils to act on behalf of people on lands that aren’t reserve lands,” Napoleon said.

Woodward has advice to the proponents of resource projects about how to approach Indigenous communities around consultation.

“To be safe, if you’re a company, you would try to get an undertaking with (both elected and hereditary systems),” Woodward said. “You would need a bit of anthropological or ethnographic intelligence on the ground to figure out who the hereditary chiefs are, and make sure you’ve got them all on board.”

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