

# UNDERSTANDING CONFLICTING LEGAL TRADITIONS

## THE WET'SUWET'EN LAND STRUGGLE AND RESOLVING LEGAL CLAIMS ON UNCEDED TERRITORY

Written for POL S 390

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**ABSTRACT** This paper examines the recent tensions in Wet'suwet'en territory as an extension of the ongoing conflict between Indigenous land defenders and state security actors over the construction of the Coastal GasLink pipeline in British Columbia. More specifically, it brings into view the ways in which Canadian law is weaponized against Indigenous communities in denying their inherent rights on unceded territory, and criminalizing resistance efforts. By using critical legal theory and principles of Indigenous legal tradition, it evaluates the history of Indigenous rights cases brought to Canada's Supreme Court and differing regimes of consent. Further, this paper suggests alternative legal frameworks that could be used to legitimate Indigenous land reclamation rights in Canada to ensure land restitution. I argue that the settler-state imposition of energy infrastructure on unceded land is not only a violation of Indigenous sovereignty and inherent rights, but also, a testament to the incompatibility of state priorities and Indigenous communities' right to land and life.

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### BACKGROUND

On December 11, 1997, the Supreme Court of Canada (SCC) delivered a historic decision in *Delgamuukw v. British Columbia* that set an important precedent for how Indigenous rights would be understood, affirming oral testimony from Indigenous people as valid evidence in court (Kurjata 2017). This was the first acknowledgement of Indigenous proprietary interest in Canada. Stemming from a 1984 case initiated by leaders of the Gitksan and Wet'suwet'en nation leaders looking to establish Indigenous jurisdiction over land and water in northwest British Columbia, the Court held that the Wet'suwet'en First Nations people had never given up rights or title to their lands (Kurjata 2017). In other words, they had never signed a treaty with the British Crown or

the Canadian government: their land is unceded. Coupled with the SCC ruling in *Tsilhqot'in Nation v. British Columbia*, which codified the existence of Indigenous title to non-treaty land in British Columbia, the Wet'suwet'en peoples have a legally recognized government and the right to reject resource extraction efforts from the Canadian state (Supreme Court of Canada 2014).

Nevertheless, the Wet'suwet'en region has been a site of ongoing violence. Land Defenders from across the country have taken direct action against various pipeline proposals that would require various state-backed energy infrastructure to trespass in their land (Armao 2021). In November 2021, tensions escalated with Royal Canadian

Mounted Police (RCMP) officers in northern British Columbia enforcing a court-ordered injunction on Wet'suwet'en land, barring protesters from setting up a blockade on a highway used by Coastal GasLink pipeline workers to complete the project (Armao 2021). Reports have been released documenting the arrests of Indigenous elders and land defenders, chiefs, and photojournalists during police raids.

The legalized violence inflicted upon Indigenous protesters, government-sanctioned efforts to construct a pipeline on unceded territory, and the colonial history of Indigenous land dispossession bring into view an urgent question surrounding the legal significance of the Wet'suwet'en struggle: *to what extent is Indigenous sovereignty as reified in Indigenous legal tradition fundamentally incompatible with settler-colonial law?* I argue that for the Canadian state to recognize the legitimacy of Indigenous rights to land is to simultaneously affirm the illegitimacy of their land occupation. Further, I posit that land restitution for Indigenous peoples requires legal and political transformation in restructuring a justice system built on Indigenous dispossession. I will apply critical legal analysis and principles of Indigenous legal tradition in locating the Wet'suwet'en struggle as a case study in a broader legal discourse on Indigenous land rights. My argument consists of a three-pronged evaluation. Firstly, I will examine the conflicting regimes of legal consent practiced by the Canadian state and Indigenous peoples. Secondly, I will assess the ways in which Canada criminalizes Indigenous land defense. Finally, I will evaluate potential legal frameworks that could be used to assert Indigenous land reclamation rights in Canada.

## ON DIFFERING REGIMES OF CONSENT

As established in SCC cases *Haida Nation v. British Columbia (Minister of Forests)*, 2004; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005; federal and provincial governments have a Duty to Consult (DTC) Indigenous peoples in receiving consent for energy infrastructure projects (Yellowhead Institute 2019,9). Generally, Indigenous conceptualizations of consent exist on a spectrum and are understood within a “decentralized,” non-hierarchical legal structure (Napoleon 2013, 238). Four primary elements make up the notion of free, prior, and informed consent (FPIC) necessary to permit any energy infrastructure projects on Indigenous land (Yellowhead Institute 2019, 10). These elements are restorative, epistemic, reciprocal, and legitimate kinds of consent. *Restorative* consent requires centering Indigenous models of governance and law in decision making processes and *epistemic* consent utilizes Indigenous epistemologies, frameworks and languages for understanding relationships to land. *Reciprocal* consent requires that Indigenous peoples are determining the terms of consent, and *legitimate* consent necessitates that a decision should not be made until the “legitimate authorities consent” in granting or rejecting a proposal (Yellowhead Institute 2019, 9). Here, a critical point of difference between Indigenous legal tradition and settler-colonial practices is the expression of “rights,” meaning the admissibility of Indigenous oral history as proof of land claims (Babcock 2013, 26 and Napoleon 2013, 239).

The Wet'suwet'en struggle, however, is a unique case. Since it is unceded territory, it is under Wet'suwet'en law and Indigenous peoples have no obligation to permit access to their land. At the time of colonization, both international and colonial law recognized that Indigenous land interests were to be legally protected if a treaty had not been signed and the Indigenous peoples were not "conquered" (Davis 2020). The Wet'suwet'en nation have not made a treaty with the Crown, nor have they been conquered. Unanimously, the Wet'suwet'en chiefs have opposed the Coastal GasLink project, and in 2020, they formally issued an eviction notice to the pipeline company (Davis 2020).

While this may seem straightforward, there are some pivotal pieces of legislation that distort Indigenous conceptualizations of consent. Here, it is important to examine the 1493 "Doctrine of Discovery" as a legal underpinning of settler-colonial frameworks for consent and establishing land claims on Indigenous territory. A document considered a relic of early settler-colonialism, the oppression faced by Indigenous peoples today can be traced back to the violent land theft that took place "under theories of dispossession such as *terra nullius*, conquest or discovery" (Gilbert 2007, 593). The Doctrine of Discovery established legal justification for colonization on non-Christian lands. Land inhabited by Indigenous peoples was declared 'vacant' by settlers since Indigenous communities were both non-Christian and non-white. This racist and dehumanizing rhetoric of land occupation is reflected in current land distribution practices by the British Columbia provincial government. Meaning, settlers "move into [Indigenous] territories and establish governments without their formalized participation and legal consent" (Borrows 2019, 27). The 'legal' logic behind the Doctrine

of Discovery can also be applied in understanding the violence in the Wet'suwet'en struggle, where the settler-state insists on the non-consensual ownership of land that is not theirs.

Evidently, two different regimes of consent are in operation: one founded on reciprocity and land preservation, and another premised on dispossession and occupation justified by settler-colonial law that disregards the DTC principle. While land claims continue to be disputed on Wet'suwet'en territory, necessary FPIC for the Coastal GasLink project has not been granted. Here, not only can we observe an irreconcilable difference between Indigenous legal practices and settler-colonial conceptions of "consent," but further, we see that the Canadian settler-colonial legal structure (in the pursuit of advancing settler interests), is historically and currently premised on Indigenous erasure.

### ON THE CRIMINALIZATION OF LAND DEFENSE

Another aspect of the Wet'suwet'en struggle worthy of examination is how Canadian law is weaponized in criminalizing Indigenous land defense and permitting settler-colonial violence on Indigenous territory. The *Pamajewon Case (R. v. Pamajewon)* was the first case where Indigenous communities defended the right to self-government before the SCC and would eventually characterize future Constitutional assertions of rights to Indigenous self-determination (Luk 2009, 109). This case came as a result of earlier cases delineating rights to natural resources, one in particular - *R. v. Sparrow* - established parameters to assess the impact of energy infrastructure on the Indigenous right to self-determination (Luk 2009, 109). As the first SCC case to interpret Section 35 of the Constitution Act (1982) on self-government

rights in relation to Indigenous rights, *Sparrow* deduced two propositions. First, Indigenous rights operate like other Constitutional rights, meaning that “laws are invalid to the extent they infringe on Aboriginal rights,” and second, that infringement on Indigenous rights could be legitimate if it is proven to be “justified” (Luk 2009, 109). This has resulted in contention on issues where what is ‘justified’ in federal courts conflicts with what Indigenous communities consider an infringement on their land rights.

The weak assertion of Indigenous rights makes them malleable and allows the state to safeguard settler-interests over Indigenous sovereignty due to the limited nature of constitutional rights. In the *Wet’suwet’en* case, the continued dispute over land claims has made way for the criminalization of Indigenous land defenders in efforts to protect state interests, where property, profit, and industry is prioritized over the lives and livelihoods of Indigenous people. The RCMP arresting protesters in *Wet’suwet’en* in November 2021 to clear the way for the pipeline project after being issued an order from the *Gidmit’en* clan to leave the territory (as is their right on unceded land, see: *Haida Nation v. British Columbia*; *Taku River Tlingit First Nation v. British Columbia*; and *Mikisew Cree First Nation v. Canada*), illustrates this undue criminalization of Indigenous peoples (Armao 2021). Militarized violence against Indigenous peoples demonstrates the role of the police force as an extension of the state, where “the government is going to war on Indigenous peoples using the police as enforcers” to protect state and settler property on Indigenous land (Kuokkanen 2019, 203). This incident reveals an oppressive double standard where settlers can violate the same law that they enforce on Indigenous peoples, and in doing so, construct Indigenous peoples as an existential threat worthy of

criminalization when they resist violence (Proulx 2014).

We can better understand this dynamic by employing a critical legal analysis of the implications of the *Wet’suwet’en* case. As expressed by critical legal scholar Duncan Kennedy, since the law is a malleable legal material that can be used to justify various interpretations, the law is a function of power (Kennedy 1986). Further, Kennedy asserts that judges have obligations to their communities. The *Wet’suwet’en* case provides an interesting angle on this perspective. Given that the majority of judges in British Columbia are white settlers, it follows that the communities they serve are primarily settler ones (Fraser 2021). Illustratively, in reviewing 100 legal cases brought forward on injunctions filed for energy infrastructure initiatives, researchers found that “82% of injunctions filed by First Nations against the government were denied,” whereas “76% of injunctions filed against First Nations by corporations were granted” (Yellowhead Institute 2020, 10). The criminalization of Indigenous land defense on *Wet’suwet’en* territory is indicative of who is protected, and who is made disposable under settler-colonial law in advancing settler projects like the Coastal GasLink Pipeline.

## TOWARDS LAND RECLAMATION

In moving towards equity, land restitution requires a fundamental reorientation of existing legal practices used in affirming land rights. One way for this restructuring to take place is through a legally binding interpretation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The provincial government of British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) into law in November 2019, which mandates the government to align laws with the UN declaration (Provincial Government of British

Columbia, n.d.). However, the principles of UNDRIP are “constitutional in nature” (Yellowhead Institute 2020). This means that even though the B.C. declaration aims to make provincial laws and legislation consistent with international responsibilities, the current framework of Canadian constitutionalism presents barriers to fully realizing Indigenous rights to land (Yellowhead Institute 2020). These responsibilities need to be taken seriously at a federal level. Nevertheless, even prior to the federal Liberal party announcing their own draft legislation on UNDRIP, the Canadian state has been “qualifying” the scope of the declaration for years, arguing “it is only political in nature” as a “non-legally binding aspirational document” (Boyer 2014, 13). Different assessments of UNDRIP have concluded that certain provisions of UNDRIP can be “regarded as equivalent to already established principles of international law,” and would be nationally binding (Boyer 2014, 13). However, while various UNDRIP articles explicitly state that “Indigenous peoples shall not be forcibly removed from their lands or territories,” current state-sanctioned efforts at removing land defenders from Wet’suwet’en territory are in violation of these provisions (Yellowhead Institute 2020).

On June 16, 2021, Canada’s Senate passed Bill C-15, formalizing UNDRIP as law (Duncanson 2021). Nevertheless, the federal interpretation of the declaration remains aspirational. The injunctions imposed upon Indigenous peoples on Wet’suwet’en territory not only bypass Aboriginal rights enshrined in Canadian law, but also contradict UNDRIP. Thus, I further propose that the implementation of UNDRIP must occur in tandem with a reassessment of the aforementioned Section 35 of the Constitution for the declaration to be effective. The two are fundamentally at odds with each other. Where

article 27 of UNDRIP requires that Indigenous traditions and customs be interpreted as law, Section 35 permits infringements on Indigenous rights so long as the state provides justification that holds under the Sparrow test (Nichols 2019). The two-step test serves as a constitutional method of justifying an infringement on an Indigenous right (Constitutional Studies n.d.). However, affirming the right to land reclamation for Indigenous peoples requires eliminating the possibility of infringement on their inherent rights. Still, interpreting UNDRIP as binding in all cases would affirm Indigenous rights to land, and the state will not criminalize itself.

### AN ALTERNATIVE VIEW

Critics are concerned that the judicial interpretation of UNDRIP and FPIC as legally-binding in all cases would effectively afford Indigenous peoples “veto-power” in determining the future of energy infrastructure projects on Indigenous land (Flanagan 2019). It is argued that having an absolute right to deny these projects would violate traditional constitutional jurisprudence, where the SCC has previously expressed that there is no constitutional right of veto (Flanagan 2019). However, I think that framing Indigenous resistance to land development as an unconstitutional “veto right” assumes that the state and private actors are equal stakeholders with Indigenous communities in determining the future of Indigenous land. This framing is demonstrably untrue in recalling Indigenous rights on unceded territory. The current debate on land rights is in itself a colonial relic rooted in genocidal legislation like the Doctrine of Discovery. The conditional recognition of Indigenous rights undermines them completely.

### CONCLUSION

Ultimately, the Wet'suwet'en struggle demonstrates that efforts at Indigenous land dispossession and cultural erasure are made possible by Canadian law and violent agents of the state. In this example, we can observe the violence enacted by law enforcement through policing practices, which has been occurring since settlers landed on Indigenous territory, continue to inflict harm on Indigenous land and bodies. This essay proposes two arguments. First, recognizing Indigenous rights and title while simultaneously affirming the right to infringe on them violates the

essence of consent, and second, legitimating Indigenous land defense requires a legally binding interpretation of UNDRIP in adopting an Indigenous consent framework. Colonial priorities of expansion and extraction that require Indigenous land dispossession and an acknowledgement of Indigenous rights to land cannot coexist. Evidently, the violence exhibited on Wet'suwet'en territory emphasizes the urgency of sovereignty for Indigenous peoples.

## REFERENCES

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- Armao, Mark. "The Wet'suwet'en pipeline conflict is heating up. Here's why." *National Observer*. 2021. <https://www.nationalobserver.com/2021/11/18/news/climatedesk-canada-supports-pipeline-violation-wetsuweten-law-well-its-own>
- Armao, Mark. "Land Defenders Appear in Court After Police Raids in Wet'suwet'en Territory." *Grist*. 2021. <https://grist.org/indigenous/land-defenders-appear-in-court-in-british-columbia/>
- Babcock, M. Hope. "[This] I know From My Grandfather: The Battle for Admissibility of Indigenous Oral History As Proof of Tribal Land Claims." In *American Indian Law Review*. 2013. <https://www.jstor.org/stable/pdf/41940640.pdf?refreqid=excelsior%3A780aeb51767d8eb99dbb7bc139d16478>
- Borrows, John. "Sources and Scope of Indigenous Legal Traditions." In *Canada's Indigenous Constitution*. University of Toronto Press. 2010.
- Boyer, Yvonne. "Using the UN Framework to Advance and Protect the Inherent Rights of Indigenous Peoples in Canada." *Centre for International Governance Innovation*. 2014.
- Centre for Constitutional Studies. "The Sparrow Test: Justifying Infringements of Aboriginal or Treaty Rights." *The Centre for Constitutional Studies*. n.d. <https://www.constitutionalstudies.ca/2021/09/the-sparrow-test-justifying-infringements-of-aboriginal-or-treaty-rights/>
- Davis, Augusta. "Unceded Land: The Case for Wet'suwet'en Sovereignty." *Cultural Survival*. 2020. <https://www.culturalsurvival.org/news/unceded-land-case-wetsuweten-sovereignty>
- Duncanson, Sander. et. al, "Federal UNDRIP Bill Becomes Law." *Osler*. 2021. <https://www.osler.com/en/resources/regulations/2021/federal-undrip-bill-becomes-law#:~:text=On%20June%2016%2C%20Canada's%20Senate.the%20Act>
- Flanagan, Tom. "Trudeau government bill may grant First Nations veto power over pipelines and other projects." *Fraser Institute*. 2019. <https://www.fraserinstitute.org/article/trudeau-government-bill-may-grant-first-nations-veto-power-over-pipelines-and-other-projects>
- Fraser, Keith. "B.C. Appeal Court 'sorely lacking' in people of colour says top judge." *Vancouver Sun*. 2021. <https://vancouver.sun.com/news/b-c-appeal-court-sorely-lacking-in-people-of-colour-says-top-judge>
- Gilbert, Jérémie. "Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title." *The International and Comparative Law Quarterly*. 2007.

## Indigenous Politics

- Kurjata, Andrew. "20 years ago, this court case changed the way Canadians understood Indigenous rights." *CBC News*. 2017. <https://www.cbc.ca/news/canada/british-columbia/delgamuukw-vs-british-columbia-20-years-rights-titles-1.4440703>
- Kennedy, Duncan. "Freedom and Constraint in Adjudication: A Critical Phenomenology." *Journal of Legal Education*. 1986.
- Kuokkanen, Rauna. "Restructuring Relations: Indigenous Self-Determination, Governance, and Gender." *Oxford University Press*. 2019.
- Luk, Senwung. "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada." *Ottawa Law Review*, no. Issue 1: 101. 2009.
- Napoleon, Val. "Thinking About Indigenous Legal Orders." *Dialogues on Human Rights and Legal Pluralism*, 229-245.. Edited by René Provost and Colleen Sheppard. 2013.
- Proulx, Craig. "Colonizing Surveillance: Canada Constructs an Indigenous Terror Threat." *Anthropologica*. 2014.
- Provincial Government of British Columbia, "Declaration on the Rights of Indigenous Peoples Act." n.d. <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>
- Yellowhead Institute, "Land Back: A Yellowhead Institute Red Paper." *Yellowhead Institute*. 2019. <https://redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf>
- Yellowhead Institute, "The UN Declaration on the Rights of Indigenous Peoples in Canada" Lessons from B.C." *Yellowhead Institute*. 2020. <https://yellowheadinstitute.org/wp-content/uploads/2020/12/yellowhead-institute-bc-undrip-report-12.20-compressed.pdf>