Reconciliation on Trial:

WET'SUWET'EN, ABORIGINAL TITLE & THE RULE OF LAW

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PHOTO: KATE GUNN

Preface

Why are so many Canadians surprised when Indigenous people erect blockades to defend their lands and children's future?

I think it's because most Canadians prefer the facile narrative of national reconciliation to the uncomfortable reality of betrayal and unfulfilled promises.

Industry and Canadian politicians are adept at peddling the reconciliation narrative. Canadians want to believe it. It fits the image of 'Canada-the-good' they were taught in school. It justifies the continuing exploitation of Indigenous lands.

Occasionally Canadians are jarred out of their complacency. They are genuinely surprised to learn many Indigenous people are not satisfied with hugs and apologies, that instead of reconciliation and partnership, the present-day Indigenous reality is more often characterized by violence and denial.

As long as daily routines are disrupted, Canadians start asking why. Such 'teaching moments', while they last, provide an opportunity to raise awareness and engage in a national debate about the country's past, present and future.

Unfortunately, when it comes to Indigenous issues Canada has a short attention span. Events intervene, governments commit to

negotiations, blockades are taken down, commuter trains resume service, interest wanes, people forget.

To combat forgetfulness, we've gathered together our essays on the controversy that erupted in the winter of 2020 when members of the Wet'suwet'en sought to reinforce their own laws in the face of Canadian aggression. Whether the memorandum of understanding eventually signed between the Wet'suwet'en Hereditary Chiefs and the provincial and federal governments results in recognition or disappointment will, in part, depend on the power of memory.

As Indigenous people know, real change doesn't happen in a flash. Oppression, racism and exploitation do not disappear with the signing of an agreement to negotiate. They persist and thrive on forgetfulness.

The Wet'suwet'en and their supporters across the country and around the world, both Indigenous and non-Indigenous, spoke out strong and clear through the winter and spring of 2020. Let their passion, commitment and fearlessness continue to remind and inspire all of us to insist on a better Canada.

Bruce McIvor, PhD
First Peoples Law Corporation
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First Peoples Law Corporation is legal counsel for Unist'ot'en. The statements here are made on our own behalf and reflect our views on this issue, not those of our client.

PHOTO: CODY O'NEIL

FEBRUARY 13, 2020

The Wet'suwet'en, Aboriginal Title and the Rule of Law: An Explainer

By Kate Gunn & Bruce McIvor

The RCMP's enforcement of the Coastal GasLink injunction against the Wet'suwet'en has ignited a national debate about the law and the rights of Indigenous people.

Unfortunately, misconceptions and conflicting information threaten to derail this important conversation. Below, we attempt to provide clear, straightforward answers to address some of these fundamental misunderstandings.

WHAT ABOUT SUPPORT FOR THE PROJECT FROM THE WET'SUWET'EN ELECTED CHIEFS AND COUNCILS?

Media outlets across the country have repeatedly reported that First Nations along the pipeline route, including the Wet'suwet'en, have signed agreements in support of the project.

Underlying this statement are several key issues that require clarification.

First, the Wet'suwet'en, like many Indigenous groups in Canada, are governed by both a traditional governance system and elected Chiefs and Councils.

The Chief and Council system exists under the *Indian Act*, a piece of federal legislation. It was introduced by the federal government in the 19th century as part of Canada's attempts to systematically oppress and displace Indigenous law and governance.

The Wet'suwet'en hereditary governance system predates colonization and continues to exist today. The Wet'suwet'en and Gitxsan Hereditary Chiefs, not the *Indian Act* Chiefs and Councils, were the plaintiffs in the landmark *Delgamuukw-Gisday'way* Aboriginal title case. They provided the court with exhaustive and detailed evidence of the Wet'suwet'en and Gitxsan governance system and the legal authority of Hereditary Chiefs.

Unless otherwise authorized by the Indigenous Nation members, the authority of elected Chiefs and Councils is limited to the powers set out under the *Indian Act*. The *Indian Act* does not provide authority for a Chief and Council to make decisions about lands beyond the boundaries of the First Nation's reserves.

By contrast, the Hereditary Chiefs are responsible under Wet'suwet'en law and governance for making decisions relating to their ancestral lands. It is these lands that the Hereditary Chiefs are seeking to protect from the impacts of the pipeline project, not *Indian Act* reserve lands.

Second, Indigenous peoples hold rights to lands in Canada which extend far beyond the boundaries of *Indian Act* reserves, including Aboriginal title and rights to the lands they used and occupied prior to the arrival of Europeans and the assertion of Crown sovereignty. Aboriginal title and rights are protected under the *Constitution Act, 1982* – the highest law in Canada's legal system.

Third, the fact that First Nations have signed agreements with Coastal GasLink does not, in itself, mean that its members support the project without qualification.

Across the country, *Indian Act* band councils are forced to make difficult choices about how to provide for their members – a situation which exists in large part due to the process of colonization, chronic underfunding for reserve infrastructure and refusal on the part of the Crown to meaningfully recognize Indigenous rights and jurisdiction.

The fact that elected Wet'suwet'en Chiefs and Councils have entered into benefit agreements with Coastal GasLink should not be taken as unconditional support for the project.

Finally, similar to how Canada functions as a confederation with separate provinces with their own authority, First Nation decisions on major projects are not simply a matter of majority rules.

The Quebec provincial government made it clear that it was opposed to and would not sanction the proposed Energy East pipeline. The federal government and other provincial governments respected Quebec's right to make this decision. Similarly, First Nations often disagree about major projects. One cannot speak for another and the majority cannot simply overrule the minority or individual First Nations.

BUT AREN'T THE *INDIAN ACT* CHIEFS AND COUNCILS DEMOCRATICALLY ELECTED?

Chiefs and Councils under the *Indian Act* may be elected, but they do not necessarily speak for the Nation as a whole.

Most Chiefs and Councils are elected by status 'Indians' whose names are on an *Indian Act* band list. The federal government decides who is entitled to be registered as a status Indian through the registration provisions of the *Indian Act*. The registration provisions are restrictive and have been subject to numerous legal challenges.

Some *Indian Act* bands have adopted custom election codes that allow non-status 'Indians' to vote. However, in general if an individual does not meet the criteria for 'Indian' status under the *Indian Act*, they will not be able to vote in band elections.

Critically, the fact that an Indigenous person is not registered under the *Indian Act* does not mean that they do not hold Aboriginal title and rights. Aboriginal title and rights are held collectively and are not restricted to status Indians registered under the *Indian Act*.

BUT WHAT ABOUT THE 'RULE OF LAW'?

Land law in Canada is much more complicated and uncertain than most non-Indigenous Canadians appreciate.

When European colonizers arrived, numerous Indigenous Nations existed throughout the land we now call Canada. Each Indigenous Nation, including the Wet'suwet'en, had their own unique and specific set of land laws. Canadian courts continue to recognize that Indigenous laws form part of Canada's legal system, including as a basis for Aboriginal title. The "rule of law" therefore includes both Canadian and Indigenous law.

Under international and British law at the time of colonization, unless Indigenous people were conquered or treaties were made with them, the Indigenous interest in their land was to be respected by the law of the European colonizing nation. The British Crown never conquered or made a treaty with the Wet'suwet'en.

In the early days of the colonization of what is now British Columbia, the British government was well aware that based on its own laws it was highly questionable that it had any right to occupy Indigenous lands or assign rights in those lands to individuals or companies.

Nonetheless, beginning in the 1860s the colony of British Columbia began passing its own land laws and giving out property interests in Indigenous land without any established legal right to do so.

The source of the Province's authority over Indigenous lands remains unresolved in Canadian law today.

In 2004 the Supreme Court of Canada referred to the historical and current situation as British Columbia's *de facto* control of Indigenous lands and resources.

In other words, the Supreme Court recognized that the Province's authority to issue permits for Indigenous lands, including the type of permits issued for the Coastal GasLink pipeline, is not based on established legal authority. It is based on the fact that the Province has proceeded, for over 150 years, to make unilateral decisions about Indigenous lands.

The fact that the Province has acted since the 1860s as though it has full authority to decide how Indigenous peoples' lands are used does not make doing so legal or just.

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ISN'T THIS CROWN LAND?

Under Canadian law, the Crown, as represented by the various provincial governments, has what is referred to as the underlying interest in all land within provincial boundaries. This is based on the discredited and internationally repudiated 'doctrine of discovery'. Courts in Canada have concluded that regardless of the doctrine of discovery having been rejected around the world, they are unable to question its legitimacy.

Importantly, even if one accepts that provincial governments hold the underlying interest in 'Crown land', that interest is subject to strict limits. It does not mean that the provincial governments have a legal right to occupy Indigenous lands or to grant rights to those lands to individuals or companies. Nor does it give provincial governments the right to sell Indigenous land, assign interests to people or companies or forcibly remove Indigenous people from their territories.

The right to benefit from the land, decide how the land should be used and exclude other people from entering on or using the land is separate from the Crown's underlying interest in the land.

The right to benefit from the land and exclude others from using the land is part of what Canadian courts have described as Aboriginal title. Aboriginal title, including Wet'suwet'en Aboriginal title, takes precedence over the Crown's underlying interest in the land.

While Canadian courts have held that provincial governments may be able to infringe Aboriginal title, the requirements to justify infringement are very onerous. The provincial government has not attempted to justify its infringement of Wet'suwet'en Aboriginal title.

BUT WHAT ABOUT THE WET'SUWET'EN NOT HAVING PROVEN THEIR ABORIGINAL TITLE IN COURT?

As with other Indigenous Nations, Wet'suwet'en Aboriginal title exists as a matter of law. It predates the colony of British Columbia and British Columbia's entry into confederation in 1871.

Its existence was not created by section 35 of the *Constitution Act, 1982* nor does it depend on recognition by Canadian courts.

Canadian courts can recognize Wet'suwet'en Aboriginal title, but they cannot create it. A court declaration of Aboriginal title would merely confirm its existence under Canadian law.

In the *Delgamuukw-Gisday'way* case, the courts heard extensive evidence about Wet'suwet'en title and rights. Ultimately, the Supreme Court refused to issue a declaration in favour of the Wet'suwet'en because of a technicality in the pleadings. The parties were left to either negotiate a resolution or begin a new trial.

Regardless of whether there is a court declaration, it is open to the Province to recognize and respect the existence of Wet'suwet'en title at any time.

Instead of recognizing the existence of Aboriginal title, the current provincial government continues to adhere to a policy of denial. This is the same policy endorsed by every provincial government since British Columbia became a part of Canada.

As long as it maintains this policy, the Province avoids the implications of having to recognize Wet'suwet'en title and fulfil its corresponding obligations under Canadian law.

By its continued denial of Wet'suwet'en title, the Province avoids the hard work of reconciling its longstanding failure to respect Indigenous land rights with the continued existence and resurgence of Wet'suwet'en law and governance.

PHOTO: CODY O'NEIL

FEBRUARY 20, 2020

The Wet'suwet'en, Governments and Indigenous Peoples: A 5 Step Plan for Reconciliation

By Bruce McIvor

Canada has reached a watershed moment.

Will it continue to bulldoze Indigenous rights in the name of resource exploitation and jobs and profits for the few, or it will renounce its colonialist past and strike out on the path of respect, collaboration and partnership with Indigenous people?

Using the current national response to the Wet'suwet'en controversy as a springboard for discussion, here's my 5-step plan for preparing the ground for real reconciliation.

#1 RENOUNCE VIOLENCE AGAINST INDIGENOUS PEOPLE

Canada must stop using the threat and reality of state-sanctioned violence to forcibly remove Indigenous people from their land. Reconciliation cannot be achieved through force.

The threat of violence as a tool of oppression of Indigenous people raises the spectre of Canada's long, violent history of colonialism. A post-colonial world does not include violence.

True reconciliation cannot begin until state-sanctioned violence is no longer an option.

#2 IMPLEMENT UNDRIP

We would not be in the situation we are in today if the British Columbia government was serious about implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.

Less than three months ago, the *Declaration on the Rights of Indigenous Peoples Act* became law in British Columbia to great fanfare. Instead of marking a new day for reconciliation and respect, it has fostered resentment and cynicism.

Why? Because in response to the Wet'suwet'en standoff, the provincial government failed to respect its own law. It took the position that its UNDRIP legislation does not apply to projects that had already received provincial approval. Its position is indefensible.

British Columbia's UNDRIP legislation is not simply forward-looking. It imposes a positive obligation on the provincial government to ensure that UNDRIP principles are implemented in the ongoing application of existing provincial law. In this context, 'law' includes legislation, regulations and policies.

The federal government is currently planning to introduce its own UNDRIP legislation. It must not repeat British Columbia's mistake.

#3 FULFILL THE FEDERAL GOVERNMENT'S ROLE

Until the last few days, the federal government has been sadly absent as the RCMP invaded Wet'suwet'en land and demonstrations of support erupted across the country.

The federal government has an important constitutional role to play when Indigenous Peoples find their rights threatened by provincial governments and resource extraction companies.

When Canada came into being in 1867, the federal government was assigned exclusive legislative authority over "Indians and Lands reserved for Indians". This was done for two main reasons: ensure a national policy on Indigenous issues and protect Indigenous Peoples from what at the time were referred to as 'local settler majorities'—we now call them provincial governments.

The federal government has an important constitutional role to play when Indigenous Peoples find their rights threatened by provincial governments and resource extraction companies.

In recent years the Supreme Court has expanded the role of provincial governments in resolving disagreements over Aboriginal and Treaty rights. This change does not absolve the federal government of its continuing responsibilities.

Because it does not face the same local pressure to remove Indigenous people from their land as provincial governments do, the federal government has an important role to play in resolving disputes.

The federal government must have the courage to fulfill its historical and legal responsibilities to Indigenous Peoples.

#4 SIGN RECOGNITION AGREEMENTS

Recognition is the prerequisite for reconciliation.

Today's controversy is the result of and a continuation of British Columbia's 150-year history of denying Indigenous rights, including Aboriginal title.

While the current provincial government publicly talks of recognition and reconciliation, in the courts and all too often on the ground, it perpetuates British Columbia's long history of denial.

Because provincial and federal governments continue to deny the existence of Aboriginal title, the courts hold them to no more than the procedural requirements to consult and, in some cases, accommodate. As the recent Trans Mountain Pipeline decision from the Federal Court of Appeal demonstrated, the duty to consult has become an ineffectual tool for Indigenous Peoples seeking to protect their Aboriginal title lands.

Instead of creating the basis for meaningful dialogue, the duty to consult has too often become the gateway to the RCMP's militarized enforcement of injunctions against Indigenous people. Over 15 years ago, the Supreme Court recognized that injunctions are all-or-nothing solutions with Indigenous people too often finding themselves on the losing end.

It is open to the federal and provincial governments to jettison denial policies and recognize Aboriginal title through agreement. As the Supreme Court has repeatedly reminded all parties, the courts are not required to be involved.

While Indigenous rights exist without government recognition, a formal recognition agreement would put an end to the destructive status quo of denial.

If there are issues about so-called 'overlaps' with neighbouring Indigenous Peoples, initial agreements can either be limited to core Aboriginal title lands or acknowledge the necessity of resolving competing claims for title. After a recognition agreement is signed the hard work of creating the space for respecting Aboriginal title through subsequent implementation agreements can begin.

Fortunately, we have clear evidence that the sky does not fall and the economy does not grind to a halt when Aboriginal title is recognized. In 2014 the Tsilhqot'in obtained a declaration of Aboriginal title to a portion of their territory. What have they been doing since? They've been in serious, respectful negotiations with the provincial and federal governments based on the recognized existence of their Aboriginal title.

A final, but crucial aspect of any potential recognition agreement would be that it would confirm respect for Indigenous law.

One of the most concerning developments in the dispute between the Wet'suwet'en and the pipeline company is that in its most recent injunction decision the B.C. Supreme Court held that while Indigenous law exists, it cannot be put into effect as part of Canadian law without a treaty, legislation or agreement.

While there are serious questions to be asked about the soundness of the Court's conclusion, its immediate effect has been to undermine many Indigenous Peoples' confidence in the Canadian legal system. A recognition agreement that recognized both Aboriginal title and Indigenous law would go a long way to renewing Indigenous Peoples' confidence in Canadian courts.

#5 EMBRACE CONSENT-BASED DECISION MAKING

Certainty, respect and collaboration depend on consent-based decision making. As long as governments continue to raise the fear of an Indigenous veto, they will fail Indigenous people and the wider public.

As many commentators have noted, veto and consent are not the same thing—the former is exercised arbitrarily, the latter is actively sought and occasionally withheld.

When government and industry talk of 'no veto', the implication is, 'therefore we're going to do what we want to do whether you support it or not.' This is the antithesis of good faith consultation. It results in projects being forced through over valid Indigenous concerns and possible alternatives.

Case in point, several years ago the Wet'suwet'en Hereditary Chiefs proposed an alternative route for the Coastal GasLink project, a route that would traverse a portion of their territory already developed for industry and that would avoid a pristine, undeveloped part of their territory. The company rejected the Chiefs' proposed alternative route based on technical issues and additional cost.

Across Canada, alternative solutions proposed by Indigenous people can be rejected with confidence because federal and provincial governments emphasize the lack of an Indigenous veto instead of seeking consent.

As long as governments rely on the language of veto, there is little incentive to work with Indigenous Peoples to find respectful, workable solutions.

Consent-based decision making is about actively engaging with Indigenous people with the intention of identifying solutions that will result in Indigenous consent. It includes

accepting that in certain situations the answer is going to be no. Non-Indigenous governments always retain the right to reject a project. Indigenous Peoples deserve the same respect.

In Canada the consent principle dates at least as far back as the Royal Proclamation of 1763. The Supreme Court has identified it as the preferable path of engagement and as a necessity in certain circumstances.

The question arises—who is authorized to give consent? Indigenous Peoples across the country are working to revitalize their Indigenous laws and governance, either separate from or working with the existing *Indian Act* Chief and Council system. The federal and provincial governments need to support and respect this work.

Consent-based decision making is practical and workable. It respects Indigenous Peoples' right to make decisions about how their land will or will not be used. A commitment to consent-based decision making will create certainty for all Canadians.

Which Way Canada?

The voices of the status quo are loud and relentless. Hiding behind the self-serving rhetoric of the 'rule of law' and the 'public interest' they call for the removal of Indigenous Peoples from their lands.

Canadians have a choice to make. Will they double-down on denial and oppression or will they embrace respect for constitutional rights and Indigenous Peoples' laws?

Our children will judge the choice we make today.

PHOTO: SHAWNA SMITH

FEBRUARY 20, 2020

La nation Wet'suwet'en, les gouvernements et les peuples autochtones : Un plan de réconciliation en 5 étapes

Par Bruce McIvor
Traduction : Denis Marier

Le Canada en est arrivé à un point crucial.

Le pays continuera-t-il à écraser les droits des Autochtones au nom de l'exploitation des ressources, des emplois et des profits d'une minorité de personnes, ou renoncera-t-il à son passé colonialiste et s'engagera-t-il dans la voie du respect, de la collaboration et des partenariats avec les peuples indigènes ?

Compte tenu de la réaction nationale actuelle à la controverse sur la nation Wet'suwet'en, en soi un tremplin propice de discussion, voici mon plan en cinq étapes pour préparer le terrain en vue d'une vraie réconciliation.

#1 RENONCER À LA VIOLENCE CONTRE LES PEUPLES AUTOCHTONES

Le Canada doit mettre un terme à la menace et aux actions de violence étatiques pour déposséder par la force les peuples autochtones de leurs territoires. Il est impossible de parvenir à la réconciliation par la force.

La menace de violence comme outil d'oppression des peuples autochtones réveille le spectre de la longue et violente histoire de colonialisme perpétrée par le Canada. Il n'y a pas de place pour la violence dans un monde post-colonialiste.

Une véritable réconciliation ne peut s'amorcer tant que la violence étatique n'est pas encore une option éradiquée.

#2 METTRE EN ŒUVRE LA DÉCLARATION DES NATIONS-UNIES SUR LES DROITS DES PEUPLES AUTOCHTONES (DNUDPA)

Nous ne serions pas dans la situation actuelle si le gouvernement de la Colombie-Britannique avait joué franc jeu en disant mettre en œuvre la *Déclaration des Nations Unies sur les droits des peuples autochtones*.

Il y a moins de trois mois, la *Déclaration des Nations Unies sur les droits des peuples autochtones* a été adoptée légalement en Colombie-Britannique, en grande fanfare. Au lieu d'instituer une nouvelle page dans les relations en vue de la réconciliation et du respect, elle a insinué un climat de ressentiment et de cynisme.

Pour quelle raison ? Parce qu'en réaction à la confrontation de la nation Wet'suwet'en, le gouvernement a outrepassé sa propre loi, argumentant que sa loi en vertu de la DNUDPA ne s'applique pas aux projets qui avaient déjà reçu l'approbation provinciale. La position du gouvernement est inadmissible.

La loi de la Colombie-Britannique qui entérine la DNUDPA n'est pas seulement en fonction de l'avenir. Elle impose une obligation active au gouvernement provincial de veiller à ce que les principes sous-jacents à la DNUDPA soient entérinés dans l'application courante des lois provinciales existantes. Dans ce contexte, le terme « loi » comprend le corps de la loi, les règlements et les politiques.

Le gouvernement fédéral prépare actuellement le dépôt de sa propre législation sur la DNUDPA. Il ne doit pas répéter l'erreur où s'est engouffrée la Colombie-Britannique.

#3 LE GOUVERNEMENT FÉDÉRAL DOIT ASSUMER SON RÔLE

Jusqu'à tout dernièrement, le gouvernement fédéral s'est regrettablement montré absent de cette scène, alors que la GRC a envahi les terres Wet'suwet'en et que des démonstrations d'appui aux Autochtones ont éclaté dans tout le pays.

Le gouvernement fédéral a un important rôle constitutionnel à remplir alors que les peuples autochtones voient leurs droits remis en question par des gouvernements provinciaux et des compagnies d'extraction des ressources.

En 1867, à la naissance du Canada, le gouvernement fédéral s'est vu attribuer l'autorité législative exclusive sur « les Indiens et les territoires réservés aux Indiens ». La raison en était double : établir une politique nationale sur les questions relatives aux Autochtones et protéger les peuples autochtones contre ce que l'on appelait à l'époque les « majorités coloniales locales », que nous appelons aujourd'hui les gouvernements provinciaux.

Dans les dernières années, la Cour suprême a élargi le rôle des gouvernements provinciaux en matière de règlement des différends concernant les droits autochtones et des traités qui les concernent. Ce changement n'absout pas le gouvernement fédéral de ses responsabilités, qui demeurent.

Compte tenu de ce qu'il n'est pas confronté aux mêmes pressions locales que les gouvernements provinciaux en vue d'écarter les peuples autochtones de leur territoire, le gouvernement fédéral a un important rôle à assumer dans le règlement des différends.

Le gouvernement fédéral doit avoir le courage d'assumer ses responsabilités historiques et légales envers les peuples autochtones.

Le gouvernement fédéral a un important rôle constitutionnel à remplir alors que les peuples autochtones voient leurs droits remis en question par des gouvernements provinciaux et des compagnies d'extraction des ressources.

#4 SIGNER DES ENTENTES DE RECONNAISSANCE

La reconnaissance est un prérequis à la réconciliation.

La présente controverse est l'aboutissement de l'exercice, depuis 150 ans, du déni, par la Colombie-Britannique, des droits autochtones – ce qui touche tous les droits autochtones.

Alors que le gouvernement provincial actuel parle ouvertement de reconnaissance et de réconciliation, dans les cours de justice et trop souvent sur le terrain, il perpétue la longue tradition de déni qui constitue la tradition en Colombie-Britannique.

Étant donné que les gouvernements fédéral et provinciaux continuent de nier l'existence des droits autochtones, les cours de justice les enjoignent à rien de plus que les exigences de procédure, soit de procéder à des consultations et, dans certains cas, à des adaptations. Comme la décision de la Cour d'appel fédérale sur l'oléoduc Trans Mountain l'a démontré, le devoir de consulter est devenu un outil inefficace pour les Peuples autochtones cherchant à protéger leurs droits territoriaux.

Au lieu de créer la base d'un dialogue représentatif, le devoir de consulter est trop souvent devenu une porte ouverte à l'imposition par la force militaire de la GRC d'injonctions contre les peuples autochtones. Il y a plus de 15 ans, la Cour suprême du Canada a reconnu que les injonctions sont des solutions du tout-ou-rien dans lesquelles les peuples autochtones se retrouvent trop souvent au petit bout du bâton.

Il revient aux gouvernements fédéral et provinciaux de se défaire, une fois pour toutes, des politiques de déni des droits autochtones et de les reconnaître, par des ententes. Comme la Cour suprême l'a maintes fois rappelé à toutes les parties concernées, les cours de justice ne sont pas requises de participation dans cette reconnaissance des droits autochtones.

Comme les droits autochtones existent sans la reconnaissance par les gouvernements, une entente de reconnaissance officielle viendrait mettre un terme au statu quo destructeur que représente ce déni.

Dans l'éventualité de questions sur des droits prétendus de 'chevauchements territoriaux' avec des peuples autochtones voisins, il est toujours possible de limiter les ententes initiales aux droits territoriaux autochtones de souche, ou de reconnaître la nécessité de résoudre les questions de droits concurrentes. Après la signature d'une entente de reconnaissance, il sera possible de procéder à la redéfinition des limites particulières des droits autochtones concernés par des ententes qui en découleront.

Heureusement, nous possédons des constats clairs que le ciel ne tombera pas et que l'économie ne se dématérialisera pas à la reconnaissance des droits autochtones. En 2014, la nation Tsilhqot'in a obtenu la déclaration d'un droit autochtone sur une partie de son territoire. Qu'a-t-elle fait depuis ce temps ? Elle s'est engagée dans des négociations sérieuses et respectueuses avec les instances gouvernementales fédérales et provinciales, sur la base de ses droits autochtones reconnus.

Un aspect final mais crucial de toute entente potentielle de reconnaissance serait qu'elle confirme le respect du droit autochtone.

L'un des développements les plus préoccupants du différend entre la nation Wet'suwet'en et la compagnie du gazoduc tient à ce que la décision de la Cour suprême de Colombie-Britannique dans son injonction la plus récente argumente que même si le droit autochtone existe, il ne peut intervenir dans le cadre du droit canadien sans le soutien d'un traité, d'une loi ou d'une entente.

Si d'une part il existe des questions importantes à débattre sur le bien-fondé de la conclusion de la Cour, d'autre part dans l'immédiat elle a eu pour effet de saper la confiance de nombreux peuples autochtones envers le système légal canadien. Une entente de reconnaissance qui reconnaîtrait aussi bien les droits que les lois autochtones pourrait grandement renouveler la confiance des peuples autochtones dans les cours de justice canadiennes.

#5 FAVORISER LE PROCESSUS DÉCISIONNEL FONDÉ SUR LE CONSENTEMENT

Il est certain que le respect et la collaboration dépendent d'un processus décisionnel fondé sur le consentement. Tant qu'ils continueront de soulever des craintes quant à la possible imposition d'un véto aux Autochtones, les gouvernements s'inscriront en défaut face aux peuples autochtones et face au public en général.

Comme de nombreux commentateurs l'ont fait remarquer, le véto et le consentement ne sont pas la même chose. Le véto est exercé de façon arbitraire, alors que le consentement est recherché activement et il est parfois retenu.

Lorsque le gouvernement et l'industrie parlent de 'pas de véto', l'implication est la suivante : 'par conséquent nous allons faire ce que nous voulons, que vous soyez d'accord ou pas'. C'est l'antithèse d'une consultation de bonne foi, avec pour résultat que l'on applique de force des projets en faisant fi des préoccupations valides des instances autochtones et des solutions de rechange possibles.

A ce titre, il y a plusieurs années les Chefs héréditaires Wet'suwet'en ont proposé un tracé de rechange au projet de Coastal GasLink, un tracé qui traverserait une partie de leur territoire déjà développé pour l'industrie et qui éviterait d'envahir une partie de leur territoire vierge, non développé. La compagnie a rejeté le tracé de rechange proposé par les chefs héréditaires, alléguant des questions techniques et un coût plus élevé.

Partout au Canada, les solutions de rechange proposées par les Autochtones peuvent être facilement rejetées, les instances gouvernementales provinciales et fédérales s'appuyant sur l'absence d'un véto autochtone, au lieu de chercher à obtenir un consentement.

Tant que les gouvernements s'appuient sur la dynamique du véto, ils ont peu d'intérêt à chercher à s'entendre avec les peuples autochtones dans la recherche de solutions respectueuses et efficaces.

Le processus décisionnel fondé sur le consentement exige la tenue de discussions avec les peuples autochtones dans l'intention de trouver des solutions qui encourageront le consentement des Autochtones. Cela veut aussi dire d'accepter que dans certaines circonstances, la réponse de l'autre partie puisse être négative. Les gouvernements non autochtones conservent toujours le droit de rejeter un projet. Les peuples autochtones ont droit au même respect.

Au Canada le principe du consentement remonte aussi loin qu'à la Proclamation royale de 1763. La Cour Suprême l'a indiquée comme le moyen de prédilection, et comme une nécessité dans certaines circonstances.

Par conséquent – qui est autorisé à donner son consentement ? D'un bout à l'autre du pays les peuples autochtones travaillent à revitaliser leur lois et règles de gouvernance autochtones, soit distinctement ou encore dans le cadre du système des chefs et conseils de bande de la *Loi sur les Indiens* actuelle. Les instances fédérales et provinciales doivent soutenir cet effort et le respecter.

Le processus décisionnel fondé sur le consentement est pratique et fonctionnel. Il respecte le droit des peuples autochtones de prendre des décisions quant à l'utilisation ou la conservation de leur territoire. Un engagement vers le processus décisionnel fondé sur le consentement établira un cadre de certitude qui profitera à tous les Canadiens.

De quel genre d'honneur se targue le Canada?

Les voix appuyant le statu quo ne cessent de retentir avec force. Se cachant derrière leurs conventions et arguments de complaisance de la « règle de droit » et de « l'intérêt public », ces voix recherchent le déplacement des peuples autochtones de leurs territoires.

Les Canadiens doivent choisir. Continueront-ils de perpétrer le déni et l'oppression ou s'engageront-ils dans le respect des droits constitutionnels et des lois autochtones ?

Nos enfants seront les juges des choix que nous prenons maintenant.

PHOTO: OSSIE MICHELIN

FEBRUARY 7, 2020

Reconciliation at the End of a Gun: The Wet'suwet'en and the RCMP

By Bruce McIvor

I spend a lot of time in small towns across Canada. Often, I go for lunch with my First Nation clients. With one of my clients I noticed that we always ate at the same local restaurant over and over again, despite there being what seemed to be several other perfectly good places to eat. When I finally suggested we try one of those restaurants for a change, the response from my clients jarred me out of my comfortable complacency: this is where we feel safe, they said.

The threat and reality of violence is at the core of Indigenous experiences with non-Indigenous Canada.

My clients live with the threat of violence their entire lives. Violence inflicted on them and their loved ones by non-Indigenous people.

From an early age they learn the cruel reality that being a visibly identifiable Indigenous person in Canada means they live with a heightened risk of being insulted, attacked and killed by non-Indigenous people.

From Colten Boushie to Tina Fontaine, to a grandfather and his granddaughter handcuffed outside a bank in downtown Vancouver, violence against Indigenous people is the Canadian reality.

It is a violence that extends beyond the personal. It has been an ever-present tool in the colonization and continuing oppression and displacement of Indigenous people in Canada.

From Indigenous perspectives, Canadian history is a horror show of violence. From Governor Cornwallis' bounty on Mi'kmaq scalps, to military attacks on the fledgling Métis Nation, to Louis Riel hanged in Regina, to John A. Macdonald's policy of starvation of the Plains Cree, to Poundmaker's imprisonment, to the hanging of Tsilhqot'in Chiefs, to residential schools and the 60s scoop, the list goes on and on.

Importantly, Canadian state-sanctioned violence against Indigenous people is not simply a matter of history and easy apologies. It is a modern-day reality. Think back over the last 20 years: Oka, Gustafsen Lake, Ipperwash, Burnt Church, Elsipogtog, Unist'ot'en.

Yesterday my Wet'suwet'en clients in northern British Columbia again faced the reality of what it too often means to be an Indigenous person in Canada. While Wet'suwet'en Hereditary Chiefs and their supporters seek to defend their land against a multinational pipeline company and a provincial government that appears to believe reconciliation occurs at the end of a gun, the RCMP again amassed an armed force in an attempt to overwhelm and subdue them.

In preparation for a similar military-style raid against my clients last year, the RCMP employed a strategy of 'lethal overwatch' and using as much violence as they deemed necessary to 'sterilize the site'.

This time around the RCMP assured Canadians that the police officers tasked with dismantling Wet'suwet'en camps, handcuffing unarmed land protectors and marching them off to jail had first undergone cultural awareness training.

For many Indigenous people the very language of 'peace, order and good government' is infused with and inseparable from real, visceral, frightening experiences of violence.

On a blustery day in northern Ontario, over a hundred miles from the nearest road, I informed Anishinaabe clients that the provincial government was finally willing to sit down and explore avenues for them to exercise their inherent Indigenous 'jurisdiction.'

The Elders politely smiled, turned away and spoke among themselves in Oji-Cree. After a few minutes, as often happens, I was told a story.

It was a story about being a child and wanting to visit cousins in the neighbouring community down river. Of traveling in an open boat, of rounding a bend in the river and seeing cousins handcuffed to poplar trees.

For my clients the word 'jurisdiction' didn't connote fairness, justice and the rule of law. It conjured visions of the personifications of government and institutional authority, the priest, the RCMP officer, the Indian Agent—the people who handcuffed their cousins to poplar trees.

The threat and reality of violence extends beyond language—it has become part of the built environment that contains and defines our daily experiences.

I grew up in rural Manitoba on the fringes of the Peguis First Nation reserve. My mother held a wide variety of jobs. I thought she could do anything. I still do. One of her jobs was working in the beer parlour in the hotel in a nearby small-town.

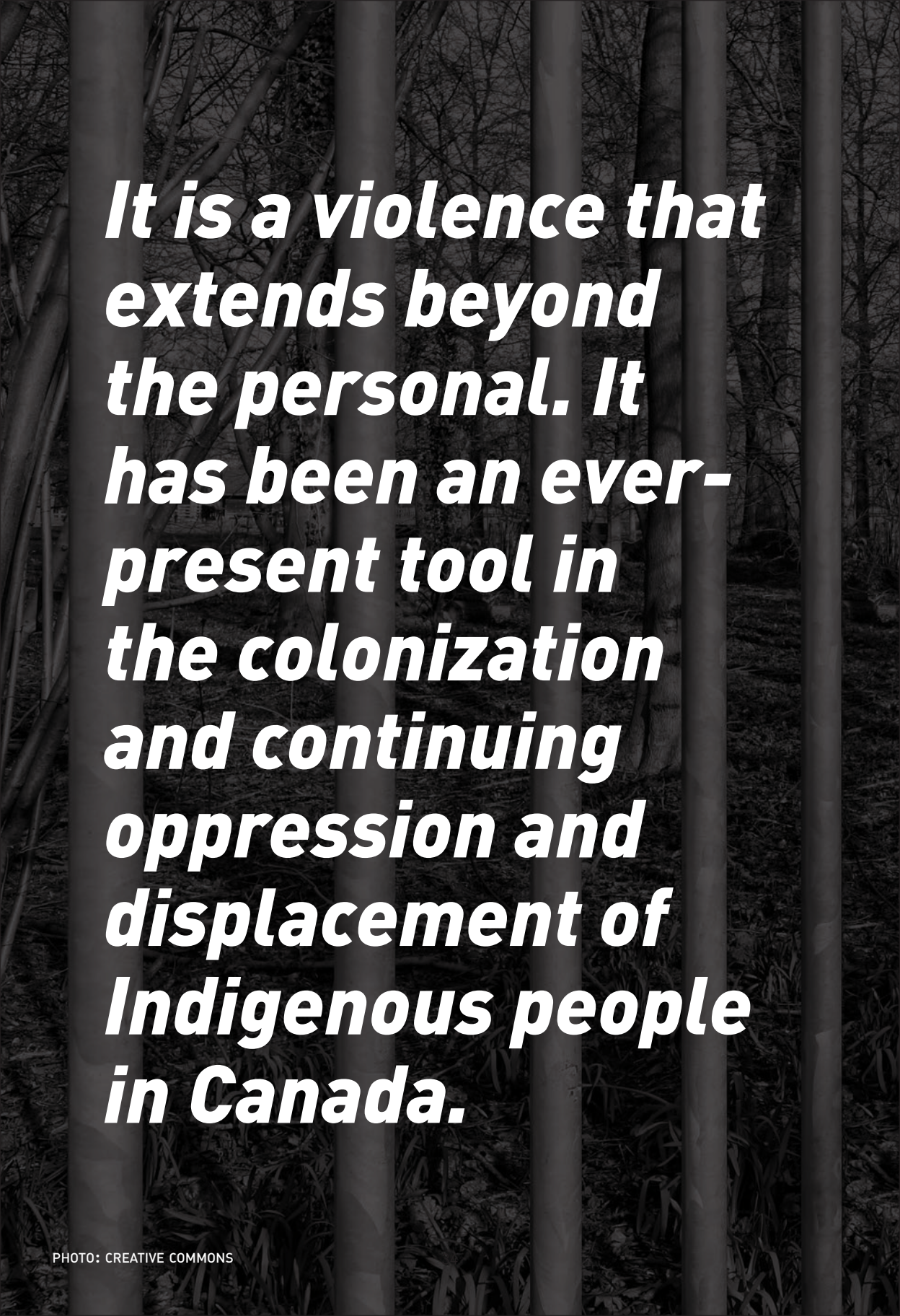
Occasionally, after school I'd wait at the hotel until her shift ended. Hoping to get a few dollars to buy a serving of French fries in the adjoining diner, I'd grip the counter at the off-sales window, pull myself up and look into the beer parlour, straining to get my mom's attention as she served draft beer and punched out change from the coin belt around her waist.

The room was dingy with a dirty carpet soaked in cheap beer. A low steel fence ran down the middle of the room, dividing it in two. I asked my mom, why is there a fence? Her answer brought many of my childhood experiences into focus: "It's to separate the Indians from the white guys." Any Indigenous person daring to sit on the wrong side of that fence risked a severe beating.

When I hear the word reconciliation I think of that fence. I think of how it represents Canada's long history of segregating Indigenous people and perpetuating violence against them.

Violence towards Indigenous people, personal, institutional and state-sanctioned, is woven into the very fabric of Canadian life, both its history and its present. It is in the words we speak and the buildings and cities we inhabit. Canadian law sanctions it, politicians justify it, industry profits from it, the public turns a blind eye.

With yesterday's RCMP raid on the Wet'suwet'en, violence has also become the hallmark of reconciliation.



It is a violence that extends beyond the personal. It has been an ever-present tool in the colonization and continuing oppression and displacement of Indigenous people in Canada.

PHOTO: CREATIVE COMMONS

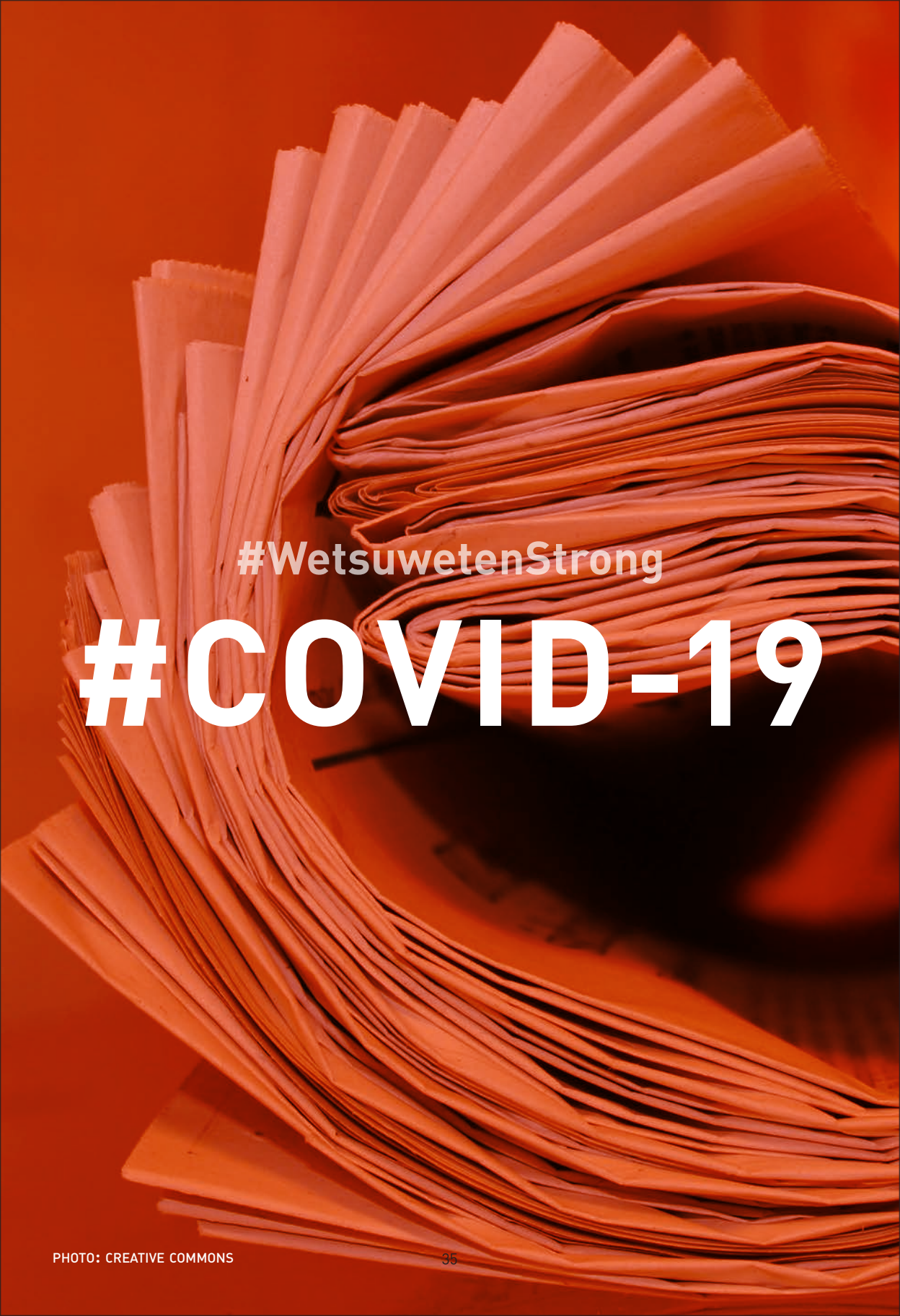


PHOTO: CREATIVE COMMONS

MAY 6, 2020

#WetsuwetenStrong in the Wake of COVID-19

By Kate Gunn

In the early months of 2020, headlines across Canada were dominated by the unfolding conflict in Wet'suwet'en territory in northern B.C.

The RCMP's forcible removal of Wet'suwet'en hereditary leaders and supporters from their ancestral lands to make way for the Coastal GasLink pipeline project sparked solidarity actions across the country, including the disruption of train traffic and the occupation of the provincial legislature in Victoria.

Fast forward three months and media coverage has all but stopped.

The global impact of the COVID-19 pandemic has eclipsed virtually all other new stories. There is little mention of whether the pipeline is proceeding, how provincial and federal leaders intend to address ongoing opposition to the project, or whether the meaningful recognition of Wet'suwet'en title is finally on the horizon.

In light of the above it would be understandable – but inaccurate – to assume that the Wet'suwet'en crisis has abated. Beneath the daily onslaught of coronavirus-related news, the issues which resulted in the conflict over the pipeline project remain unresolved. Below we provide an overview of what happened and what we can learn from the events of early 2020.

What happened

In 2014, the Province issued an environmental assessment certificate to Coastal GasLink approving the construction and operation of a 670-kilometre long natural gas pipeline from Dawson Creek to Kitimat, B.C. over the opposition of Wet'suwet'en hereditary leaders.

Coastal GasLink signed benefits agreements with elected *Indian Act* bands along the pipeline route. Wet'suwet'en hereditary chiefs and their supporters remained steadfastly opposed to the project.

The pipeline route runs through areas of particular cultural and historical significance to the Wet'suwet'en. It also includes the Unist'ot'en Healing Centre, which provides land-based healing to Indigenous people recovering from intergenerational trauma and abuse.

The Wet'suwet'en Hereditary Chiefs were plaintiffs in the landmark Delgamuukw-Gisday'wa case, in which the Supreme Court of Canada accepted evidence of the Wet'suwet'en hereditary governance system and confirmed that Aboriginal title to lands in Wet'suwet'en territory had never been surrendered or extinguished.

While it stopped short of issuing a declaration of Aboriginal title, the Supreme Court held that the Crown had a duty to enter into good faith negotiations to resolve outstanding issues with the Wet'suwet'en. Over twenty years have elapsed since the decision, but the Crown has yet to recognize Wet'suwet'en title or jurisdiction.

In December 2018, the BC Supreme Court issued an interim injunction prohibiting opponents of the pipeline project from blocking or interfering with construction activities on Wet'suwet'en territory. The RCMP's enforcement of the injunction order garnered international attention in early 2019.

The issue attracted further attention later that same year when internal communications revealed the RCMP was prepared to use lethal force against the Wet'suwet'en in the course of enforcing the injunction.

A year later, at the end of December 2019, the Court extended the injunction order until the completion of the project. Like its predecessor, the 2019 injunction order includes provisions authorizing the RCMP to enforce the injunction. In response, Wet'suwet'en hereditary leaders issued their own notice evicting the company from their territory.

A month later the RCMP carried out a multi-day operation during which Wet'suwet'en leaders, matriarchs and supporters were handcuffed, arrested and removed from their ancestral lands.

The enforcement operation was immediately followed by a series of solidarity movements across Canada and around the world. Indigenous and non-Indigenous supporters carried out non-violent demonstrations, temporarily disrupted highways and railway lines, and peacefully occupied public spaces including the B.C. legislature.

Throughout the dispute, B.C. Premier John Horgan repeatedly refused to meet Wet'suwet'en hereditary leaders, arguing that the "rule of law" must prevail. At the same time, Indigenous organizations and legal professionals emphasized the importance of resolving the underlying legal issue of who has the right to make decisions on lands subject to unextinguished Indigenous title.

Recent events

Provincial and federal leaders finally met with the Wet'suwet'en at the end of February 2020. Three days of negotiations resulted in a draft memorandum of agreement on issues related to Wet'suwet'en rights and title. Few specifics about the agreement have been released, other than that it does not expressly address the Coastal Gaslink issue.

Less than two weeks later, the World Health Organization designated COVID-19 a global pandemic. Governments throughout the world enacted sweeping changes to contain the spread of the virus, including significant disruptions to individual freedoms, daily life and economic activities.

In Canada, public attention turned swiftly from concerns about Indigenous rights and self-determination to urgent questions about maintaining public health and safety.

The effect on the Wet'suwet'en-Coastal GasLink dispute was immediate. Large gatherings of people were prohibited, making solidarity demonstrations impossible. Courts drastically reduced their hearing schedules, resulting in the indefinite suspension of numerous legal challenges filed in relation to the pipeline project.

Wet'suwet'en hereditary leaders were forced to find ways for members to review the draft agreement remotely, without access to the feast hall which plays a central role in Wet'suwet'en law and governance. As of April 28th, media sources announced that the Wet'suwet'en had reached consensus to sign the agreement, but that concerns regarding the Coastal GasLink project remain unresolved.

At the same time, public health authorities declared the pipeline project to be an essential service. Construction continues, despite mounting concerns about the increased risk of transmission of COVID-19 posed by transient workers moving to and from remote work camps.

What have we learned?

The COVID-19 pandemic has temporarily diverted public attention away from the Wet'suwet'en-Coastal GasLink conflict. However, critical issues regarding the relationship between the Crown and Indigenous Peoples remain unresolved and will need to be addressed once the current health crisis abates.

In the meantime, we have an opportunity to take stock of what we have learned so far.

First, it is far from clear whether the Coastal GasLink project will proceed as planned in Wet'suwet'en territory. The company's decision to press ahead with its agenda ignores the multiple levels of uncertainty now connected with the project, including the underlying issue of Aboriginal title, pending court challenges, outstanding permit conditions, and the ever-increasing economic ramifications of the pandemic.

Second, the federal and provincial governments' responses to the COVID-19 situation underscore that where there is sufficient political will, governments are able to act quickly and decisively to allocate resources and implement creative solutions for complex problems. It will no longer be acceptable for governments to claim that the issues posed by Indigenous title and jurisdiction are too complicated or costly to resolve.

Lastly, the winter of 2020 has revealed the deep commitment on the part of both Indigenous and non-Indigenous people in Canada to work together to achieve justice for the Wet'suwet'en.

Going forward, the public is unlikely to be distracted by specious arguments about *Indian Act* bands versus hereditary governments, the meaning of "consent" versus "veto," or the legitimacy of Indigenous law.

The pandemic has given federal and provincial leaders a reprieve, but it will not make the issues which underlie the Wet'suwet'en conflict go away.

Regardless of how long the COVID-19 situation persists, we can expect Indigenous and non-Indigenous people alike to hold their governments to account and take steps to meaningfully recognize Wet'suwet'en title and jurisdiction over their ancestral lands.

PHOTO: JEFF NICHOLLS [TSIMSHIAN]

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Kate has been called to the British Columbia and Ontario bars. She also holds an LLM from the University of British Columbia, where her research focused on the interpretation of Indigenous-Crown treaties. Her work has been published in the University of New Brunswick Law Journal and the University of British Columbia Law Review.

Kate is a founding member of the Justice and Corporate Accountability Project, a legal clinic based at Osgoode Hall and Thompson Rivers University which provides support to communities affected by transnational resource extraction.

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Bruce is dedicated to public education. He recently published the third edition of his collection of essays entitled ***First Peoples Law: Essays in Canadian Law and Decolonization (click here for free download.)*** He is also an Adjunct Professor at the University of British Columbia's Allard School of Law where he teaches the constitutional law of Aboriginal rights and Treaty rights.

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First Peoples Law

First Peoples Law was established as a vehicle for protecting and advancing the rights of Indigenous Peoples in Canada. We do this through providing the highest quality legal services while actively participating in public education. Our objective is to play a meaningful role in Indigenous Peoples' ongoing struggle for a more respectful and equitable world for themselves and their children.

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