

LEGAL SCHOLAR WEIGHS IN ON WET'SUWET'EN STANDOFF

The standoff involving Wet'suwet'en hereditary chiefs, elected band councils, Coastal GasLink, provincial and federal governments, and supporters and opponents across Canada is an "extraordinarily challenging issue," according to a legal scholar with substantial experience in Indigenous law.



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Bradford Morse, law professor at Thompson Rivers University in Kamloops, B.C.

Bradford Morse is a law professor at Thompson Rivers University in Kamloops, B.C. Over a career of more than four decades, he has taught courses on Canadian and comparative Indigenous law and served as a legal advisor to numerous First Nations, government departments and royal commissions. From 1984 to 1993, he served as general counsel to the Native Council of Canada (now the Congress of Aboriginal Peoples).

Supporters of the Wet'suwet'en hereditary chiefs who oppose the Coastal GasLink pipeline often cite the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Canada was initially one of four countries to oppose UNDRIP, but later reversed its position and supported the declaration. However, there is currently no law at the federal level committing the government to adhere to UNDRIP.

Under international law, Morse says, UN declarations are not seen as treaties, which are formally considered law. Enforcement mechanisms exist for treaties, but do not exist for declarations such as UNDRIP. Instead, UN declarations are seen as "international customary law," to which

countries are viewed as obliged to adhere unless they formally renounce them. But international customary law is only enforceable through the intervention of other nation-states.

The only jurisdiction in Canada that has enshrined UNDRIP in law is the B.C. government. Yet it was B.C. Premier John Horgan who subsequently said the "rule of law" demanded that the Coastal GasLink project go ahead, arguing that permits were in place and courts had approved construction.

Morse suggests that differing interpretations of the law pose the question: "Whose consent counts?" He notes that all five elected band councils in the Wet'suwet'en Nation approved the pipeline and entered into formal agreements with Coastal GasLink.

On the other hand, five traditional Wet'suwet'en hereditary chiefs argue that they have not given consent for the project. But Morse points out that male hereditary chiefs in 2019 stripped traditional titles from female hereditary chiefs, who supported the pipeline. Furthermore, two of these male chiefs had previously run to be chiefs on the elected band councils but were defeated.

While acknowledging that the band councils were colonial institutions imposed on First Nations by the Indian Act, Morse says the defeat of hereditary chiefs in band council elections "speaks to them not having support within their own individual First Nation." But their opposition to the pipeline "became a wonderful story. It's a story in which people could pillory the federal government and be seen to be...on the side of the weak... It's a complicated situation, which people have wanted to [portray as] white hat, black hat."

On the question of civil disobedience to protest the pipeline, Morse notes that common law provides for the right to protest on public property,



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as long as one is not preventing people from entering their own homes or workplaces.

In the case of the railway blockades in Tyendinaga, Mohawks set up the blockade on their own traditional territory.

“One of the tragic stories of First Nations across Canada is just under a third of all the First Nations have railways through their lands,” Morse says.

“The federal government, which has constitutional jurisdiction for railways, also had it of course for reserves. It made it very easy for them to seize reserve land and give it to CPR, CNR, local and regional railways. Similarly we have highways and lots of pipelines running through reserves from days when the federal government just decided to do it on its own.”

Canada, Morse says, must come to grips with issues related to traditional Indigenous land across the country. Even on treaty territory, he says, the idea that Indigenous peoples “consented” to surrender their land by signing the treaties is complicated by the fact that the Crown misrepresented what the treaties meant.

“There was no way that the negotiations encompassed the Crown making very clear that there would be a wave of Europeans coming in the tens and then hundreds of thousands and then millions—and people from not just Europe, but from around the world, they all come in and occupy 99% of their traditional territory,” Morse says.

Through the lens of UNDRIP, he adds, one

focuses on the will of the entire people, not just the leaders—whether traditional or elected.

“The challenge really is that, I think, the [Anglican Church of Canada] has intervened on the side of what appears to be clearly a minority view,” Morse says. “It’s done so because of the popular protests elsewhere in the country.... But they’ve leapt to a conclusion that the traditional chiefs are in fact the ones who are the legitimate governors of the territory and they weren’t consulted, and hence government’s in breach.

“If the church is going to intervene and choose a side, it’s got to do so based on careful examination of the circumstances.... I think the church playing the role in mediation is a very helpful one,” he adds. “We’ve seen that done in the past. But in this particular case, I think the church leapt into a very complex situation, choosing one side within the Wet’suwet’en Nation against the other, larger side within the Wet’suwet’en Nation.... [That was] well-intentioned, but ends up being somewhat colonialistic.”

To learn more about the church’s rationale for its statements of support for the five Wet’suwet’en hereditary chiefs opposing the Coastal GasLink pipeline, we invite you to read the article [“Church leaders sign statement of support for Wet’suwet’en”](#) and Archbishop Mark MacDonald’s column [“Why I stand with the five traditional leaders of Wet’suwet’en—especially now,”](#) both published by the Anglican Journal in February 2020.