The Villain in the Trans Mountain Fiasco – and Other Fiascos since 2004 – is the Supreme Court of Canada

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The Trudeau government was clearly taken by surprise at the Federal Court's nullifying of their approval of the 1,150-km Trans Mountain pipeline expansion. Otherwise they would not have signed a deal with Kinder Morgan that explicitly stated any adverse court decisions would not be deemed to constitute a "material adverse effect" that could change the deal's terms.

No wonder Kinder Morgan shareholders voted virtually unanimously to wash their hands of the project at the speed of summer lightning following the court's announcement. Now the government is stuck with a project that won't be going anywhere for some time, if ever.

Central to the objections raised by the court was the failure adequately to consult six First Nations. There are many opinions on what to do next. Some argue for taking the Federal Court decision to the Supreme Court for a ruling. But it was the Supreme Court that got us into this mess in the first place, by introducing the concept of the "honour of the Crown" regarding First Nations in 2004.

In Haida Nation vs. British Columbia (Minister of Forests), the SCC ruled that the B.C. Minister of Forestry could not approve the transfer of a 40-year old Tree Farm License (which prior to this ruling had been done many times) without first consulting with the "Council of the Haida Nation" and, "if appropriate," accommodating their concerns. "Accommoda and "if appropriate" are imprecise words which the SCC did not clarify.

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Further muddying the waters, the SCC said in their ruling that in consulting and accommodating Indian concerns, honourable Crown conduct "must be understood generously." What does "generously" mean precisely? (Nobody knows. E Indian bands have tended to use it as a cudgel of economic coercion since then.) The SCC explains the Crown's generosity is required "if we are to achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Whose meaning is also wide open to interpretation.

In his newly published book, There is no Difference: An Argument for the Abolition of the Indian Reserve System, lawyer Peter Best devotes a chapter to unpacking the consequences of Haida Nation. It makes for fascinating reading. Before this decision, Best says, it was understood "that aboriginal claims and rights over the land were more than 'reconciled.' In fact, Canadians, Indians and non-Indians alike, thought they were, especially in treaty areas, extinguished, plain and simple," apart from the right to hunt, fish and trap on unoccupied wilderness Crown land, and even then with Crown sovereignty. Haida Nation – and cases decided since then – reversed the meaning of the treaties.

The SCC read in an intent "merely to 'reconcile' Indians' prior sovereign occupancy of the land with the new sovereignty of the Crown." That is, they were "instruments of power and land-sharing, not instruments of rights extinguishment."

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So it seems we are now in a never-ending power-sharing arrangement, “requiring the constant, expensive, uncertain fine-tuning and adjustment from time to never-ending time of the granted Crown rights with the retained sovereign Indian rights.” This new jurisprudence, Best says, decrees a devolution of Crown sovereignty to Indians – a handing back of previously surrendered power, effectively turning Indian bands into a third order of government.

The key words, “to consult and where appropriate, accommodate the Aboriginal interests…” give Indian bands across the country power over all kinds of economic development – mines, forestry, wind power installations, roads, and of course pipelines.

Following Haida Nation, any band that asserts a proposed off-reserve project affects an Indian interest, actual or projected, the “consultation and accommodation if necessary” process is automatically launched. No evidence has to be produced, no threshold of importance to be met. (“Sacred ground” is always effective – and what ground is not sacred to aboriginals who live on it?).

In most negotiations with conflicting interests, each party has a motive to see the deal done. But “consultation” is not negotiation, and aboriginals often have no particular reason to settle. Best notes that during consultations, there’s a great deal of travel, expense account living, important meetings and pleasant busywork, with most politicians lacking the courage to utter the words “not appropriate” with regard to further “consultation.”

There is also no incentive for aboriginals to settle for anything less than exactly what they want. The Lax Kw’alaams of B.C. turned down a billion dollars in exchange for their support of an industrial project. There was no downside for them. They had the power and knew it. No matter how long they held out, their transfer payments flowed in as usual, and they took no economic risks if the project failed. If one side has nothing to lose and the other side has everything to lose, Best says, “you don’t have negotiations – you have a shakedown.”

I asked Peter Best how he felt this untenable situation might be resolved. He wrote to me, “Simply put, either the Constitution has to be amended to repeal section 35 or to drastically limit its application, or else, as a more doable alternative, the Supreme Court has to in effect reverse itself on Haida Nation and all its country-damaging legal successors.

“Courts do sometimes reverse themselves when they realize they committed a massive boo boo, like here. But the Trudeau government, in its appeal of the Trans Mountain decision (which they must do) has to in effect ask the Court to do so.”

I don’t think Best actually believes either of these scenarios will come to pass. Trudeau will always privilege his aboriginal-whispering mystique over the interest of all Canadians. And so, what happened to Kinder Morgan – and has happened to other companies since Haida Nation – will eventually kill all private interest in major infrastructure and mining projects. Aboriginal correctness will slow down our economy. But that won’t affect the salaries of the Supreme Court judges.

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