Kwikwetlem First Nation v. British Columbia (Utilities Commission)

The recent case of *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* raises the issue of the duty to consult Aboriginal peoples before undertaking projects that may affect their rights or title. The case was an appeal to the British Columbia Court of Appeal on behalf of Kwikwetlam First Nation, Nlaka'pamux Nation, and the Okanagan Nation.[1]

Because of the growth in Vancouver's lower mainland population, BC Hydro, along with the British Columbia Transmission Corporation (BCTC), underwent a consultation process to decide how best to meet the growing energy needs of their customers.[2] After considering a number of options, BCTC decided that it was the most cost-effective option to build a new transmission line from Merritt to Coquitlam, a project dubbed ILM.[3] However, before construction on the new line could begin they had to obtain two permits: one from the Environmental Assessment Office (EAO) and one from the British Columbia Utilities Commission.[4] Both of these are Crown agencies charged with enforcing government regulations, regulations that in this case required consultation with First Nations if it is deemed that their rights might be affected by Crown corporations.

Aboriginal and treaty rights are "recognized and affirmed" in section 35 of the *Constitution Act, 1982*;[5] under this section, the Supreme Court of Canada has found that the Crown has a duty to consult First Nations before infringing on their rights or title.[6] The question before the appeals court in this case was whether or not a duty to consult arose, and if so, which of these Crown agencies was required to discharge the onus of the duty to consult. BC Hydro and BCTC argued that the decision should be left to the EAO whereas the appellants, led by the Kwikwetlam First Nation, argued that the onus must is on the British Columbia Utilities Commission because it is a quasi-judicial board that has the proper power and regulatory authority to uphold the honour of the Crown.[7] It was argued that the EAO had been deprived of much of its regulatory power and was primarily concerned with the narrow issue of environmental protection.[8] The utilities commission took the stance that either of the two Crown agencies could fulfill the duty to consult. It then issued a certificate of public convenience and necessity (CPCN) over the objections of the First Nations and placed the duty to consult with the lesser qualified EAO.[9]

The B.C. Court of Appeal found that the Commission had to consider whether the Crown had a constitutional duty to consult with regard to the ILM project, and if

so, to determine the scope of that duty, and whether it was fulfilled.[10] The court held that the utilities commission had erred in law when it failed to consider the First Nations challenge to the consultation process.[11] As a result, the court ordered the suspension of the CPCN that would have allowed the project to proceed, and ordered the utilities commission to reconsider the concerns of the affected First Nations before the suspension would be nullified.[12]

The decision of the court in this case helped clarify the Crown's duty to consult. After finding that the proposed power line project had the potential to "profoundly affect the appellants' Aboriginal interests," the court said that "consultation requires an interactive process with efforts by both the Crown actor and the potentially affected first Nations… [and] it may require the Crown to make changes to its proposed actions."[13] Justice Huddart went on to add that "if consultation is to be meaningful, it must take place when the project is being defined until the project is completed."[14]

The power line constructed through the appellants' lands some decades earlier had been built without any consultation to the detriment of the affected First Nations.[15] This decision shows how Aboriginal rights have been strengthened by the courts in the past two decades.

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[1] *Kwikwetlam First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 at para. 4 (CanLII).
[2] *Ibid*. at para. 2.
[3] *Ibid*. at para. 2.
[4] *Ibid*. at para. 19.
[5] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11.
[6] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII);*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII).
[7] *Supra* note 1 at paras. 8, 20 and 23.
[8] *Supra* note 1 at para. 44.
[9] *Ibid*.
[10] *Ibid*. at para 13.
[11] *Ibid*. at para. 14.
[12] *Ibid*. at para. 15.
[13] *Ibid*. at paras. 67-68.
[14] *Ibid*. at para. 70.
[15] *Ibid*. at para. 67.