





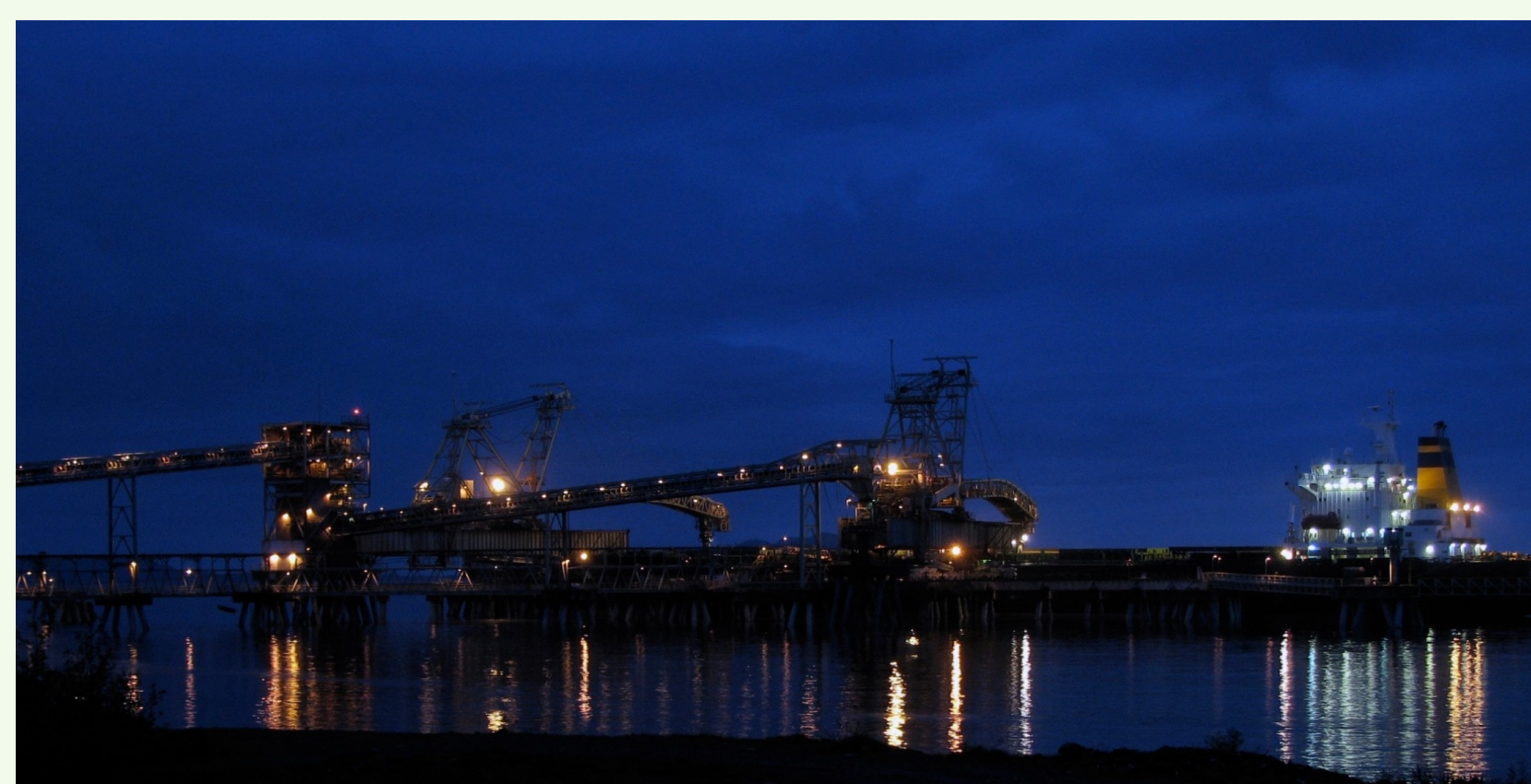


Introduction: The Duty to Consult

-  The **duty to consult** has shaped the way in which project proponents and the **Crown interact with Indigenous communities** that the resource development and **extractive sectors impact**.
-  This is by way of it being a **proactive duty** that applies **prior** to Canada taking any action that may have **adverse effects on Aboriginal rights or Aboriginal treaty rights** (collectively, "**Rights**").
-  **Litigation** in the duty to consult often, unfortunately **pits the interests of** the Aboriginal **rights** of Aboriginal communities **against** the **economic interests** of project proponents.¹
-  The reality is that **Indigenous people in Canada are not always uninterested in economic opportunities** in the resource development sectors.²

Thesis: Economic Benefits as Rights

-  The **central question**: Should the courts **recognize** Aboriginal communities' **economic opportunities** or benefits as Aboriginal rights and/or Treaty **rights**?
-  The **Thesis: Yes**, the courts should **recognize economic benefits as Rights**.



- The Ridley Terminal in Prince Rupert, B.C., is a major coal-exporting facility. Photo: alexmcc: corollary subject of *Ermineskin*, *infra*



- AltaLink Management Ltd. logo, an energy transmission company: applicant in *AltaLink*, *infra*

Ermineskin Cree Nation v Canada (Environment and Climate Change), 2021 FC 758

The Court reversed a Minister's decision to *de facto* close a coal mining project that a First Nation economically benefitted from because the **economic benefit was a right, requiring the Minister's consultation with the First Nation**.

Duty to consult existed: **economic benefits are a derivative of Aboriginal and Treaty Rights**.

Closing the mine without consultation presented an **adverse effect on the Right**.

"The reality [is] that often Aboriginal peoples are involved in exploiting the resource" and that "[t]his too is **part of reconciliation**": para 87.

AltaLink Management Ltd v Alberta (Utilities Commission), 2021 FC 578

After a Company partnered with two First Nations to give 51% ownership of electrical transmission lines, a Commission approved the partnership with the onerous condition that no related auditor/commission costs be passed on to rate payers. The Court ruled **Commission was wrong to not factor financial savings of partnership to ratepayers while insisting financial costs of partnership not be passed to ratepayers**.

Commission ignored reconciliation and Honour of the Crown: Indigenous participation in economic opportunities serves the public interest.

On reserve employment benefits the quality of life of the community and Canada as a whole: a "**diverse workforce benefits society**": para 75.

Feehan J., Concurring: there was a **duty to consult because rights were impacted** (implying that the economic benefits were rights).

Policy Reasons for a Recognition of Economic Benefits as Rights

Ermineskin proposes that economic benefits are rights, while *AltaLink* expands on why economic benefits are important for reconciliation, the Honour of the Crown, and Canadian society. Further **policy considerations include**:

Reductivism: per *Council of the Innu* at para 176: the "time when Aboriginal activities consisted only in hunting, fishing, trapping and selling artisanal products has passed. **Aboriginal peoples' economic reality can no longer be reduced to only those traditional activities**"³

Avenue for **genuine partnership** between project proponents and Indigenous communities by providing judicial protection of economic rights pursuant to impact benefit agreements. **No baggage from the crown's historical injustices**.⁴

Legal **protection for projects** will allow projects to **attract capital** because the closing of projects providing economic benefit to First Nations then cannot be arbitrarily halted without consultation.⁵

Notes and Sources

¹ Martin Ignasiak *et al*, *Federal Court recognizes the Crown's duty to consult on economic benefits linked to Aboriginal rights* (Calgary: Osler, Hoskin, & Harcourt LLP, 2021), online: Osler, Resources, Canadian Legislation & Regulations < <https://www.osler.com/en/resources/regulations/2021/federal-court-recognizes-the-crown-s-duty-to-consult-on-economic-benefits-linked-to-aboriginal-right>> (26 Nov 2021).

² See e.g. Ken Coates & Brian Lee Crowley, *New Beginnings: How Canada's Natural Resource Wealth Could Re-Shape Relations with Aboriginal People* (Ottawa: Macdonald-Laurier Institute, 2013), online: Macdonald Laurier, Files < https://www.macdonaldlaurier.ca/files/pdf/2013.01.05-MLI-New_Beginnings_Coates_vWEB.pdf> (6 Mar 2022); Brian L. Crowley & Ken Coates, *The Way Out: New thinking about Aboriginal engagement and energy infrastructure to the West Coast* (Ottawa: Macdonald-Laurier Institute, 2013), online: Macdonald Laurier, Files < <https://www.macdonaldlaurier.ca/files/pdf/2013.05.30-MLI-3NorthernGateway-WebReady-vFinal.pdf>> (6 Mar 2022).

³ *Council of the Innu of Ekuanitshit v Canada (Fisheries and Oceans)*, 2015 FC 1298, [2016] CNLR 107 at para 176.

⁴ See e.g., Ian Ross, *Resource Revenue Sharing a Thorny Issue for Ontario* (Northern Ontario business, 2021), online < <https://www.northernontariobusiness.com/around-the-north/resource-revenue-sharing-a-thorny-issue-for-ontario-368775>> (6 Mar 2022) (Indigenous communities seeking to rectify past non-accommodation to the detriment of brokering a current accommodation)

⁵ Dennis McConaghy, *Breakdown: The Pipeline Debate and the Threat to Canada's Future* (Toronto: Dundurn, 2019) ("[f]irst, Canadian Politicians must accept that any approval process is functionally useless if it fails to attract capital" at 127).

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Please don't hesitate to reach out with any questions or comments. Thank you for reading and listening!