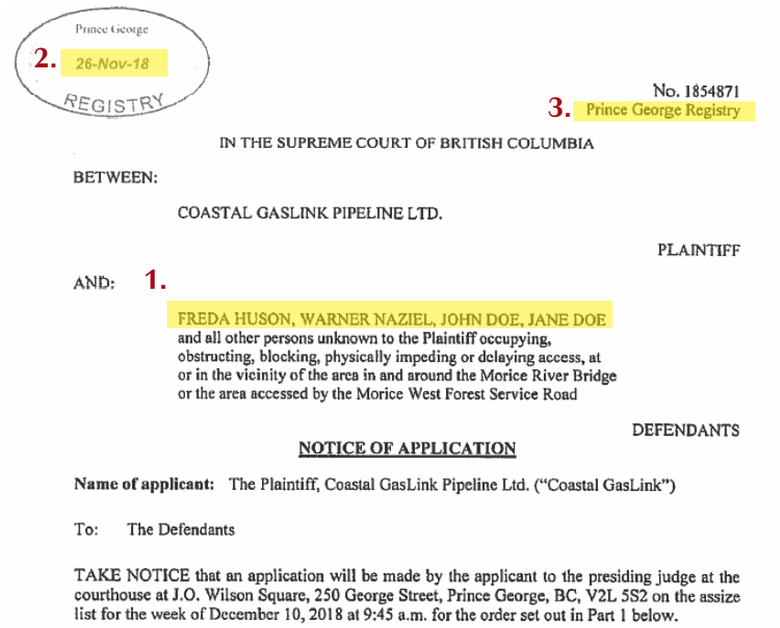
An Analysis of Coastal GasLink's Notice of Application for Injunction

Yellowhead Institute

THE FOLLOWING IS AN ANALYSIS of Coastal Gaslink's Notice of Application for Injunction, filed on November 26, 2018. The analysis breaks down select parts of the application, highlighting the specific strategies used to weaponize Canadian law over Indigenous law and rights, as well as the resulting financial and time disadvantage forced upon Indigenous communities defending their territories. Coastal GasLink was granted an interim application on the basis of this Application and this has been in place since December 14, 2018 but Dark House challenged this at a hearing in June 2019. A decision has not yet been issued.



Prince George
2. 26-Nov-18
REGISTRY

No. 1854871
3. Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

COASTAL GASLINK PIPELINE LTD.

PLAINTIFF

AND: 1.

FREDA HUSON, WARNER NAZIEL, JOHN DOE, JANE DOE
and all other persons unknown to the Plaintiff occupying, obstructing, blocking, physically impeding or delaying access, at or in the vicinity of the area in and around the Morice River Bridge or the area accessed by the Morice West Forest Service Road

DEFENDANTS

NOTICE OF APPLICATION

Name of applicant: The Plaintiff, Coastal GasLink Pipeline Ltd. ("Coastal GasLink")

To: The Defendants

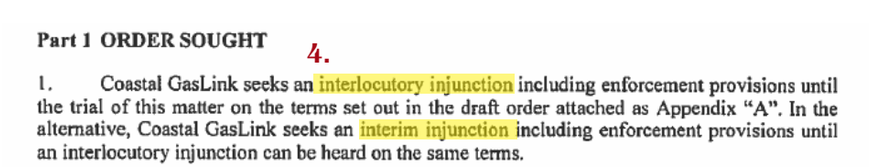
TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at J.O. Wilson Square, 250 George Street, Prince George, BC, V2L 5S2 on the assize list for the week of December 10, 2018 at 9:45 a.m. for the order set out in Part 1 below.

1. CGL chose to only name Freda Huson and Warner Naziel and John and Jane Doe as the parties. They did not name Unist'ot'en or Dark House or any of the other Wet'suwet'en house groups or clans that oppose the pipeline and whose territory is crossed by CGL's pipeline. Warner Naziel is head chief of the Laksamishu clan and holds the hereditary name Smogelgem, which is his appropriate name.

By naming Freda and Smogelgem as individuals, CGL identifies them to the court as blockaders. They are represented as individuals whose actions are taken in opposition to an industrial project rather than as people protecting their Yintah, or territory. By also naming John and Jane Doe, who are legal shorthand for anyone else who defies the injunction, CGL states that they view anyone obstructing their construction the same - whether Unist'ot'en, Gitdumden, other Wet'suwet'en or white settlers.

2. Coastal GasLink started their court case against Freda Huson and Warner Naziel on November 26, 2018 and it was heard on December 14, 2018, less than three weeks later. During this time, Freda and Smogelgem had to work through the 16 Affidavits that CGL filed, over a thousand pages as well as find a lawyer to represent them. CGL got months to prepare their documents.

3. CGL filed the hearing in Prince George which is about a 5 hour drive from the Unist'ot'en camp. They could have filed in Smithers, which is approximately a third of the distance away but chose not to.



Part 1 ORDER SOUGHT 4.

1. Coastal GasLink seeks an interlocutory injunction including enforcement provisions until the trial of this matter on the terms set out in the draft order attached as Appendix "A". In the alternative, Coastal GasLink seeks an interim injunction including enforcement provisions until an interlocutory injunction can be heard on the same terms.

4. In December, CGL asked for an interlocutory injunction, meaning that it would stay until trial occurred. Instead, they were granted a temporary injunction that would stay in place until there could be a longer injunction hearing.

Court took place on December 14, 2019. This is roughly 4 hours of court time at the end of which Justice Church granted the injunction that CGL was asking for. A later hearing date was set for a longer hearing but once the interim injunction was in place CGL started working.

Part 2 FACTUAL BASIS

1. The Defendants are intentionally and tortiously blockading and obstructing critical construction activities that are required in order to build the Coastal GasLink pipeline project (the "Project"), which will serve the LNG Canada Development Inc. ("LNG Canada") liquefied natural gas ("LNG") facility (the "Export Facility"). The construction activities are all authorized by various permits, licences and authorizations received by Coastal GasLink. This blockade is causing damage and irreparable harm. The Defendants have not challenged the project through any lawful means and have instead taken matters into their own hands by illegally blockading. Coastal GasLink seeks an injunction so that it can conduct necessary work and commence construction of the Project on schedule.

5.

4. LNG Canada holds an LNG Export Licence from the National Energy Board which allows LNG Canada to export Canadian natural gas to overseas markets. The estimated cost for the full build-out of the Export Facility, the Project and associated upstream natural gas development is approximately $40 billion. During peak construction approximately 7,500 people will be employed at the Export Facility project site in Kitimat, with an additional approximately 2,500 people working on the Project. 6.

7.

8. Coastal GasLink was granted an Environmental Assessment Certificate for the Project (the "EAC") on October 23, 2014. In addition to the EAC, Coastal GasLink has received various permits from the British Columbia Oil and Gas Commission related to the construction of the Project and related ancillary works.

11. In support of the Project, Coastal GasLink has also entered into project agreements with all 20 elected Indigenous bands along the Project route, including five Wet'suwet'en Bands (the "Project Agreements"). In addition, throughout the process of obtaining its permits and licences, Coastal GasLink has consulted extensively with Indigenous groups in relation to the Project, including Wet'suwet'en Bands, the Office of the Wet'suwet'en, Wet'suwet'en Hereditary Chiefs, and Dark House. 8.

5. This paragraph sets up CGL's whole argument. The Defendants are presented as engaged in blockading a pipeline project. The pipeline activities have been sanctioned by the Provincial Government in British Columbia.

CGL says that the Defendants have not challenged the pipeline legally by challenging these permits and instead have taken the illegal step of blocking a road. This representation states that the only "legality" CGL needs to be concerned with is that which comes through the colonial court system. Indigenous rights and laws do not matter in CGL's presentation of the facts.

6. This is all very speculative and the construction jobs will not last. An estimated 75% of pipeline workers working in the Houston area are not local and will leave after the construction.

7. The environmental permit that CGL obtained was received on October 23, 2014. Unist'ot'en or other groups, such as the Office of the Wet'suwet'en would have had to challenge this within 60 days, by December 23, 2014. This was almost 4 years before CGL actually made a final investment decision on the project.

In 2014, the Enbridge pipeline was the main focus for Unist'ot'en. At the time there were also at least 6 other LNG pipelines that had been proposed. LNG Canada's pipeline was one of many. Estimates for legal fees for a judicial review OF CGL's environmental certificate were at least $100,000. Dark House receives no consistent funding from the Provincial government or anyone else for its operation. Any funds that it generates are generally in the form of grants or specific projects and fundraising.

To prepare for judicially reviewing all the pipelines, even for a larger organization like the Office of the Wet'suwet'en, would be financially impossible and simply prohibitive given the limited capacity of a small organization.

8. CGL states that it has entered into project agreements with 5 Wet'suwet'en bands. They signed agreements with the 5 Wet'suwet'en first nations/band councils.

In *Delgamuukw v. British Columbia,* the Supreme Court of Canada found that Wet'suwet'en houses and clans had authority over traditional Wet'suwet'en territories, where the CGL pipeline is built.

In Wet'suwet'en society, the 5 Wet'suwet'en First Nations are band council governments. Under the Indian Act, band councils only have authority over the reserve but not outside it. The hereditary system has jurisdiction to govern the rest of their traditional territory under Wet'suwet'en law. No traditional authorities agreed to the project and all opposed it, but CGL says that they consulted and uses this as support for their project.

9.

12. The Defendants Freda Huson, Warner Naziel and others calling themselves "Unist'ot'en Camp" (the "Blockaders") set up a blockade by standing, sitting or positioning vehicles, gates and other obstacles across the Morice West FSR at the Morice River Bridge (the "Blockade").

13. The Defendant, Freda Huson, has stated that she is the spokesperson for the Unist'ot'en Camp and the Blockaders.

10.

14. The Blockaders have used the Blockade to prevent Coastal GasLink from:

(a) completing field data collection;

(b) undertaking preparatory construction activities; and

(c) commencing construction in the eastern portion of Section 8.

Impact of the Blockade on Coastal GasLink

19. Multiple attempts have been made to complete the work necessary to ensure that the Project is meeting all of its regulatory and permitting obligations and to finalize the execution plan so as to optimize safety and efficiency. The Project is at a point where unimpeded access is now required to complete the work necessary to finalize execution plans and permitting, and continue with construction of the Project. Unimpeded access is important to ensure the safety of crews working in these remote areas, in the completion of final planning activities and through construction, as well as being critical to the execution of the Project.

11.

21. The construction in this area is on the critical path for the construction of the Project. As a result, even a short delay in access could cause the Project to cease. If the Project does not proceed, then LNG Canada's facility will have no source of gas, and likely it would not proceed either.

24. If Coastal GasLink is unable to access the area affected by the Blockade and complete these activities, Coastal GasLink will suffer harm including:

(a) Delay to the construction schedule;

(b) Impairment of ability to plan and schedule construction activities (in particular due to weather and environmental constraints and challenging terrain west of the Blockade);

(c) Significant risk of missing the date required for completion of construction under Coastal GasLink's contract with LNG Canada;

(d) Without access, the Project cannot proceed; and

12. (e) Loss of the ability to obtain a return on investment in the Project.

9. One of the groups that CGL was required to consult with was Dark House based on their environmental permit from the British Columbia government. Unist'ot'en is a traditional name for the people of Dark House, which is Freda's house group and part of the Gilseyhu clan, one of the 5 Wet'suwet'en clans. Dark House chiefs have led the Unist'ot'en checkpoint since it started.

Since 2013, CGL has been receiving correspondence from Dark House signed by their hereditary chiefs stating that the Unist'ot'en Camp is an action that they have taken. CGL knows this but instead refers to the Unist'ot'en as "Blockaders." This is an attempt to delegitimize the government of actions of Dark House members, led by Chief Knedebeas (Warner William), and their opposition to the project.

10. Dark House's expression of sovereignty and their enforcement of the traditional Wet'suwet'en law against trespass through restricting unwanted access to their Talbits Kwa territory is framed as an illegal act taken by "Blockaders."

Canadian settlers have invaded Wet'suwet'en territory, established a legal system without consent and uses this legal system to delegitimize the legal orders of Indigenous people and to permit the preferred uses of land by the colonizer - in this case a pipeline to facilitate resource extraction.

Any actions to resist this flow of events by Dark House, the sovereign Indigenous government, are presented as Blockading Activities taken by an intimidating and confrontation illegal occupation. This has been the response of colonial Canada for hundreds of years and CGL is asking the court to continue to participate in colonial occupation.

11. CGL claimed in December 2018 that they had to get in to work in Talbits Kwa territory immediately or their whole project could fail. However, they had not at this time completed any archaeology work in this area behind the Unist'ot'en checkpoint.

Current construction plans indicate that they won't be building pipeline in this section until summer 2020, meaning that all that is required to be completed before then is road work and pipeline right of way clearing. It is difficult to imagine that the project would be jeopardized by waiting till a proper injunction hearing could be scheduled.

12. The harm alleged by CGL and its contractors is harm related to whether or not they can build their pipeline - financial harm. The pipeline is itself a project that will cause harm to the climate and to Wet'suwet'en and Dark House territory specifically.

Irreparable harm, the standard that CGL needs to meet for the court to grant the injunction is harm that is of a kind that cannot be compensated by money - however, courts hold that when an individual or a group of individuals blocking a pipeline cannot make financial payment to recoup losses that a company invests, financial harm is irreparable harm.

The Legal Basis

1. Coastal GasLink is attempting to construct the Project in accordance with numerous authorizations obtained after years of public and Indigenous consultation. It is being prevented from doing so by a number of individuals who are ignoring the rule of law, and are unlawfully preventing access to the Blockaded Area.

13. Canadian settler law is presented to the court as the only relevant law.

14.

2. The courts have held that "self-help remedies" in the nature of the Defendants' Blockade are unacceptable in a democratic society governed by the rule of law. Courts have consistently granted injunctions as the appropriate remedy in response to such conduct. ***British Columbia Hydro and Power Authority v. Boon***, 2016 BCSC 355 at para. 80 ("***Boon***"); ***Behn v. Moulton Contracting Ltd.***, 2013 SCC 26 at para. 42 ("***Behn***").

14. CGL calls Dark House's blockade a self-help remedy because it is a direct action taken by an Indigenous community rather than challenging the permits granted by the Canadian government for the CGL pipeline.

Because Dark House didn't apply to the Canadian colonial court system to challenge CGL's permit, their assertions of sovereignty are said to be illegal and inconsequential. CGL asks the court system to be a party to this colonial act.

15.

4. Coastal GasLink meets the usual test for an interlocutory injunction: it has established a fair question to be tried (in fact a strong case) that the Defendants' conduct is tortious; the harm created by the Defendants' tortious conduct is irreparable; and the balance of convenience supports the grant of an injunction. ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311 ("***RJR***"); ***Attorney General v. Wale***, 9 B.C.L.R. (2d) 333 (C.A.) aff'd [1991] 1 S.C.R. 63.

15. This is the standard three step test for an injunction.

16.

5. In order for Coastal GasLink to establish a "fair" or "serious" question to be tried, the Court must be satisfied that the case is neither frivolous nor vexatious: ***RJR*** at 403.

16. The first step of the test is whether the case as alleged by CGL is a serious case. CGL states Dark House has engaged in various forms of illegal acts by attempting to ensure that the colonial court system does not overrule their legal system. This step was easily met by CGL.

9. Given the illegality of the Blockade, irreparable harm is not required to grant the injunction. Nonetheless, Coastal GasLink and others will suffer irreparable harm if the injunction is not granted, including, but not limited to:

(a) Interference with an on-going business is harm within the meaning of the test for injunctive relief: ***A.J.B. Investments Ltd. v. Elphinstone Logging Focus***, 2016 BCSC 734 at paras. 31-22; *D.N.T Contracting Ltd. v. Abraham*, 2016 BCSC 1917 at paras. 37-39 ("***D.N.T.***").

17.

(b) Causing delays, which will result in increased costs to Coastal GasLink and others that the Defendants will not be able to compensate Coastal GasLink or its contractors for: ***Red Chris Development v. Quock***, 2006 BCSC 1472; ***Trans Mountain Pipeline ULC v. Gold***, 2014 BCSC 2133.

(c) Causing delays, increased costs and layoffs of employees: ***Red Chris***; ***Council of the Haida Nation v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)***, 2018 BCSC 1117 at para. 83.

(d) Impairment of an owner's and contractors' ability to plan and schedule a project: ***Boon*** para 65; ***The British Columbia Housing Management Commission v. Doe***, 2017 BCSC 2387 at para. 28 ("***BCHMC***").

(e) Disruption and inconvenience to Coastal GasLink's employees and contractors and compromising their feelings of safety and security in the workplace: ***Homalco Band Council v. Blaney***, 2007 BCSC 918 at paras. 40, 46-47.

17. Here, CGL states how they have experienced irreparable harm because of delays to their ability to complete the pipeline and that this has caused a financial loss. These harms were found to be irreparable harm at the interim injunction.

18.

11. The public interest weighs in favour of allowing construction to proceed. The Project is being built with the necessary permits and authorizations to do the work required. Construction of the Project will create jobs for local and First Nations communities, provide benefits to First Nations as set out in the various Project Agreements that have been signed and contribute to the economy of British Columbia and Canada through significant capital investment and payment of taxes.

18. The court must consider the broader public interest as a factor in deciding the third injunction step - the balance of convenience. CGL is arguing that Indigenous people will be best off by making some money from the pipeline project, regardless of damage caused.

19.

12. By engaging in the Blockading Activities, the Defendants seek to alter the *status quo*, which is that Coastal GasLink is prepared to start construction and has obtained all necessary authorizations to complete the work that is being blocked. The Defendants have not challenged the issuance of any of these authorizations. In ***Boon*** at paras. 71-73, this Court dealt with the issue of *status quo*, noting that all of the necessary permits had been issued for construction following a public process. The Court found that refusing to issue the injunction would allow the protestors to collaterally attack the permits.

19. Another factor in the balance of convenience test is who is seeking to alter the status quo. CGL assumes the status quo as that established by the Canadian government - again delegitimizing Dark House and Wet'suwet'en sovereignty.

20.

16. In contrast to the lawful actions of Coastal GasLink, the Defendants are acting without lawful authority with the stated purpose of stopping the Project. This is not a situation of balancing competing rights. The balance of convenience weighs heavily, if not entirely, toward granting the injunction.

20. CGL ends by reinforcing that the court should not find that Dark House sovereignty confirms any rights that should be weighed against the rights of CGL, which is essentially arguing that terra nullius exists in this instance, despite the millions of dollars that Wet'suwet'en people spent on the Delgamuukw case.

Enforcement Order

17. This is an appropriate case to include enforcement provisions within the injunction order. The terms of the enforcement order that Coastal GasLink seeks are consistent with the terms provided by counsel for the RCMP and preserve the discretion of the peace officer to decide whether to arrest or remove a person from the area designated.

21. CGL asks the court for an enforcement order, which they received. In practice, this means that the RCMP can enforce the injunction order and say that they are following court orders, rather than acting on their own behalf. This is a way that companies and the RCMP use the court to try and deflect criticism. This means that the RCMP can enforce the injunction order and arrest people for contempt of court and say that they are following court orders rather than having to say that individuals are committing criminal offenses for protecting their land.

This is one of the many ways in which the RCMP, the court system and government ministries that issue corporate permits work together to force indigenous communities and their supporters out of their land bases. These institutions simultaneously distribute responsibility across the colonial apparatus to deflect criticism away from any one institution.