Case Comment: *Coastal Gaslink Pipeline Ltd. v. Huson* [*Dsta'hyl*]

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In 2024, a Wet'suwet'en chief was convicted in BC Supreme Court of criminal contempt of an injunction obtained by a fossil fuel company, Coastal GasLink Pipeline Ltd.,[1] on his northwestern British Columbia territory, *Coastal Gaslink Pipeline Ltd. v. Huson*, 2024 BCSC 509 (hereafter referred to as *Dsta'hyl*). He was subsequently sentenced to sixty days' house arrest. At the time this commentary was written, the conviction was being appealed.

The court's reasons for his conviction betrayed its failure to understand and give full effect to the multijuridical nature of the Canadian legal order. In this case commentary, I first lay out the facts relevant to the Wet'suwet'en law of trespass, to the Canadian law of equitable injunctions, and to the Canadian common law of criminal contempt. Then I unpack the penultimate paragraph of the court's reasons for finding the chief guilty, which relate to what the judge calls the uncomfortable coexistence of Canadian and Wet'suwet'en law in this case and his questioning of why the chief did not invoke an aboriginal rights defence of his actions.[2] In the process, the veracity of some of injunction law's myths and legends are called into question.

Relevant Facts

In October 2021, Dsta'hyl, a wing chief of the Sa Yikh (Sun House)[3] of the Likhts'amisyu Clan, removed the batteries from an excavator and other equipment belonging to a contractor building a gas pipeline through his House's territory west of Houston, British Columbia.[4] The pipeline was scheduled to carry methane from northeastern British Columbia and northern Alberta to feed a liquefied natural gas export facility at the tidewater port of Kitimat. The evidence before the court showed that Dsta'hyl had been legally appointed a wing chief of his House at a balhats, or public feast.[5]

An important duty of any Wet'suwet'en chief is the protection of his or her House territories.[6] Since 2010, several Wet'suwet'en Houses have attempted to stop pipeline construction across

[1] Owned by TC Energy Corporation.
[2] *Dsta'hyl* at para. 57.
[3] A yikh or House is a matrilineal kinship group that is the principal legal actor and territory-holding entity in the Wet'suwet'en legal order. Sa Yikh has about 140 members.
[4] *Dsta'hyl* at para. 6. Throughout its decision, the court unusually referred to the accused only by his Chief name and not once by his English name or surname.
[5] *Dsta'hyl* at para. 20.
[6] *Dsta'hyl* at para. 21.

their territories until their environmental and human rights concerns and their inherent jurisdiction were properly dealt with by the pipeline company and the provincial and federal governments. The governments' refusal to incorporate Wet'suwet'en law into their decisions precipitated blockades by a number of Houses. The blockades eventually led the company to obtain a December 2019 BC Supreme Court injunction (*Coastal Gaslink Pipeline Ltd. v. Huson*, 2019 BCSC 2264, hereafter referred to as *Huson*).[7] In January 2020, Dsta'hyl, his House chief, Smogilhgim, and other Wet'suwet'en chiefs of the affected House territories warned Coastal GasLink in writing of its trespass and gave it notice to leave.[8] At a 2021 meeting of the Likhts'amisyu Houses, a collective decision was made to disable pipeline equipment – a proportionate means to enforce Wet'suwet'en trespass laws and to get the company to engage in dialogue on its trespass.[9] Dsta'hyl and another Likhts'amisyu chief, Tse'besa, were collectively appointed to so act.[10]

Before the removal of the equipment batteries, Dsta'hyl had warned both Coastal GasLink security and the RCMP of his intentions.[11] As he was required to do under Wet'suwet'en law, upon removing the equipment batteries, Dsta'hyl immediately took responsibility for his actions. He readily admitted them to company employees and contractors, to the police, and to the public generally.[12] Such an act done in public is characterized in Wet'suwet'en law as a "taking," distinguishing it from an act done in secret, which is characterized as a "theft." Taking can be remedied through negotiated compensation between the parties considering all the circumstances of the act.[13] Theft cannot be remedied, leaving the perpetrator beyond such legal protection – in other words, an outlaw. Ironically, it was the public nature of Dsta'hyl's act that made it liable for criminal rather than civil contempt under Canadian state law.

Uncomfortable Coexistence

[7] *Coastal Gasink Pipeline Ltd. v. Huson,* 2019 BCSC 2264 [*Huson*]. For a thorough analysis of the *Huson* decision, see Declan O'Briain, "An Inconvenient Balance: Interlocutory Injunctions, Civil Disobedience, & Reconciliation," *UBC Law Review* 56, no. 3 (2023): article 5, https://commons.allard.ubc.ca/ubclawreview/vol56/iss3/5. For a geographer's review of Wet'suwet'en encounters with fossil fuel pipelines more generally, see Tyler McCreary, *Indigenous Legalities, Pipeline Viscosities: Colonial Extractivism and Wet'suwet'en Resistance* (University of Alberta Press, 2024).
[8] *Dsta'hyl* at para. 23. The court's decision misspells the name of Dsta'hyl's House Chief as "Smolgelgem."
[9] *Dsta'hyl* at paras. 28 and 29.
[10] *Dsta'hyl* at para. 28.
[11] *Dsta'hyl* at para. 30.
[12] *Dsta'hyl* at para. 15.
[13] For compensation for trespass and the consequences of "sneaking around," see Melanie Morin, ed., *Niwhts'ide'nï Hibi'it'ën: The Ways of Our Ancestors* (School District No. 54 and Witsuwit'en Language and Culture Authority, 2016), 59–60. For an oral history of the Wet'suwet'en legal process for compensation after a serious wrong, in that case, a killing, see Diamond Jenness, "The Carrier Indians of the Bulkley River: Their Social and Religious Life," 1943, Anthropological Papers, No. 25, Smithsonian Institution, Bureau of American Ethnology 469, 479–80.

Dsta'hyl's lawyers argued a novel excusatory defence to his contempt charge that he was acting "pursuant to a coexisting Indigenous legal order."[14] The judge commented:

> Contrary to the defence position that the Court would be showing respect for the "rule of law of the relevant Indigenous legal order, within the confines of the colonial court system", what is actually proposed is recognition of an *imprecisely defined* law of trespass to the exclusion of the Canadian law of contempt. The two legal orders cannot comfortably co-exist in the circumstances. The proposed defence advocates application of the Wet'suwet'en law of trespass to effectively render nugatory a valid order made by this Court.[15] (emphasis added)

It should be noted that earlier in his decision, the judge characterized the four defence witnesses' evidence on the Wet'suwet'en law of trespass as having been given "in detail."[16] If he thought the trespass law had been "imprecisely defined," presumably he could have questioned them further to get clarification. More importantly, he could have laid out the legal test he used to assess imprecision in the evidence of indigenous[17] laws and given details of how the testimony in this case failed to meet it.[18] This may be an instance of indigenous laws given in evidence orally being given less weight than state laws recorded in writing. As for the uncomfortable coexistence of indigenous law and Canadian law, the common law and civil law legal orders have existed in a multijuridical Canada for some 250 years.

A brief history of injunction law in British Columbia as it has coexisted with the exercise of indigenous law and aboriginal law can provide useful background to the court's findings of fact and its decision in *Dsta'hyl*. Injunctions are court orders preventing someone from doing something. Here we are talking about interlocutory injunctions, which are equitable remedies ostensibly intended to best maintain the status quo of litigation parties until the trial of their substantive dispute could be heard. In the mid-1980s, indigenous groups were able to obtain a number of interlocutory injunctions based on their aboriginal rights under s. 35 of the Canadian Constitution. The most prominent of these early aboriginal law injunction cases was the 1985

[14] *Dsta'hyl* at para. 44.
[15] *Dsta'hyl* at para. 57(a).
[16] *Dsta'hyl* at para. 22. Aside from Dsta'hyl, the other witnesses were two Wet'suwet'en chiefs of the Likhts'amisyu Clan and a Gitxsan chief of the related Gishaast or Fireweed Clan.
[17] It seems wrong to try to take away a people's lands, governance, and children and in return put capital letters on the collective nouns employed to classify them. I attempt to show my respect for Indigenous peoples by using the same grammatical rules as I do for all other legal orders.
[18] For example, he could have followed the example of the judge who granted the *Huson* injunction when, at para 132, she acknowledged that she was assisted "by the descriptions of Wet'suwet'en governance structures and processes" and cited prior jurisprudence including *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, and *Canadian Forest Products Inc. v. Sam*, 2011 BCSC 676.

MacMillan Bloedel Ltd. v. Mullin decision,[19] which, like the *Huson* injunction, was precipitated by a blockade. In that case, the BC Court of Appeal found that if it upheld the people's injunction, the trees on Meares Island would still be available for timber industry use or for indigenous use regardless of which party was eventually successful at trial.[20] The court granted the injunction on the basis that "both justice and convenience demand that the proposed logging not take place while the Indians' claim is being actively pressed in this litigation."[21] The claim was for aboriginal title by the Nuu-Chah-Nulth people, which the court overly optimistically anticipated would proceed to trial that same year.[22]

The court in *Huson* applied the standard test for injunctions in its 2019 decision:

> First, a preliminary assessment … must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[23]

The judge added that "public interest has been found to be a significant factor in weighing the balance of convenience."[24]

A review of injunctions granted in 2020 involving indigenous groups shows that industrial corporations successfully obtained the court orders they sought 80 percent of the time, governments 90 percent of the time, and indigenous groups less than 20 percent of the time.[25] Shiri Pasternak and Irina Ceric conclude "that the heavy lifting done by notions of 'public interest' both relies on and obscures the circumvention and exclusion of Aboriginal treaty and constitutional rights from the law of injunctions and constitutes a de facto resolution of Aboriginal land rights in Canada."[26] The public interest test features prominently in injunction law as courts attempt to determine the balance of convenience between the parties.

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[19] *MacMillan Bloedel Ltd. v. Mullin*, [1985] CanLII 154 (BC CA).
[20] *MacMillan Bloedel* at 20 and 21.
[21] *MacMillan Bloedel* at 21.
[22] *MacMillan Bloedel* at 23. Optimistic, for example, in light of the concurrent Gitxsan and Wet'suwet'en aboriginal title trial, which took three years to prepare (1984 to 1987) and took 374 days of evidence and argument over another four years (1987 to 1991). *Delgamuukw*, 1997 CanLII 302 (SCC) at para. 5; *Niwhts'ide'nï Hibi'it'ën*, 337.
[23] *Huson* at para. 160 quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334.
[24] *Huson* at para. 215.
[25] Shiri Pasternak and Irina Ceric, "'The Legal Billy Club': First Nations, Injunctions, and the Public Interest," *Toronto Metropolitan University Law Review* 7 (2023): 8, 9.
[26] *The Legal Billy Club*, 29. In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 40, the Supreme Court of Canada held that "a project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest."

In northwestern British Columbia, a series of injunction cases brought by the Gitxsan[27] tracked the courts' move away from preserving forest land pending settlement of aboriginal rights and towards characterizing the public interest as synonymous with the private interest of the timber industry. In *Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council*, Justice Esson held that a proposition flowing from *MacMillan Bloedel* was that "the court should not grant an injunction if the economic consequences of doing so would have a serious impact upon the economic health of the province, the region *or the logging company*"[28] (emphasis added), thus potentially putting the right of a company to get a return on its investment above the constitutional rights of indigenous peoples. Justice Esson did, however, express skepticism at Westar's argument that if the basis of enjoining the company from building a bridge into "virgin territory"[29] was extrapolated, "the existing policy of sustained yield logging would be destroyed" and that "mills will close."[30] The Gitxsan injunction was nevertheless granted in 1989 but discharged in 1995 on the ground that the court of appeal's decision in the *Delgamuukw* aboriginal title case[31] did not give the applicant Gitxsan Houses the right to exclude others from their territories beyond the contested bridge.[32]

In light of the court of appeal's holding in these cases that the province's and the company's continued economic health depended on prioritizing logging over unproven aboriginal rights and title, it is useful to look at the subsequent history of the timber industry in the region. In 1971, timber-processing mills in the region from Prince Rupert and Kitimat on the coast to Hazelton in the interior comprised two pulp mills and eleven sawmills.[33] By 2010, both pulp mills had closed and only two sawmills remained. The closures were ultimately the result of the pulp companies acquiring most of the region's forest licences and high-grading the best timber from bottom lands close to the mills.[34] At the same time, the province initiated a policy of "sympathetic

[27] *British Columbia (Attorney General) v. Wale*, 1986 CanLII 171 (BC CA); *Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council*, 1989 CanLII 2764 (BC CA); *Wiigyet v. District Manager*, 1990 CanLII 2314 (BC SC); *Houses of Gwoimt and Tsabux v. Skeena Cellulose Ltd.*, 1995 CanLII 1832 (BC SC).
[28] *Westar* at para. 55.
[29] *Westar* at para. 24.
[30] *Westar* at para. 70.
[31] *Delgamuukw v. British Columbia*, 1993 CanLII 4516 (BC CA).
[32] *Houses of Gwoimt and Tsabux*, 1995 CanLII 1832 (BC SC) at paras. 28 and 34, leave to appeal denied by the BC Court of Appeal: *Gwoimt v. Skeena Cellulose Ltd.*, 1995 CanLII 1496 (BC CA). The respondent timber company had changed its name and owners since *Westar* but its forest licences and timber processing mills remained essentially the same.
[33] Albert Farley, *Atlas of British Columbia* (University of British Columbia Press, 1979), 66, 70.
[34] *High-grading* here refers to the practice of first logging the more sound tree species – in northwestern British Columbia, lodgepole pine and spruce – on gently sloping ground closer to the mills and provincial road networks. As a result, the less sound species – balsam fir and hemlock – on steep ground far from mills and roads then proved to be unprofitable although included in the annual cut calculations. See Resource Planning Unit, Environment and Land Use Committee Secretariat, *Terrace-Hazelton Reginal Forest Resources Study* (British Columbia Ministry of Environment, 1976).

administration"[35] of the companies' timber utilization and reforestation obligations.[36] The last owners of the Westar/Skeena Cellulose empire were vulture capitalists who ensured their holding company was the only secured creditor of the company's creditor-protected assets, leaving municipalities owed millions in property taxes[37] and contractors and employees without redress.[38]

Significantly, those two surviving sawmills, Skeena Sawmills in Terrace and Kitwanga Forest Products in Kitwanga, each now cut a good proportion of their timber on Gitanyow House territories under a sustainability plan[39] the Gitxsan village's hereditary chiefs negotiated with the province in 2012. Under the plan, each House territory sustains not only timber yield[40] but many other forest resources – water, fish, wildlife, and functioning ecosystems. The lumber companies appreciate the plan's clear prescriptions as to where and how they must operate in the woods.[41] By allowing both Gitanyow indigenous law (ayookw) and provincial Crown law to be maintained over the same area of land and water, the plan is a working example of a multijuridical Canada.

The Gitanyow land-use plan came about largely as the result of four factors. The first was the *Haida Nation v. British Columbia (Minister of Forests)* decision requiring the Crown to consult and accommodate unproven aboriginal rights.[42] Less than a decade after the failed injunction applications by Gitxsan House groups, the Supreme Court of Canada in *Haida* acknowledged that aboriginal rights trials are complex affairs that take years and even decades to resolve in court.[43] An interlocutory injunction over such a long period, in the court's view, would be prejudicial and be a disincentive for the successful party to find a compromised settlement. More

[35] *Sympathetic administration* was a government euphemism for the relaxation of timber harvesting and forest management standards during the 1982–84 economic recession. David Haley, "Forest Policy," in *Forestry Handbook for British Columbia*, 5th ed., edited by Susan Watts and Lynne Tollard (Forestry Undergraduate Society, University of British Columbia, 2005), 6.
[36] Richard Rajala, *Up-Coast: Forests and Industry on British Columbia's North Coast, 1870 – 2005* (Royal BC Museum, 2006), 193, 195, 203, 209.
[37] Jeff Nagel, "City slaps liens on Skeena assets," *Terrace Standard* (10 September 2003), 1; "Prince Rupert claims pulp mill for non-payment of taxes," *Pulp and Paper Canada* (6 October 2009) https://www.pulpandpapercanada.com/prince-rupert-claims-pulp-mill-for-non-payment-of-taxes-1000342738/. The articles report that the District of Terrace was owed $2.4 million and the City of Prince Rupert was owed $6.4 million in unpaid property taxes.
[38] *Skeena Cellulose Inc. (Re),* 2002 BCSC 1280; *Skeena Cellulose Inc. (Re),* 2003 BCSC 27.
[39] The sustainability plan was the Gitanyow Lax'yip Land Use Plan formalized with the British Columbia Crown in the 2012 *Gitanyow Huwilp Recognition & Reconciliation Agreement*; see "Gitanyow Lax'yip Land Use Plan," Gitanyow Hereditary Chiefs, 2025, https://www.gitanyowchiefs.com/wilp-sustainability/gitanyow-laxyip-land-use-plan/.
[40] The concept of a "sustained yield" of timber was entrenched in the BC *Forest Act* in 1947 but was quietly removed by the legislature in 1979.
[41] Matt Simmons, "Some Feared That Gitanyow's Plan Would Hurt Forestry. But Land Is Protected – and Industry Is Thriving," *The Narwhal*, 24 January 2023, https://thenarwhal.ca/gitanyow-land-plan/.
[42] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
[43] *Haida* at para. 14.

reflective of indigenous groups' experience in northwestern British Columbia, the court noted that with injunction cases "the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to 'lose' outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns."[44] In *Haida*, the court held that while injunctive relief was still available to indigenous groups,[45] a process of consultation and accommodation is necessary to maintain the honour of the Crown: "[M]eaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations."[46] The Gitanyow chiefs relied on this newly established Crown duty to consult and accommodate aboriginal rights in a series of cases[47] in which they challenged British Columbia's failure to properly consult on and accommodate on the 2007 transfer of Crown forest tenures from Skeena Cellulose to NWBC Timber and Pulp Ltd.[48]

The second factor that resulted in the Gitanyow land-use plan was that following Skeena Cellulose's creditor protection and asset sale,[49] there was no viable timber conglomerate to assert that any exercise of aboriginal rights would collapse the region's forest economy. The corporations had already done that on their own. The third factor was the chiefs' demand that the joint development of a land-use plan for their House territories be on the consultation agenda. Although an order to this effect was not included in its final decision, the court did make a declaration that the provincial Crown had thus far failed to properly consult and accommodate the Gitanyow chiefs' asserted aboriginal rights.[50] Finally, the Forest Service staff the province assigned to the planning process were regional professionals with a record of promoting and monitoring forest sustainability.[51]

The Gitanyow experience shows the importance of indigenous groups having an endgame in mind when embarking on consultation litigation. Otherwise, compelling the Crown to properly

[44] *Haida* at para. 14.
[45] *Haida* at paras. 13 to 15.
[46] *Haida* at para. 46, quoting with approval New Zealand Ministry of Justice, *A Guide for Consultation with Mäori* [*sic*] (New Zealand Ministry of Justice, 1997), 21.
[47] *Gitxsan v. British Columbia (Minister of Forests)*, 2002 BCSC 1701; *Gitanyow First Nation v. British Columbia (Minister of Forests)* 2004 BCSC 1734; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139*; Wii'litswx v. HMTQ,* 2008 BCSC 1620.
[48] NWBC Pulp and Timber Ltd. was the secured creditor that the vulture capitalists had created to enable them to profit from the sale of Skeena Cellulose's viable assets: *Skeena Cellulose Inc. (Re),* 2002 BCSC 1280 paras. 14, 36.
[49] *Skeena Cellulose Inc. (Re),* 2002 BCSC 1280 para. 36.
[50] *Wii'litsxw v. HMTQ*, at para. 25.
[51] *Wii'litsxw v. British Columbia (Minister of Forests)*, at paras. 108–19 and 189.

carry out its duties merely leads to a refinement of its bureaucratic note-taking, box-ticking, and report-writing regime. More importantly, Gitanyow has shown that developing land-use plans based on indigenous law and negotiating agreements to ensure that they will be followed by provincial Crown forest licensees can lead to a more stable resource industry than the corporate model that continues to be favoured by the courts in injunction cases.

Aboriginal Rights

The *Dsta'hyl* court commented further on the novel defence of harmonizing indigenous law and colonial law:

> I tend to agree with the Crown's submission that if the novel defence were to be successfully advanced, it would likely need to be as a form of exemption from criminal liability premised on s. 35 of the *Constitution Act*. It would be difficult to envisage the defence succeeding absent a proven claim of Aboriginal title to the lands in question. In this case, the defence has consistently taken the position that it was not invoking nor relying on s. 35, and has not complied with the statutory requirements for making such a claim.[52]

The Wet'suwet'en experience with s. 35 remedies, either attempting to prove aboriginal title through litigation or attempting to get their title recognized through treaty negotiations, has been frustrated by a reluctance of the courts or elected governments to grasp this nettle. This frustration has been experienced at both a broad level and at the narrower level of the people's experience with fossil fuel pipelines.

In *Delgamuukw*, the Wet'suwet'en and Gitxsan plaintiff House chiefs took a broad approach, albeit informed by their experience of increasing dispossession from their territories by land alienation to private owners and to Crown land tenure-holders.[53] But because the trial judge gave limited admissibility and no independent weight to the Wet'suwet'en and Gitxsan oral history evidence,[54] the Supreme Court of Canada was unable to determine whether the plaintiffs had sufficient factual basis for their title claim.[55] The court sent their claim back to trial with the now famous admonition that the "reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" is ultimately "through negotiated settlements, with good faith and

[52] *Dsta'hyl* at para. 57(b).
[53] Gisday Wa and Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, May 11, 1987* (Reflections, 1989); Tyler McCreary, *Shared Histories: Witsuwit'en-Settler Relations in Smithers, British Columbia, 1913–1973* (Creekstone Press, 2018).
[54] *Delgamuukw*, 1997 CanLII 302 (SCC) at para. 96
[55] *Delgamuukw*, 1997 CanLII 302 (SCC) at para. 108.

give and take on both sides, reinforced by the judgments of this Court."[56] Exhausted financially and emotionally as they were, the *Delgamuukw* plaintiffs took their claim to the treaty negotiating table. While one of the 1995 injunction judges found evidentiary support for Gitxsan suspicion of British Columbia's negotiation intentions, he seemed reassured by the province's written promises, which he reproduced:

> The government of British Columbia, including the Ministry of Forests, has adopted or will imminently adopt administrative policies to implement the decisions in *Delgamuukw* and *Sparrow* in relation to the issuance of permits under the *Forest Act*. These policies are intended to ensure that any Aboriginal rights potentially affected by a permit will be identified in the planning process and measures will be taken to avoid infringing those rights. Where infringement is inevitable, it will be restricted to the minimum necessary and will have to be justified by the Province pursuant to the tests set out in *Sparrow*. … The treaty negotiation process allows for the adoption of interim measures, including co-management programs, which can be employed to protect priority areas or increase participation of First Nations in decision-making processes.[57]

But the day after the 1997 *Delgamuukw* ruling came down from the Supreme Court of Canada, the provincial government formed a secret committee to get input from the oil and gas, timber, cattle, real estate, and mining industries on treaty negotiations. The timber industry representative told the government that "the decision makes the need for certainty through surrender all the more clear. We see no other alternative."[58] At a "certainty working group" advising BC's treaty negotiators, lawyer Chris Harvey warned, "[T]here is now uncertainty over whether the entire province is burdened by Aboriginal title … What should be sought through the treaty process is the end of Aboriginal rights and title."[59] According to the documents, provincial officials promised to do this through the modern BC treaty process, whereby indigenous peoples would surrender rights to over 90 percent of their territories in exchange for financial compensation and small parcels of land. BC Ministry of Aboriginal Affairs officials deliberated how to accelerate and revamp the treaty process "to create faster certainty in the areas of lands and resources." They proposed "interim agreements" that would have First Nations "agree to support economic stability in British Columbia by refraining from direct action or litigation."[60]

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[56] *Delgamuukw*, 1997 CanLII 302 (SCC) at para. 186.
[57] *Houses of Gwoimt and Tsabux*, 1995 CanLII 1832 (BC SC) at para. 32.
[58] Martin Lukacs and Shiri Pasternak, "Industry, Government Pushed to Abolish Aboriginal Title at Issue in Wet'suwet'en Stand-Off, Docs Reveal," *The Narwhal*, 7 February 2020, https://thenarwhal.ca/industry-government-pushed-to-abolish-aboriginal-title-at-issue-in-wetsuweten-stand-off-docs-reveal/. The quotes used here are from provincial government documents obtained by the *Narwhal* reporters through a Freedom of Information request.
[59] Lukacs and Pasternak.
[60] Lukacs and Pasternak.

Examples of such agreements would be the Forest and Range Agreements of the type rejected by the Gitanyow chiefs before they obtained provincial agreement with the *Gitanyow Lax'yip Land Use Plan*, and the Pipeline Benefit Agreements between BC and *Indian Act* bands rejected by the Wet'suwet'en House Chiefs.[61]

The courts have been reluctant to find proven s. 35 aboriginal rights and title even after long and expensive trials,[62] preferring to advocate negotiated settlements with the Crown reinforced by judgments that merely set out parameters and criteria. By now, however, judges should be aware that negotiated aboriginal rights settlements, from the enshrined constitutional conferences,[63] through modern treaties, to provincial interim resource development agreements, are subject to the political and bureaucratic imperatives to not threaten the current economic "certainty."

At the narrower level, the focus is on the recent problematic history of Wet'suwet'en attempts to give practical effect to s. 35. The failure of governments' ability or courage to honourably negotiate aboriginal rights has been amply demonstrated with the politics and law generated by the building of fossil fuel pipelines through the Houses' territories. The litigation that is the focus of this commentary has challenged two injunction law mantras cited by the courts to convict Dsta'hyl of criminal contempt: one is that disregard of court orders brings the rule of law into disrepute; the other is the court's condemnation of what it characterizes as "self help" when Wet'suwet'en trespass law is being followed. It is said that the rule of law is eroded by diminishing the authority of the court.[64] Yet the Wet'suwet'en experience, both with litigating and negotiating a s. 35 claim and with raising blockades, suggests that following their own law has been more effective than following the Canadian state rule-of-law course.

First, in considering the defendants' submission that they have acted in accord with Wet'suwet'en law and authority,[65] the judge in *Huson* said she found it difficult to reach any conclusions on the indigenous legal perspective based on the evidence before her. She held that the Wet'suwet'en

[61] Information on *Forest and Range Agreements* (superseded since 2024 by *Forest Consultation and Revenue Sharing Agreements*) is at First Nations Forestry Agreements, British Columbia, last updated 19 September 2024, https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/forestry-agreements. Information on *Pipeline Benefit Agreements* is at Natural Gas Benefits Agreements, British Columbia, last updated 19 September 2024, https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/natural-gas-pipeline-benefits-agreements.
[62] The exception being *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII), [2014] 2 S.C.R. 257, where proof of exclusively held territory relied more on the people's common military defence of it than on their indigenous law.
[63] Part IV of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* c. 11 (UK).
[64] *Dsta'hyl* at para. 39.
[65] *Huson* at para. 124.

defendants were asking the court "to decide those issues in the context of the injunction application with little or no factual matrix. This is not the venue for that analysis and those are issues that must be determined at trial."[66] But she would appear to have been somewhat disingenuous here. Canadian injunction law appears to systemically diminish its own authority by using the legal fiction that the issues behind the interlocutory enjoined actions will eventually be adjudicated at a trial. The pipeline company filed its Notice of Civil Claim on 23 November 2018, but in the ensuing years has made no attempt to initiate a trial.[67] There would appear to be an implied understanding between injunction-seeking plaintiffs and the court that there will be no trial at which a factual matrix could be established and judgment rendered on the substantive matter in dispute. When the substantive dispute is about constitutional aboriginal title to territories undergoing significant industrial change, there would seem to be no legal avenue to adjudicate the matter. As already noted in *Haida*, "the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to 'lose' outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns."[68] When, as in this and most other injunction cases, there is no final determination, the process "practically constitutes a de facto resolution of disputed land claims."[69]

As for the *Haida* court's hope that "meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations,"[70] when representatives of the Wet'suwet'en Houses proposed an alternative pipeline route during Coastal GasLink's provincial environmental assessment process that would avoid the crucial salmon spawning and rearing reaches of the Morice River, the company rejected it on the grounds of increased costs and technical considerations.[71] What role, if any, the honour of the provincial and federal Crowns[72] played in that rejection is not clear from the *Huson* court's reasons.

The judge in *Huson* made errors in her application of the public interest factor, however, when she found as a fact that,

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[66] *Huson* at para. 138.
[67] Nor will it. As of the date of this commentary, the construction and testing of the Coastal GasLink pipeline has been completed.
[68] *Haida* at para. 14.
[69] *The Legal Billy Club*, 16.
[70] *Haida* at para. 46.
[71] *Huson* at para. 59.
[72] *Haida* at para. 25.

> [w]hile the defendants suggest that there will be irreparable harm to the public interest specific to Dark House[73], it is not clear on the evidence before me that the same can be said for the Wet'suwet'en nation as a whole. As I have already noted, there is considerable disagreement among members of the Wet'suwet'en nation with respect to the Pipeline Project and there are many in the community who support the Pipeline Project and are of the view that it will have substantial benefits to the Wet'suwet'en nation as a whole.[74]

As evidence of this disagreement, the judge found that five of the six Wet'suwet'en *Indian Act* bands had entered into "community and benefit agreements" with Coastal GasLink and "Pipeline Benefit Agreements" with the provincial Crown.[75] The provincial agreement with the Moricetown Band (now Witset First Nation) states in its preamble and purpose that it is intended to secure the band's support for "the development of the natural gas Pipeline Project" in return for financial benefits.[76] While the financial benefits are detailed,[77] the band's contractual obligations are limited to certifying that it: had engaged in "aboriginal interests" consultation on the pipeline; would not bring any legal action because such consultation was deficient; agreed that all compensation, accommodation, and infringement claims had been resolved; and would not participate in any direct action to impede pipeline construction.[78] In other words, the band is being paid to remain silent on any inadequacies of the province's aboriginal rights consultation and accommodation process. The agreement, however, does not require the band to politically or legally support pipeline development. Therefore, the only formal statements before the *Huson* court as to the Wet'suwet'en "public interest" were the evidence of the House groups involved in the blockades.

The Coastal GasLink agreements along its pipeline route are not public, even to members of the participating bands. A media report of a leaked company benefits agreement with one such band, the Nak'azdli Whut'en, indicates that in return for payments, the band would dissuade its members from taking actions that could "impede, hinder, frustrate, delay, stop or interfere with the project, the project's contractors, any authorisations or any approval process … including any

[73] Dark House, or Yikh Tsawiliggis, of the C'ilhts'ekhyu (Big Frog Clan) was the defendants' territory and House group.
[74] *Huson* at para. 218.
[75] *Huson* at paras. 66 and 136. The question arose in the injunction hearing as to whether the *Indian Act* bands had any authority to enter into an agreement about lands outside of reserve boundaries, but the judge declined to examine even this basic *Indian Act* statutory interpretation issue.
[76] British Columbia, *Coastal GasLink Pipeline Project: Natural Gas Pipeline Benefits Agreement*, 23 January 2015, preamble and s. 2.1, retrieved from https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/natural-gas-pipeline-benefits-agreements.
[77] British Columbia, part 3.
[78] British Columbia, part 5.

media or social media campaign."[79] In an interview, the band's chief councillor said he did not intend to monitor his community: "How can they enforce that clause? It's freedom of speech. They can say whatever the hell they want."[80] Similarly, there is no evidence that the Witset First Nation band has attempted to silence Dsta'hyl or any of the other hereditary chiefs.

The benefit agreements show that a company or government with sophisticated legal advice can attempt to foment at least an illusion of internal disagreement by skating very close to, if not into, Charter of Rights and Freedoms violations. On their face, there was no evidence that the various benefit agreements undermine the authority of the Wet'suwet'en House chiefs on their territories. As with all legal orders, Wet'suwet'en law accommodates internal disagreements through conflict resolution responses and decisions. Similarly, there was no evidence before the court that the pipeline would contribute to the public interest of the Wet'suwet'en people as a whole.

If someone blatantly disregards an injunction, they can be charged with criminal contempt of court, which is what happened to Dsta'hyl. Early in its reasons, the *Dsta'hyl* court identified the central issue of Canadian criminal contempt law as whether the accused's actions "would tend to deprecate the authority of the court"[81] and that "conduct which diminishes the authority of the court, broadly speaking, will have the additional effect of eroding the rule of law as that concept is properly understood in Canada."[82] The judge then quoted the Supreme Court of Canada: "The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect."[83]

The *Dsta'hyl* court identified "self-help remedies," meaning blockades, as not being a legally viable option to deal with the original injunction's disregard of relevant Wet'suwet'en law.[84] In *Huson*, the judge quoted an earlier BC Court of Appeal decision asserting that "such 'self-help' remedies are not condoned anywhere in Canadian law, which includes aboriginal, common, and

[79] Chantelle Bellrichard, "Benefits Agreement Asks First Nation to Discourage Members from Hindering BC Pipeline Project," CBC News, 9 August 2019, https://www.cbc.ca/news/indigenous/coastal-gaslink-nak-azdli-whut-en-agreement-1.5238220.
[80] Bellrichard.
[81] *Dsta'hyl* at para. 36.
[82] *Dsta'hyl* at para. 39.
[83] *Dsta'hyl* at para. 40, quoting *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at para. 50.
[84] *Dsta'hyl* at para. 55.

criminal law, and they undermine the rule of law."[85] In the *Manuel*, *Huson*, or *Dsta'hyl* decisions, however, the courts did not attempt to understand and apply the relevant Secwépemc or Wet'suwet'en indigenous law that was argued before them. If they had, they would have discovered that the very basis of those legal orders was the absence of any overarching sovereign law or enforcement. Rather, each legal actor – in the Wet'suwet'en case, the House group in consultation with the other Houses in its clan – has a trust-like duty to defend its territories for the benefit of future generations. If judges want to characterize such a duty as "self-help" they may do so but not without carefully examining the relevant evidence of such indigenous law and legal process.

Yet events following the 31 December 2019 *Huson* injunction showed that blockades can be a powerful tool when indigenous jurisdictions see their authority being repressed by, rather than reconciled with, Canadian law. In the following three months, solidarity blockades by indigenous peoples erupted in at least six provinces, widely disrupting freight and passenger activity at rails and ports across Canada, prompting panicked reactions from politicians, the RCMP, and security services.[86] By the end of February, the federal and BC governments had cobbled together a Memorandum of Understanding (MOU) with the Wet'suwet'en House Chiefs in which the provincial and federal Crowns "recognize that Wet'suwet'en rights and title are held by Wet'suwet'en houses under their system of governance" and "recognize Wet'suwet'en aboriginal rights throughout the Yintah."[87] The three parties then committed to negotiations on the substance of this rights and title recognition with three-month, six-month, and twelve-month deadlines for various items and stages of completion.[88] The MOU was formally ratified on 14 May 2020. But by then the COVID-19 epidemic was sweeping the country, and the Canada-wide blockades joined everyone else in lockdown. With the economic and political threat dissipated, the MOU's aggressive formal recognition timetable also dissipated. By the end of the year, the

[85] *Huson* at para. 153, quoting *R. v. Manuel*, 2008 BCCA 143 at para. 62. In paras. 153–56 of *Huson*, the judge takes the concept of Aboriginal law in the *Manuel* quote – the constitutional rights and title of Indigenous Peoples that are recognized by the Crown – and applies it to Indigenous law – the legal orders of Indigenous Peoples that they themselves recognize and practice.
[86] See, for example: "Wet'suwet'en Chiefs, Blockades and Coastal GasLink: A Guide to the Dispute over a B.C. Pipeline," *Globe and Mail*, 14 January 2020, https://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-coastal-gaslink-pipeline-rcmp-explainer/; "Timeline of Wet'suwet'en Solidarity Protests and the Dispute That Sparked Them," Global News, 17 February 2020, https://globalnews.ca/news/6560125/timeline-wetsuweten-pipeline-protests/; Amber Bracken and Leyland Cecco, "Canada: Protests Go Mainstream as Support for Wet'suwet'en Pipeline Fight Widens," *The Guardian*, 14 February 2020, https://www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies.
[87] Memorandum of Understanding between Canada, British Columbia and Wet'suwet'en, 29 February 2020, enclosed with letter from Hon. Carolyn Bennett, federal Minister of Crown-Indigenous Relations, and Hon. Scott Fraser, provincial Minister of Indigenous Relations and Reconciliation, to Wet'suwet'en Hereditary Chiefs (1 March 2020). "The Yintah" refers to the Wet'suwet'en House territories.
[88] Memorandum of Understanding.

initial urgency of the MOU had become enmeshed in the web of some ten or so action groups and committees, including a large Wellness Working Group and two regional "stakeholder" groups.[89] The MOU's three- to twelve-month completion deadlines were long passed and apparently long forgotten. To complete the process's bureaucratization, British Columbia gave a three-year funding grant of $7.22 million to the society providing technical support to the hereditary chiefs.[90] Since the funding announcement, little news has emerged from the rights and title negotiations. At the same time, British Columbia was spending nearly $28 million on the RCMP Community-Industry Response Group (C-IRG)[91] enforcing Coastal GasLink injunctions on the Wet'suwet'en Morice River territories.[92]

Contrary to judges' finger-wagging at "self-help" blockades, the Wet'suwet'en experience since the *Huson* injunction shows that blockades can produce a political response, which can be quickly translated into legally-binding agreements between indigenous peoples and state governments as long as a nationwide threat can be maintained. In 2020, the COVID-19 outbreak prevented any such sustained effort, and the more local Wet'suwet'en territory defence was able to be contained by vigorous police action, albeit at a significant financial cost to government.

Conclusions

In his trial decision in *Delgamuukw*, Chief Justice McEachern observed that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations."[93] This article has shown that the equitable law of injunctions as currently practiced in British Columbia has its own history, legends,[94] and politics, but with uncertain moral obligations.

The history of injunctions involving the province's resource industries replays the legend that the determinative issue of public interest is equated with the private interest of industrial corporations. This became apparent in the 1990s when judges granted timber companies' injunction applications against indigenous groups on their forest territories on the ground of public interest, despite the industry's clear record of unsustainable forest practices and a rare

[89] *MOU Negotiations Update: The Wet'suwet'en Affirmation Agreement (AA): Ongoing Dialogue*, Office of the Wet'suwet'en, 7 January 2021.
[90] BC Ministry of Indigenous Relations and Reconciliation/Office of the Wet'suwet'en News Release, "Province Supports Wet'suwet'en Nation MOU on Title and Rights Negotiations," 16 April 2021.
[91] Since January 2024, C-IRG has been rebranded as the Critical Response Unit.
[92] Brett Forester, "Injunctions Justify RCMP Spending Nearly $50M on Resource Standoffs, BC Mountie Says," CBC News, 13 January 2023, https://www.cbc.ca/news/indigenous/rcmp-cirg-injunctions-brewer-1.6713168. The financial data are from 2018 to mid-2022.
[93] *Delgamuukw v. British Columbia*, 1991 CanLII 2372 (BC SC) at 582, quoting *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104.
[94] *Legend* is defined here as a narrative that may not have happened but is useful to those who promulgate it as true. For example, that mathematical models reflect natural systems, that the doctrines of discovery reflect Canadian state law, and that encounters with spirit beings give meaning to people's lives and identity.

practical example of Crown-indigenous sustainable comanagement at Gitanyow. Post-*Delgamuukw*, the province made a determined, if secret, effort to minimize its impending constitutional obligation to reconcile Crown sovereignty with the preexistence of indigenous societies and to maximize its political obligations to deliver on the resource industries' demand for tenure "certainty" on Crown lands.

A second legend told in the *Huson* injunction decision and retold in the subsequent MOU between the Wet'suwet'en Chiefs and British Columbia was that any recognition of indigenous law and title required there be no conflict of views among the Wet'suwet'en. The *Huson* court takes several pages to describe and quote in detail the evidence of four Witset band members who disagreed with the blockades. Despite the injunction judge finding that the bands have a "different perspective" on the pipeline from the House groups,[95] the evidence described in the decision suggests the bands appeared more concerned with getting their Impact Benefit Agreement payments than with the effects of pipeline construction on Wet'suwet'en territories or on Wet'suwet'en people.[96] No such "unity" requirement has been suggested for provincial citizens in whose name the provincial government gave the pipeline builders its legal permits and authorizations and in whose name it later signed the 2020 MOU.

A third legend, earnestly repeated in both the *Huson* injunction decision and the *Dsta'hyl* criminal contempt decision, was that "self-help" in the form of blockades showed disrespect for the rule of Canadian state law. Yet it was after nationwide blockades by members of a number of indigenous peoples in support of Wet'suwet'en actions that both the federal and provincial governments signed an MOU that recognized Wet'suwet'en aboriginal rights held by their hereditary chiefs. The governments were able to indefinitely stall implementing the terms of the MOU only after the COVID-19 epidemic dissipated the supportive blockades. While this stalling may have been legal – MOUs are generally not legally binding on their parties – the Crowns' disregard of the agreed implementation timeline does bring into question a breach of moral obligations, let alone the honour of the Crown.

Injunction law on Wet'suwet'en and Gitxsan territories over the last four decades shows the claims to recognition and implementation of aboriginal title are beset with history, legends,

[95] *Huson* at para. 136.
[96] *Huson* at para. 68.

politics, and moral obligations told and dispensed by both Crown governments and Crown courts, as well as by indigenous peoples. In these circumstances, the matter of when and by whom the rule of law is brought into disrepute becomes quite nuanced.