IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coastal GasLink Pipeline Ltd. v. Huson,* 2019 BCSC 2264

Date: 20191231
Docket: S1854871
Registry: Prince George

Between:

Coastal GasLink Pipeline Ltd.

Plaintiff

And

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

Corrected Judgment: This judgment was amended on January 22, 2020.

Before: The Honourable Madam Justice Church

Reasons for Judgment

In Chambers

Counsel for plaintiff:	K.G. O'Callaghan D.L. Bryant N. Rand
Counsel for defendants:	M.L. Ross K. Campbell N. Ross B. Ralston
Place and Date of Hearing:	Prince George, B.C. June 12, 13 & 14, 2019
Place and Date of Judgment:	Prince George, B.C. December 31, 2019

Introduction

[1] By way of a notice of application filed November 26, 2018, the plaintiff, Coastal GasLink Pipeline Ltd., sought an interlocutory or interim injunction restraining the defendants from blockading the Morice West Forest Service Road ("Morice West FSR") at the Morice River Bridge (the "Bridge Blockade") and preventing access to the area to the west of the Bridge Blockade, which is accessible by vehicle using the Morice West FSR.

[2] On December 14, 2018, I granted an interim injunction enjoining the defendants from blockading the Morice West FSR and preventing access to the area accessed by that road.

[3] After the interim injunction was granted on December 14, 2018, another group of individuals set up a new blockade at KM 44 of the Morice Forest Service Road ("Morice FSR"), which they referred to as the "Gidimt'en Access Point" (the "KM 44 Blockade").

[4] As a result of the KM 44 Blockade, the plaintiff sought to vary the December 14, 2018 order to expand the area impacted by the interim injunction order. On December 21, 2018, I revised the interim injunction to include all of the Morice FSR (the "Interim Injunction").

[5] The Interim Injunction was granted pending a full hearing of the interlocutory injunction application. The defendants required additional time to retain legal counsel and prepare materials in support of their application response in which they opposed the granting of the interlocutory injunction. The parties agreed to schedule the interlocutory injunction application hearing before me on June 12–14, 2019.

[6] During the intervening period, two further applications were filed.

[7] On May 30, 2019, the plaintiff filed an application to strike portions of various affidavits submitted by the defendants on the grounds that they contained argument, irrelevant hearsay and inadmissible opinion evidence.

[8] On June 10, 2019, the defendants filed an application seeking to set aside the Interim Injunction on the grounds that there was an outstanding jurisdictional issue before the National Energy Board and this court was not aware of that outstanding jurisdictional issue at the time the Interim Injunction was granted. The defendants submitted that the outstanding jurisdictional issue raised a question as to whether the plaintiff held all of the necessary regulatory permits to proceed with its undertaking.

[9] All three applications were heard by me on June 12–14, 2019.

Background to the Interim Injunction Order

[10] As set out in my reasons for judgment of December 14, 2018, the plaintiff, Coastal GasLink Pipeline Ltd. is a British Columbia company and is a wholly-owned subsidiary of TC Energy Corporation (formerly known as TransCanada Pipelines Limited), which owns and operates a network of approximately 91,900 km of natural gas pipelines across North America.

[11] The plaintiff obtained all of the necessary provincial permits and authorizations to commence construction of a natural gas pipeline that will run for approximately 670 kilometres from an area west of Dawson Creek to a liquefied natural gas export facility to be built near Kitimat (the “Pipeline Project”). The Pipeline Project will be owned and operated by TC Energy Corporation, through the plaintiff, Coastal GasLink Pipeline Ltd.

[12] The estimated cost to build the export facility and the Pipeline Project is approximately $40 billion. The plaintiff has entered into long term transportation service agreements with LNG Canada Joint Venture Participants and it is estimated that the plaintiff will spend approximately $6.2 billion to implement the Pipeline Project.

[13] The Pipeline Project is a major undertaking, which the plaintiff contends will generate benefits for contractors and employees of the plaintiff, First Nations along

the pipeline route, local communities and the Province of British Columbia. Those benefits are expected to include:

a) Creation of approximately 2,500 jobs during peak construction on the Pipeline Project and a total of approximately 10,000 jobs during peak construction across the export facility, the Pipeline Project and associated upstream development;

b) Substantial federal, provincial and local municipal and regional tax revenue;

c) Long term financial benefits to the 20 Indigenous Bands along the Pipeline Project route as a result of project benefit agreements, forecast to total more than $338 million cumulatively over the life of the Pipeline Project;

d) Contracting and employment opportunities in proximity to the Pipeline Project, including more than $620 million in contract work to Indigenous businesses for upcoming construction and additional opportunities for Indigenous and local businesses expected to total approximately $400 million; and

e) Investment to support community programs and events and provide training and educational opportunities for local communities and First Nations.

[14] The defendant, Freda Huson is the spokesperson for the Unist'ot'en, described as a matrilineal group of Wet'suwet'en with bloodlines that belong to the earliest membership who make up the larger Wet'suwet'en Nation. Their membership spans three different house groups in the Gil_seyhu Clan (the Big Frog Clan).

[15] Ms. Huson is also a contact person for Dark House (Yex T'sa wil_k'us), one of the Wet'suwet'en houses in Gil_seyhu Clan. She is also an elected member of the Witset First Nation Band council, which is one of the Wet'suwet'en *Indian Act* Bands.

[16] The defendant, Warner Naziel is a member of the Sun House of the Laksamshu Clan and holds the hereditary titles Toghestiy and Smogelgem. Prior to

separating from Ms. Huson in December 2018, Mr. Naziel assisted the Unist'ot'en with trapping, hunting, gathering firewood, and providing logistical support.

[17] In or about 2012, Ms. Huson, Mr. Naziel and others set up the Bridge Blockade on the Morice West FSR. The defendants have said publicly that one of the main purposes of the Bridge Blockade was to prevent industrial projects, including the Pipeline Project, from being constructed in Unist'ot'en traditional territories.

[18] The Bridge Blockade consisted of two gates spanning the width of the Morice River Bridge. The gates blocked access to the bridge and also to the Morice West FSR to the west of the Bridge Blockade. The first gate was constructed midway across the Morice River Bridge and was comprised of wood and barbed wire. The wood portion of the gate was painted with signage that read "WEDZIN KWA CHECKPOINT UNIST'OT'EN TERRITORY NO ACCESS WITHOUT CONSENT". A second gate made of metal pipe and spanning the width of the bridge was constructed further down the Morice River Bridge.

[19] The defendants have used the gates to restrict access beyond the Morice River Bridge and administer a "free, prior and informed consent protocol" to individuals seeking access. They have denied access to various representatives of industry and government, including the RCMP and have refused to remove the gates on the bridge despite notice that the construction of the Blockade contravened the *Forest Service Road Use Regulation*, B.C. Reg. 70/2004.

[20] In recent years, the defendants have allowed Canadian Forest Products and its contractors through the Bridge Blockade to conduct work, including logging and log hauling, construction of new access roads and maintenance of existing roads.

[21] In addition to the gates, the defendants and their supporters have constructed several structures and cabins to the west of the Morice River Bridge, on either side of the Morice West FSR. The structures and cabins are referred to as the

Unist'ot'en Camp or Village and the defendants have deposed that they utilize those structures as a house and a healing centre.

[22] Over a period of several years beginning in 2012, the plaintiff obtained the provincial permits and authorizations to commence construction of the Pipeline Project, as well as road use permits and road use agreements, including for the use of the Morice River FSR and the Morice River Bridge. During this time, no final decision had been made with respect to construction of the export facility in Kitimat and thus construction of the Pipeline Project remained in a holding pattern.

[23] After 2012, the plaintiff made various attempts to access the area to the west of the Bridge Blockade for the purpose of conducting field work required for planning and permitting for the Pipeline Project. Those attempts were largely unsuccessful due to the Bridge Blockade. The plaintiff chose to complete some of those activities by working around the Bridge Blockade, rather than confronting the defendants and possibly escalating conflict.

[24] On October 1, 2018, the LNG Canada Joint Venture Participants announced that they had taken a positive Final Investment Decision for construction of the export facility and the following day, TC Energy Corporation announced that it would proceed with construction of the Pipeline Project beginning in January 2019.

[25] The Pipeline Project is large, ambitious and logistically complex. Construction contractors are required to complete construction by the end of 2021, in order to meet the plaintiff's contractual obligation to LNG Canada for delivery in 2022. There are scheduling constraints, such as weather and environmental restrictions, which limit the plaintiff's construction window.

[26] The Pipeline Project runs from KP 0 (i.e., 0 kilometres) near Dawson Creek to the western terminus, KP 667 (i.e., 667 kilometres) near Kitimat. Construction organization for the Pipeline Project is divided into eight sections, numbered from east to west, with Section 1 being the easternmost section and Section 8 being the westernmost section. The area between KP 583.3 and KP 667.4 is designated as

Section 8. It includes steep terrain and mountainous topography as the Pipeline Project travels over the Coast Mountains. Section 7 is the area east of KP 583.3 to KP 500 and is where the Bridge Blockade and the KM 44 Blockade are located.

[27] In addition to the Pipeline Project, the plaintiff plans to construct certain ancillary sites in Section 7, which will be required to undertake construction in Section 8. These include a workforce accommodation camp, known as Camp 9A, which will initially facilitate construction for clearing and grading work and will later expand to house workers in 2020 and 2021. The plaintiff also plans to construct several smaller camps in Section 7, known as pioneer camps.

[28] Section 7 is a critical access point to Section 8 of the Pipeline Project, due to the rough terrain, remoteness and regulatory constraints associated with the eastern portion of Section 8. The plaintiff submits that the only feasible access point for Section 8 is via existing roads, which connect to the western portion of Section 7. If the plaintiff is unable to access and construct Section 8 of the Project, the Pipeline Project cannot proceed.

[29] The plaintiff has obtained provincial authorizations, including road use permits and road use agreements, to use a number of roads in this area, including the following:

a) Morice FSR;

b) Morice West FSR;

c) Shea Creek FSR;

d) CP 571 R07593 2 0; and

e) CP 573 R07593 6 0.

(the “Roads”)

[30] Prior to the Interim Injunction, access to the Roads was impeded by the Bridge Blockade.

Events After the Interim Injunction

[31] As I have already noted, I granted an interim injunction order on December 14, 2018 and revised the Interim Injunction on December 21, 2018 to include all of the Morice FSR.

[32] Despite the Interim Injunction, the Bridge Blockade and the KM 44 Blockade remained in place after December 21, 2018. The KM 44 Blockade was fortified with a wooden barricade across the road, barbed wire and a bus, which remained parked behind the barricade. There were persons behind the KM 44 Blockade and pedestrians and vehicles were prevented from accessing the road beyond the barricade.

[33] On January 7, 2019, the RCMP attended the KM 44 Blockade to enforce the Interim Injunction. Efforts were made to diffuse the escalating tensions at the KM 44 Blockade and representatives of the plaintiff met with a group of Wet'suwet'en hereditary chiefs, including John Ridsdale, Jeff Brown, Ron Mitchell and Warner William, to discuss providing voluntary access beyond the KM 44 Blockade. Those efforts were unsuccessful and the individuals behind the KM 44 Blockade refused to voluntarily remove the barricade.

[34] Shortly thereafter the RCMP began an operation to enforce the Interim Injunction, which included scaling the blockade, securing the area and making arrests. When RCMP members began the enforcement action, a large fire was ignited behind the bus and trees were felled across the road which further impeded access to the west of the KM 44 Blockade.

[35] Late in the day on January 7, 2019, the RCMP established control over the area of the KM 44 Blockade and fourteen individuals were arrested by the RCMP while enforcing the Interim Injunction. The individuals arrested were subsequently

released on undertakings to comply with the Interim Injunction. Contempt proceedings against the fourteen individuals were later vacated.

[36] Although some of the plaintiff's personnel, workers and contractors were in the vicinity and ready to undertake construction related works following enforcement of the Interim Injunction, they were not able to access the area beyond the KM 44 Blockade and the Bridge Blockade on January 7, 2019 or for several days after the enforcement action.

[37] According to the evidence of the plaintiff, access to the roads west of the Morice River Bridge continued to be impeded until January 11, 2019 and there were repeated incidents by individuals involved in the blockades that delayed the plaintiff's schedule of work.

[38] The plaintiff eventually entered into negotiations with individuals at the Unist'ot'en Camp, which resulted in the conclusion of an Access Protocol Agreement dated April 12, 2019 (the "Access Protocol"). The Access Protocol has provided a framework for access pursuant to the Interim Injunction since that time.

Pipeline Project Work Since the Interim Injunction

[39] The plaintiff was unable to access and conduct surveys of the access roads west of the KM 44 Blockade and the Bridge Blockade in November or December, 2018, as anticipated in the construction schedule. As a result of the Interim Injunction, the plaintiff was able to access that area in January 2019 and it determined that approximately five new bridges were required in the area beyond the Morice River Bridge, which required additional time for procurement, design and delivery to the site. As a result, the start of the Section 8 right-of-way was delayed by approximately two months and was not completed until early March 2019.

[40] The plaintiff's contractors were able to complete most of the pre-construction activities in Section 8, including work on access road construction and maintenance, clearing, and camp site development. Clearing of approximately two kilometres of new access road was completed in Section 8 by the date of the chambers hearing.

The construction schedule estimated that 12 kilometres of new access road would have been completed by that point.

[41] The blockades and other access issues have resulted in delays in occupancy of Camp 9A, with the result that workers who would have been based at Camp 9A to conduct clearing activities in 2019 ended up having to travel approximately 4 hours to the site. The plaintiff alleges that this has resulted in lost production time and additional costs in excess of $1 million for the period up to May 2019.

[42] Despite the Access Protocol, the plaintiff alleges that there continued to be incidents involving supporters of the defendants, which have intermittently impeded and delayed the Pipeline Project. The defendants have been soliciting support and donations from the public and encouraging people to join them in the blockades. Other groups, referred to as “new resistance camps”, have established themselves in other areas within Sections 7 and 8 with the stated purpose of preventing construction of the Pipeline Project.

[43] On March 19, 2019, the defendant, Mr. Naziel made the following post on Instagram regarding the purpose of the Unist’ot’en Camp and the other “resistance camps”:

> For almost ten years, the Wet’suwet’en have been resisting an array of oil and gas pipelines...The focal point of these efforts have been the Unist’ot’en Camp, a long-standing territorial reoccupation which was built directly in the proposed pipeline corridor. Years of resistance have caused multiple multi-billion dollar projects to be delayed and/or cancelled.
>
> …
>
> It is important to realize that the fight is far from over. The events of December and January should be regarded as one phase in a struggle that has been going on for a decade. A new phase of struggle will begin in the Spring of this year, and it may prove to be a decisive one. Part of the strategy is to stymie CGL by blocking them at multiple points. Whereas at the beginning of December, there was one resistance camp on Wet’suwet’en territory, there are now three, and a fourth will be beginning soon. We encourage all committed land defenders to plan to participate in the struggle on Wet’suwet’en territory this Spring and Summer.

[44] In March 2019, a camp was re-established in the pull-out area at approximately KM 44, near the location of the KM 44 Blockade. Various wood pallet structures were erected at the pull-out, which are not blocking access through the area by road but have prevented use of the pull-out area on the Morice FSR.

[45] On March 2, 2019, a Pipeline Project crew was threatened by an individual and turned back while surveying a remote area around KP 586.7. The plaintiff then became aware of a camp constructed in the vicinity of KP 587 on the Pipeline Project right-of-way. A group calling themselves the Tsayu Land Defenders have established a camp at that location and have described the purpose of their activities as a means of stopping the plaintiff from conducting work in the Tsayu Clan's asserted territory.

[46] On May 29, 2019, employees and contractors of the plaintiff observed increased traffic proceeding down the Crystal Creek Forest Service Road ("Crystal Creek FSR"), including vehicles departing from the Unist'ot'en Camp carrying building supplies and some passengers covering their faces with bandanas or balaclavas. Staff of the plaintiff discovered a cabin built at KM 5 of the Crystal Creek FSR, directly in the path of the Pipeline Project right-of-way. Public statements made by individuals representing the Unist'ot'en Camp have included their intention and plan to "build Healing Cabins in strategic locations".

[47] In March 2019, a group formed by the defendant, Warner Naziel and referred to as the "Sovereign Likhts'amisyu", indicated that they intended to assert jurisdiction in the vicinity of the Parrot Lakes Recreation Site, in order to start "a new phase of struggle" in the fight against oil and gas pipelines. The group and Mr. Naziel have stated that their goal is to "stymie" and "impede" the plaintiff's activities by blocking it at multiple "strategically located" points with the construction of several permanent buildings within the Pipeline Project right-of-way.

[48] There have been incidents of movement and removal of flagging relied upon by Pipeline Project crews for construction and environmental matters, causing

compliance issues for the plaintiff, and re-establishment of flagging has led to increased cost and delay.

[49] Other incidents have also delayed progress on work scheduled for the eastern portion of Section 8, including individuals entering the areas behind safety barriers creating safety concerns, individuals parking vehicles in front of heavy machinery and in an active work site, and masked individuals driving a pickup truck into an active work site at a high rate of speed and close to contractors actively working on the road.

[50] Some of the plaintiff's personnel accessing active work sites have been subjected to intimidating behaviour or verbal harassment from individuals and there have been reports of similar intimidation in the local community, targeting project workers and individuals who support the Pipeline Project.

Position of the Defendants

[51] The defendants assert that the Wet'suwet'en people, as represented by their traditional governance structures, have not given permission to the plaintiff to enter their traditional unceded territories in which Sections 7 and 8 of the Pipeline Project are located. They submit that the plaintiff is in their traditional territory in violation of Wet'suwet'en law and authority and their efforts in erecting the Bridge Blockade were to prevent violations of Wet'suwet'en law. The defendants assert that they were at all times acting in accordance with Wet'suwet'en law and with proper authority.

[52] Counsel for the defendants submits that the Wet'suwet'en legal perspective is "front and centre in this dispute and deserves equal legal weight in informing the Court's principled exercise of its equitable jurisdiction". The defendants submit that consideration of the Wet'suwet'en legal perspective requires this court to canvass facts and Indigenous laws that inform this perspective.

a) Wet’suwet’en Governance

[53] The Wet’suwet’en people have both hereditary and *Indian Act*, R.S.C 1985, c. I-5 Band council governance systems.

[54] There are 13 Wet’suwet’en houses, each with its own head hereditary chief or house chief and other hereditary chiefs. The 13 houses are also divided into five clans but decisions are made at the house level. The Wet’suwet’en hereditary chiefs assert that they are the representatives for Wet’suwet’en Aboriginal rights and title and the Office of the Wet’suwet’en represents the hereditary chiefs of those houses who agree to be represented by it for the purposes of consultation.

[55] Dark House (Yex T’sa wil_k’us) is one of the 13 Wet’suwet’en houses and is in the Gil_seyhu Clan (the Big Frog Clan). Chief Warner William, also known as Knedebeas, is the current House Chief of Dark House. Since May 2010, Dark House has chosen to operate independently from the Office of the Wet’suwet’en and is not represented by the Office of the Wet’suwet’en for any business activities, including consultation and accommodation agreements.

[56] There are also five Wet’suwet’en *Indian Act* Bands with elected Chiefs and Councils which represent Wet’suwet’en people: Wet’suwet’en First Nation, Burns Lake Band (Ts’il Kaz Koh First Nation), Nee Tahi Buhn Band, Skin Tyee Nation and Witset First Nation.

[57] In 2012, the plaintiff began the environmental assessment process for the Pipeline Project, in which the Environmental Assessment Office issued a Section 11 Order. Schedule B of the Environmental Assessment Office’s Section 11 Order identified the Aboriginal groups with whom the plaintiff and the Province of British Columbia were required to consult regarding the Pipeline Project. These included the Office of the Wet’suwet’en, as the administrative body which represents most of the Wet’suwet’en Houses; Dark House, who had chosen to operate independently from the Office of the Wet’suwet’en; and the Wet’suwet’en Bands under the *Indian Act*.

[58] It is not disputed that the plaintiff engaged in consultation with the Wet'suwet'en hereditary chiefs and the Office of the Wet'suwet'en over a number of years, through in-person meetings and other interactions. The plaintiff discussed issues raised by the Office of the Wet'suwet'en and the Wet'suwet'en hereditary chiefs and submits that it attempted to address concerns regarding the Pipeline Project.

[59] The Office of the Wet'suwet'en participated in the Environmental Assessment Office's Working Group for the Pipeline Project and actively proposed an alternate McDonnell Lake route for the Pipeline Project. The plaintiff explored and considered the proposed alternate route but ultimately rejected it for various reasons, including inappropriateness for the diameter of the pipeline, increased cost, the desire to avoid urban areas and greater adverse environmental impacts. The plaintiff determined that it was not able to re-route the Pipeline Project through Sections 7 and 8.

[60] Since 2014, the Office of the Wet'suwet'en has expressed opposition to the project on behalf of 12 of the 13 Houses and indicated that the Wet'suwet'en hereditary chiefs opposed the granting of the Environmental Assessment Office and Oil and Gas Commission permits on various grounds. Offers by the plaintiff to negotiate agreements with the Office of the Wet'suwet'en have not been accepted.

[61] The plaintiff made repeated attempts to consult directly with Dark House and offered to provide information and discuss the concerns of Dark House regarding the Pipeline Project and ways to mitigate the potential impacts to Dark House territory. Dark House was invited to participate in the Environmental Assessment Office's Working Group for the Pipeline Project but refused to do so.

[62] Dark House has not participated in formal consultation processes with the plaintiff but has expressed, through its representatives, its opposition to the Pipeline Project. Ms. Huson, in her capacity as spokesperson for Dark House, refused all offers by the plaintiff to meet to discuss the Pipeline Project prior to the commencement of construction. She refused to provide any substantive comments to the Environmental Assessment Office or the Oil and Gas Commission regarding

permit applications and did not accept the plaintiff's offers to provide capacity funding for consultation purposes.

[63] Ms. Huson's only responses have been to state her opposition to the Pipeline Project and that she would not permit the plaintiff to access the territory past the Bridge Blockade.

[64] The plaintiff consulted with the Wet'suwet'en Bands listed in the Environmental Assessment Office's Section 11 Order regarding the Pipeline Project and those Bands also participated in the Environmental Assessment Office's Working Group for the Project, together with the Office of the Wet'suwet'en.

[65] The Wet'suwet'en First Nation, Burns Lake Band, Nee Tahi Buhn Band, the Witset First Nation and Skin Tyee Nation all received capacity funding from the plaintiff for consultation regarding the Pipeline Project. Four of the Bands submitted traditional land use and socio-economic studies identifying potential impacts or benefits of the Pipeline Project.

[66] The plaintiff has entered into community and benefit agreements with all five Wet'suwet'en Bands, as it has with all of the 20 elected Indigenous Bands along the Pipeline Project route. The five Wet'suwet'en Bands have also entered into Pipeline Benefit Agreements with the Province of British Columbia in relation to the Pipeline Project. Many of the benefits under these agreements are subject to material commencement of construction and completion of the Pipeline Project. The long-term financial benefits to those Indigenous Bands are expected to be significant, possibly exceeding $338 million cumulatively over the life of the Pipeline Project.

[67] The defendants assert that the elected Band councils only exercise federal jurisdiction in regard to reserve lands. The affidavit material before me suggests that this position is disputed by the elected Band councils.

[68] The elected Band councils assert that the reluctance of the Office of the Wet'suwet'en to enter into project agreements, out of concern that it might negatively impact their claims to Aboriginal title, placed the responsibility on the Band councils

to negotiate agreements to ensure that the Wet'suwet'en people as a whole would receive benefits from Pipeline Project and other projects in their territory. This appears to have resulted in considerable tension between the Office of the Wet'suwet'en and the elected Band councils, which is readily apparent in some of the affidavit materials filed by members of the Wet'suwet'en community.

[69] Troy Young, a Wet'suwet'en person, descendant of Hereditary Chief Na'moks of the Tsayu (Beaver Clan) is the general manager and director of Kyah Resources Inc., a company owned by a Witset First Nation Limited Partnership and a Wet'suwet'en member owned company. Kyah Resources Inc. has a contract to provide work, including clearing, heli-logging, road building, security and first aid services in Section 8 of the Pipeline Project. Mr. Young deposed that:

> 22. Kyah has a direct connection to the local First Nation community. In addition to local employment opportunities, through Witset's ownership interest in Kyah, a portion of the company's profits can be expected to go to the local community.
>
> 23. A delay in construction of the Project would have a severe impact on the local Wet'suwet'en community and the Wet'suwet'en people. A substantial number of local First Nations persons are expecting to be employed to perform work related to the Project. These jobs would be well-paying and could provide a means of supporting further economic development in the community by providing access to valuable skills training, that would positively affect how people live in the community. The Project provides a real opportunity for positive change in the local community.

[70] Similarly, Reginald Ogen is member of the Wet'suwet'en First Nation and President and CEO of Yinka Dene Economic Development General Partner Inc., general partner of Yinka Dene Economic Development Limited Partnership ("YLP"). YLP is the Wet'suwet'en-wholly-owned economic development arm of the Wet'suwet'en First Nation ("WFN") and has entered into a limited partnership which was awarded a contract for camp facilities at Camp 9A and Pioneer Camp 2. The contract is valued at approximately $75 million and is expected to employ between 50 and 80 people. Mr. Ogen deposed that:

> 10. Generally, YLP stands to benefit from Project-related contracts and resulting economic and employment opportunities. The benefits received by YLP will ultimately flow to WFN and WFN members, including by way of jobs,

> training, education, and revenue to the community. The Project represents a generational opportunity for YLP. Major projects like this are infrequent for WFN and YLP. Delay or cancellation of the Project would have negative consequences by virtue of the loss of employment and opportunities for WFN members, as well as lost business opportunities for YLP.
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> …
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> 12. Jobs and training are critical for the 255 WFN members living on and off reserve land. These jobs are a short and medium term opportunities for employment but also a long term opportunity for training in trades-training that lasts a lifetime and provides future opportunity. However, without the Project these direct benefits stemming from the Project will not come to pass.
>
> 13. As a WFN member, I recognize the rights of my fellow WFN members and I would like the court to recognize my aboriginal rights under Section 35 of the *Constitution Act, 1982* and the rights of my community of WFN members and WFN with regard to participation in decisions and activities related to economics, lands and culture that occur within WFN traditional territory. Our rights, therefore are infringed upon and will be affected by the present Blockade.

b) The Unist’ot’en

[71] The defendant, Ms. Huson, has been identified as spokesperson for the Unist’ot’en, which as I have already noted has been described as a matrilineal group of Wet’suwet’en with “incontestable bloodlines that belong to the earliest membership who make up the larger Wet’suwet’en Nation. Our membership spans for many millennia, and also across three different House Groups in the *C’ilhis’ekhyu* Clan, which was referred to in the Delgamuukw v the Queen Supreme Court Case.”

[72] This description of the Unist’ot’en appears to have evolved and changed, even over the course of these proceedings. The Unist’ot’en Camp’s own website has described the Unist’ot’en as the Big Frog Clan. The Unist’ot’en are not, however, a governing Wet’suwet’en body and the Office of the Wet’suwet’en continues to represent the other two houses in the Big Frog Clan, Thin House and Birchbark House.

[73] More recently the defendants have described Unist’ot’en as “a Wet’suwet’en name for the Dark House, which is one of the three houses in the Gil_seyhu Clan”. In their affidavits filed in this proceeding, Chief William and Ms. Huson describe the

term “Unist’ot’en” and Dark House as being equivalent. This is in marked contrast to public statements made by the defendants in the years leading up to October 1, 2018, that the Unist’ot’en span three different house groups.

[74] The Unist’ot’en was not identified in the Section 11 Order as an Aboriginal group with whom the plaintiff was required to consult with respect to the Pipeline Project.

c) The Wet’suwet’en Matrilineal Coalition

[75] More recently, there have been disagreements among some of the Wet’suwet’en people with respect to who holds certain hereditary chief names and whether proper protocols have been followed with respect to taking of such names.

[76] Darlene Glaim and Theresa Tait-Day both assert that they are hereditary chiefs of the Wet’suwet’en and that they were tasked by other hereditary chiefs with forming a group to consider how to conduct decision-making as a nation with respect to major projects in Wet’suwet’en territory. According to Ms. Glaim, this arose due to concerns from some hereditary chiefs regarding the refusal of the Office of the Wet’suwet’en to engage in negotiations regarding projects in their territory because of concerns that such engagement might compromise its position in treaty negotiations and its title claims.

[77] Ms. Glaim further asserts that the Bridge Blockade and the Unist’ot’en Camp are located in Grizzly House territory, not in Dark House territory as alleged by the defendants, in accordance with territorial boundaries described in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[78] Ms. Tait-Day asserts that the Wet’suwet’en Matrilineal Coalition (“WMC”) was formed to set up a process in which Wet’suwet’en house groups could consider projects in their territories and negotiate agreements in a manner that reflects Wet’suwet’en peoples’ cultural values, matrilineal system and traditional governance. She said that it is meant to bring the Wet’suwet’en nation together to

facilitate engagement and decision-making. There are five board members on the WMC, representing each of the five Wet'suwet'en clans. Each of the board members is either a hereditary chief or wing chief.

[79] Ms. Tait-Day appears to suggest that many Wet'suwet'en people seek a more democratic approach for decision making that impacts the Wet'suwet'en people as a nation. She noted in her affidavit that, although the nation was divided into Bands and hereditary governance, "there is currently no process for decision making as the Wet'suwet'en nation as a whole. A few House Chiefs cannot make decisions for our nation. Everyone in our nation is equal and has a voice that deserves to be heard."

[80] The defendants dispute the evidence of Ms. Glaim with respect to her right to use a hereditary title and they submit that Ms. Glaim and others have failed to follow proper protocols with respect to traditional Wet'suwet'en governance and decision-making. The defendants allege that the plaintiff is attempting to circumvent the Office of the Wet'suwet'en and Dark House by engaging with the WMC when faced with opposition from the Office of the Wet'suwet'en to the Pipeline Project.

[81] The plaintiff denies that it has engaged in any activities that would circumvent Wet'suwet'en traditional governance structures and submits that it has continued to consult with those hereditary chiefs who have been identified to it as hereditary chiefs, as well as with the Office of the Wet'suwet'en "in an attempt to ensure that it is meaningfully consulting with the Wet'suwet'en nation through its hereditary system in the manner in which the Wet'suwet'en people wish to be consulted".

[82] The WMC was not identified in the Section 11 Order as an Aboriginal group with whom the plaintiff was required to consult with respect to the Pipeline Project.

d) Other Groups Asserting Rights

[83] As I have previously noted, after the Interim Injunction was granted, other groups have established a presence along the area of the Pipeline Project right-of-way and have asserted authority over the territory.

[84] The group who refer to themselves as “the Gidumt’en” set up the KM 44 Blockade, which was referred to as the “Gidimt’en Access Point”. After RCMP enforcement of the Interim Injunction and removal of the KM 44 Blockade, the Gidumt’en re-established a camp at a pull-out near the location of the KM 44 Blockade. One of the individuals who identifies with the KM 44 Blockade, Molly Wickham, has made public statements indicating that their occupation of the land is for the purpose of preventing the plaintiff from completing the work necessary to obtain permits and authorizations and to ultimately prevent the Pipeline Project from being constructed.

[85] The group referred to as the “Sovereign Likhts’amisyu” has made public its intention to assert jurisdiction over the Parrot Lakes Recreation Site, with the goal of impeding the plaintiff’s activities by constructing permanent buildings at multiple strategic locations.

[86] Another group of individuals calling themselves the “Tsayu Land Defenders” have established a camp in the vicinity of KP 587 on the Pipeline Project right-of-way. An individual associated with that group, Rob Alfred, has posted video of himself confronting employees of the plaintiff attempting to conduct survey work near KM 587. Mr. Alfred has publicly stated that the plaintiff’s employees are trespassing on Tsayu territory and their injunction “is not valid here”.

[87] Although Gidumt’en and Tsayu are two of the five Wet’suwet’en clans, neither the group at the KM 44 Blockade nor the Tsayu Land Defenders were identified in the Section 11 Order as Aboriginal groups with whom the plaintiff was required to consult with respect to the Pipeline Project.

[88] It is against this background that I must decide the applications before me. I will now address each of the three applications in turn.

Application to Set Aside Interim Injunction Order (as revised December 21, 2018

[89] As I have already noted, the defendants are seeking to vacate the Interim Injunction order. They seek to do so on the grounds that the plaintiff did not advise this Court that the National Energy Board ("NEB") had been asked to determine if the Pipeline Project was properly within federal jurisdiction, giving rise to the possibility that federal permits would have been required by the plaintiff.

[90] In my reasons for judgment granting the Interim Injunction, I accepted the submission of counsel for the plaintiff that the plaintiff had obtained "all necessary permits and authorizations" for the Pipeline Project.

[91] On October 23, 2014, an Environmental Assessment Certificate ("EAC") was issued to the plaintiff under the *Environmental Assessment Act*, S.B.C. 2002, c. 43. The plaintiff completed, or was in compliance with the conditions of the EAC, except those conditions which required access through the Bridge Blockade or pertained to future phases of the Pipeline Project.

[92] The plaintiff was also granted numerous permits, authorizations and other approvals in contemplation of construction work and other activities associated with the Pipeline Project in Sections 7 and 8. Permits from the British Columbia Oil and Gas Commission had been granted to the plaintiff, authorizing it to construct and operate a pipeline and certain ancillary sites in Sections 7 and 8. The pipeline permits required the plaintiff to comply with certain conditions and conduct field work in Sections 7 and 8.

[93] The plaintiff also obtained authorizations to use the Roads in the area for an industrial purpose, namely developing natural resources.

[94] At the time of the hearing with respect to the Interim Injunction, the NEB had agreed to hear an application for determination of jurisdiction of the Pipeline Project. The NEB issued a letter on October 22, 2018, indicating that there was a *prima facie*

case that the Pipeline Project might form part of a federal undertaking and could be subject to regulation under the *National Energy Board Act*, R.S.C. 1985, c. N-7*.*

[95] The defendants argued that the plaintiff's application for an interim injunction, and indeed my decision on that application, was based in large part on the evidence of the plaintiff that it had obtained all of the necessary permits and authorizations to complete the outstanding field work and pre-construction activities. They submitted that the plaintiff did not advise the Court of the outstanding issue before the NEB as to the Pipeline Project's jurisdictional status or the potential that federal permits might be required if the NEB found that the Pipeline Project was part of a federal undertaking and properly subject to federal regulation.

[96] At the time of the chambers hearing in June 2019, the NEB had conducted an oral hearing as to the jurisdictional status of the Pipeline Project but had not yet released its final decision.

[97] On July 26, 2019, the NEB rendered its final decision and concluded that there was no basis on which to conclude that the Pipeline Project was properly within federal jurisdiction. The NEB found that the Pipeline Project was a local work and undertaking, properly regulated by the Province of British Columbia.

[98] The NEB decision, in my view, entirely disposes of the defendants' application to vacate the Interim Injunction. Their application was based on the assertion that there was a "strong likelihood" that the Pipeline Project would be determined to fall under federal jurisdiction and thus the plaintiff did not possess the regulatory authorization to proceed with construction of the Pipeline Project. The decision of the NEB has confirmed the position that the plaintiff has taken throughout this court proceeding, which is that it had all of the necessary and required provincial permits and authorizations.

[99] The defendants did advance an alternative basis for their application, namely that the plaintiff was less than candid at the Interim Injunction hearing in failing to disclose that there was an ongoing jurisdictional issue before the NEB and that such

failure “distorted its representation” that it had all of the necessary and required provincial permits.

[100] I agree with the submission of the plaintiff with respect to this ground. Until such time as the jurisdictional issue was determined by the NEB, the facts of the application and finding by the NEB that there was a *prima facie* case were not relevant. The submission of the plaintiff that it possessed all of the required provincial permits and authorizations was entirely accurate. Federal permits were not required at that time and would not be required unless and until the NEB decided otherwise.

[101] The notice of application of the defendants filed June 10, 2019 is therefore dismissed.

Application to Strike Portions of the Defendants’ Materials

[102] The full hearing of the plaintiff’s interlocutory injunction application was ultimately adjourned to June 12–14, 2019 to allow time for the named defendants to retain counsel and prepare materials in response.

[103] After those response materials were filed, the plaintiff filed on June 5, 2019 a notice of application to strike certain portions of the affidavit material filed on behalf of the defendants.

[104] The application was made on the basis that:

1. The affidavit of Dr. Antonia Mills contains purported expert opinion evidence but did not comply with the provisions of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 regarding expert evidence, her evidence contains second hand hearsay and argument, and is partisan advocacy;

2. The affidavit #1 of Sheldon Ostopowich incorporates inadmissible hearsay in paragraph 4 and Exhibits B and D;

3. The affidavit of Mike Ridsdale contains unattributed hearsay and inadmissible opinion evidence at paragraph 15;

4. The affidavit #1 of Warner Naziel contains inadmissible opinion evidence, argument and unattributed hearsay at paragraphs 43, 46, 79, 80 and 82; and

5. The affidavit #2 of David de Wit contains argument at paragraphs 13 and15 and inadmissible hearsay at paragraph 24.

[105] The plaintiffs also oppose the admission of Affidavit #5 of Freda Huson, Affidavit #2 of Chief Warner William and Affidavit #2 of Sheldon Ostopowich as being contrary to the provisions of the *Supreme Court Civil Rules* and an attempt at "case splitting".

[106] The defendants dispute that the affidavits of Sheldon Ostopowich, Mike Ridsdale, Warner Naziel and David de Wit contain the offending material referred to by the plaintiff. They suggest that:

1. The affidavit of Sheldon Ostopowich includes publicly available information produced by a public official that is relevant to matters at issue in this proceeding;

2. The affidavit of Mike Ridsdale includes statements relayed to him by other hereditary chiefs during the course of work he undertook with the Office of the Wet'suwet'en;

3. The affidavit of Warner Naziel contains observations and opinions about his experience as a member of the Wet'suwet'en hereditary governance and community; and

4. The affidavit of David de Wit contains his opinion regarding events with which he was involved as the natural resources manager for the Office of the Wet'suwet'en and includes business records produced by the Office of the Wet'suwet'en and reviewed by Mr. de Wit.

[107] They do not dispute that the affidavit of Dr. Mills contains opinion evidence and was not properly submitted as an expert opinion. Their position, however, is that Dr. Mills is, in fact, an expert qualified to give such opinions with respect to Wet'suwet'en law and that there is a need for flexibility in how courts approach proof of Indigenous law.

[108] The defendants further argue that the additional affidavits of Freda Huson, Chief Warner William and Sheldon Ostopowich concern new facts that arose after February 19, 2019.

[109] Rule 22-2(13) of the *Supreme Court Civil Rules* provides that:

> (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
>
> (a) the source of the information and belief is given, and
>
> (b) the affidavit is made
>
> (i) in respect of an application that does not seek a final order, or

[110] (ii) by leave of the court under Rule 12-5 (71) (a) or 22-1 (4) (e).Affidavit #1 of Sheldon Ostopowich is an affidavit of a legal assistant from the office of counsel for the defendants. In paragraph 4, Mr. Ostopowich describes downloading various documents from a website called Discourse Media and he attaches two of those documents as Exhibits C and D that were posted with an article on the website. There is no other information as to the source of the documents. Exhibit B to his affidavit consists of copies of redacted documents obtained from a *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 request made by defence counsel to the Ministry of Aboriginal Relations and Reconciliation in 2017. The documents are redacted and there were no submissions made by the defendants' counsel as to the relevance of those documents to these applications. I agree with the submission of the plaintiff that paragraph 4 and Exhibits B to D of the Affidavit #1 of Sheldon Ostopowich contain inadmissible hearsay, are irrelevant and should be struck.

[111] In paragraph 15 of Affidavit #1 of Mike Ridsdale, Mr. Ridsdale says "as I heard from our hereditary leaders…" and then goes on to depose that certain Wet'suwet'en persons have not followed protocol and been stripped of their titles. The hearsay evidence referred to by Mr. Ridsdale is unattributed. Paragraph 15 also contains inadmissible opinion evidence with respect to the actions of the plaintiff and is essentially argument. I agree with the plaintiff's submission that paragraph 15 of Affidavit #1 of Mike Ridsdale is inadmissible and should be struck.

[112] I have reached a similar conclusion about paragraphs 43, 46, 79, 80 and 82 of Affidavit #1 of Warner Naziel. Those paragraphs contain inadmissible opinion evidence with respect to impact on moose and caribou populations in the area and argument regarding the actions of the plaintiff and his belief that the plaintiff is attempting to undermine the authority of the Wet'suwet'en hereditary chiefs and unattributed hearsay, where Mr. Naziel references his "discussions with others" regarding the impact on reconciliation efforts. While Mr. Naziel may genuinely hold such opinions and beliefs, they are not admissible evidence on this application and those paragraphs should be struck.

[113] I agree with the plaintiff's submission that paragraphs 13 and 15 of Affidavit #2 of David de Wit, in which Mr. de Wit expresses an opinion that the plaintiff has sought to undermine traditional Wet'suwet'en governance structures by engaging with the WMC, are opinion and/or argument and are therefore inadmissible. Those paragraphs contain evidence that Mr. de Wit would not be permitted to state in evidence at trial.

[114] With respect to paragraph 24 of Affidavit #2 of David de Wit, Mr. de Wit purports to give evidence regarding a statement alleged to have been made by Richard Gateman, president of the plaintiff, at a meeting that was not attended by Mr. de Wit. Although Mr. de Wit deposes that he reviewed the notes of the meeting, there is no evidence as to who took those notes or when they were taken. Mr. de Wit references and attaches a letter which describes concerns raised by the Office of the Wet'suwet'en following a meeting with officials of the plaintiff in August 2015 but that letter makes no mention of any such comments made by Richard Gateman. In my opinion, this evidence cannot be saved by the assertion that it is a "business record".

[115] With respect to Affidavit #1 of Dr. Antonia Mills, much of her affidavit references her various written works over the many years that she has conducted research and lived with the Wet'suwet'en. She is an anthropologist who has conducted research with and about the Wet'suwet'en since 1985 and has published

books and articles about her research. She was called as an expert witness by the plaintiffs in *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.). Her research has been referred to by other academics in various publications. More recently, she has co-taught an experiential learning course at the Unist'ot'en camp which involved living at the camp and she has publicly supported the defendants and their supporters with respect to these proceedings.

[116] It is clear that the defendants rely on the opinions contained in Affidavit #1 of Dr. Mills as expert evidence of Wet'suwet'en society, governance and laws.

[117] The plaintiff objects to the admission of this evidence on the grounds that Dr. Mills would be inappropriate as an expert as she has participated as an advocate for the Unist'ot'en and has responded to calls for attendance at rallies to support some of the people arrested for participating in the KM 44 Blockade, and thus cannot give fair, objective and non-partisan opinion evidence.

[118] I am prepared to admit Affidavit #1 of Dr. Mills for the purposes of the interlocutory injunction application. It meets the threshold criteria for relevance and is necessary to the extent that her evidence with respect to Wet'suwet'en society and governance is outside the experience or knowledge of the trier of fact.

[119] I am, however, mindful of the fact that Dr. Mills' evidence, while admitted at trial in *Delgamuukw*, was given no weight by the trial judge because of his concern that she was not able to give fair, objective and non-partisan opinion evidence. The trial judge held at 251:

> Dr. Mills, the plaintiffs' other principal anthropologist, also showed she was very much on the side of the plaintiffs. She has almost completely changed her opinion from that contained in her June 1986 draft where she attributed almost all Wet'suwet'en social organization, including the kungax, to borrowings from the Gitksan or other coastal Indians. This is a startling departure from a large body of professional opinion on the part of a witness closely associated with the beneficiaries of her new opinion.

[120] In light of her public support for and close association to the Unist'ot'en Camp, I have similar concerns about Dr. Mills' objectivity and her willingness and

ability to fulfill her duty as an expert witness to this Court to be impartial and non-partisan. This will significantly impact the weight I am able to give Affidavit #1 of Dr. Mills in these proceedings.

Application for an Interlocutory Injunction

[121] The plaintiff seeks an interlocutory injunction on largely the same terms as the Interim Injunction order granted by me on December 21, 2018. The plaintiff is also seeking an enforcement order.

[122] The plaintiff submits that the defendants have chosen to engage in illegal activities to voice their opposition to the Pipeline Project, rather than to challenge the Pipeline Project by legal means. The plaintiff further submits that the defendants continued to engage in illegal activities after the Interim Injunction was granted, in clear breach of the court order.

[123] The plaintiff argues that an overriding principle that should guide the court's decision in this case is that the use of self-help remedies is contrary to the rule of law and is an abuse of process. The plaintiffs submit that where the defendant is obstructing lawfully permitted activity, recourse to self-help remedies cannot and should not be condoned by the court.

[124] The defendants remain opposed to the interlocutory injunction order sought by the plaintiff. The defendants maintain that the plaintiff is attempting to enter Dark House territory in violation of Wet'suwet'en law and authority and they were simply taking steps to prevent such violation of Wet'suwet'en law. The defendants submit that they have at all times acted in accord with Wet'suwet'en law and with proper authority.

[125] The defendants argue that their position does not depend on denying the validity of whatever provincial authorizations the plaintiff may have obtained, although they do in fact dispute their validity. Rather their position is that Wet'suwet'en authorization is also required in order for the plaintiff to proceed on Wet'suwet'en territories and such authorization has not been obtained. Thus, the

defendants maintain that they have a legal right for their actions based on traditional Wet'suwet'en law.

[126] The defendants submit that in all the circumstances, it would not be just and convenient to grant the plaintiff an interlocutory injunction.

Indigenous Law as a Defence

[127] As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions*: Alderville First Nation v. Canada*, 2014 FC 747 at para. 40

[128] There has been no process by which Wet'suwet'en customary laws have been recognized in this manner. The Aboriginal title claims of the Wet'suwet'en people have yet to be resolved either by negotiation or litigation. While Wet'suwet'en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law.

[129] Indigenous laws may, however, be admissible as fact evidence of the Indigenous legal perspective, where there is admissible evidence of such Indigenous customary laws. It is for this purpose that evidence of Wet'suwet'en customary laws is relevant in this case.

Indigenous Legal Perspective

[130] Counsel for the defendants submits that the affidavit evidence of Dr. Antonia Mills provides admissible evidence of the applicable Indigenous customary laws and suggests that I may take judicial notice of Indigenous law as part of Canadian law with the assistance of Dr. Mills' affidavit evidence and other learned publications.

[131] The plaintiff submits that if the affidavit evidence of Dr. Mills is admitted, her opinion evidence should be given little to no weight because Dr. Mills is partisan and lacks independence.

[132] I have been assisted by the descriptions of traditional Wet'suwet'en governance structures and processes in prior jurisprudence, including those found in *Delgamuukw* and in *Canadian Forest Products Ltd. v. Sam*, 2011 BCSC 676.

[133] I have also admitted the evidence of Dr. Mills, upon which some of those descriptions in prior jurisprudence were based. However, for the reasons that follow, the evidence regarding traditional Wet'suwet'en customary law is of limited assistance with respect to the Indigenous legal perspective in the context of this application.

[134] The evidence before me indicates significant conflict amongst members of the Wet'suwet'en nation regarding construction of the Pipeline Project, including disagreements amongst the Wet'suwet'en people as to whether traditional hereditary governance protocols have or have not been followed, whether hereditary governance is appropriate for decision-making that impacts the entire Wet'suwet'en nation and the emergence of other groups, such as the Unist'ot'en, which purports to be entitled to enforce Wet'suwet'en law on the authority of Chief Knedebeas and more recently the WMC, which apparently seeks to challenge the authority of the hereditary chiefs to make decisions for the Wet'suwet'en nation as a whole and the manner in which the traditional governance processes have occurred.

[135] The Unist'ot'en, the WMC, the Gidumt'en, the Sovereign Likhts'amisyu and the Tsayu Land Defenders all appear to operate outside the traditional governance structures, although they each assert through various means their own authority to apply and enforce Indigenous laws and customs. It is not clear whether the emergence of some of these groups is, as the defendants allege, an attempt by the plaintiff to circumvent the Wet'suwet'en legal process or if it is part of the continuing evolution of Wet'suwet'en governance.

[136] The Indigenous legal perspective in this case is further complicated by the fact that the Wet'suwet'en people have both hereditary and *Indian Act* Band council governance systems and there is dispute over the extent of the jurisdictions of each of those governance systems. The five Wet'suwet'en Bands under the *Indian Act* have a different perspective with respect to the Pipeline Project and have entered into various project and benefit agreements, which are expected to provide significant and meaningful financial and other benefits to their community.

[137] All of this evidence suggests that the Indigenous legal perspective in this case is complex and diverse and that the Wet'suwet'en people are deeply divided with respect to either opposition to or support for the Pipeline Project.

[138] It is difficult to reach any conclusions about the Indigenous legal perspective, based on the evidence before me, and I tend to agree with the submission of the plaintiff that the defendants are posing significant constitutional questions and asking this 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.

[139] The reconciliation of the common law with Indigenous legal perspectives is still in its infancy and as the court noted in *Beaver v. Hill*, 2018 ONCA 816 at para. 29:

> …because we are still feeling our way in this delicate area, courts should avoid making definitive pronouncements where a case is in the early stages and where the applicable law is yet in the early stage of development: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 32 and 35.

Self-Help Remedies

[140] As I have already noted, the plaintiff submits that the defendants have chosen to engage in illegal activities to voice their opposition to the Pipeline Project rather than to challenge the Pipeline Project by legal means, which should not be condoned.

[141] The plaintiff argues that the courts have consistently held that where the defendant is obstructing lawfully permitted activity, recourse to self-help remedies is contrary to the rule of law, is an abuse of process and cannot be condoned by the court, which will issue an injunction to restrain it: *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355.

[142] The defendants seek to distinguish their position by arguing that their position does not rely on a denial of the validity of the provincial permits and authorizations obtained by the plaintiff. They argue that by virtue of Wet'suwet'en law and authority, the plaintiff also requires the specific authorization of Chief Knedebeas, Warner William, for access to the Dark House territory and specific land-use activities and such authorization has not been sought or granted.

[143] Although counsel for the defendants has framed their position as one which does not rely on a denial of validity of the provincial permits, the essence of the position the defendants are asserting is that the Pipeline Project and its authorizations are infringing on their Aboriginal title and their right to decide to what use that land should be put.

[144] Their claims that Indigenous customary laws apply and are a defence to what the plaintiff asserts is illegal conduct are grounded in their claim to Aboriginal title over Dark House and other Wet'suwet'en traditional territories. In their Amended Response to Civil Claim, the defendants rely on "indigenous governmental jurisdiction to make and enforce indigenous laws within We'suwet'en territory".

[145] The defendants' submissions also indicate that they do, in fact, challenge the legality of the permits and authorizations granted to the plaintiff by the Province of British Columbia. They assert at paragraph 94 of their written submissions that even if the court finds that the defendants' communications with the plaintiff took the form of threats or intimidation, "they did not cause the Plaintiff or its agents to refrain from something that they were lawfully allowed to do" [emphasis added].

[146] At its heart, the defendants' argument is that the Province of British Columbia was not authorized to grant permits and authorizations to the plaintiff to construct the Pipeline Project on Wet'suwet'en traditional territory, without the specific authorization from the hereditary chiefs, including Chief Knedebeas. Thus, rather than seeking accommodation of Wet'suwet'en legal perspectives as suggested by their counsel, the defendants are seeking to exclude the application of British Columbia law within Wet'suwet'en territory, which is something that Canadian law will not entertain: *Beaver*.

[147] I cannot accept the defendants' submission that their conduct in blockading the Morice West FSR and the Morice River Bridge was simply to prevent the plaintiff from violating Wet'suwet'en law by entering Dark House territory without permission. The actions of the defendants at the establishment of the Bridge Blockade and their subsequent public statements and internet postings do not, in my view, support that submission.

[148] The Bridge Blockade was established in or about 2012 with the stated purpose of preventing industrial projects, including the Pipeline Project, from being constructed in "Unist'ot'en traditional territories". The defendants have publicly questioned the authority of the Province of British Columbia, the Government of Canada and the RCMP within Unist'ot'en traditional territories.

[149] The Aboriginal title claims of the Wet'suwet'en remain outstanding and have not been resolved either by litigation or negotiation, despite the urging of the Supreme Court of Canada in *Delgamuukw*. It is apparent from their affidavit materials and submissions that the defendants are aware that their title claims remain outstanding.

[150] On March 19, 2019 the defendant, Warner Naziel posted on Instagram that:

> For almost ten years, the Wet'suwet'en have been resisting an array of oil and gas pipelines…the focal point of these efforts have been the Unist'ot'en Camp, *a long standing territorial reoccupation which was built directly in the proposed pipeline corridor*. Years of resistance have caused multiple multi-billion dollar projects to be delayed and/or cancelled.
> [Emphasis added.]

[151] Thus, rather than efforts to prevent violation of Wet'suwet'en law, the defendants' efforts appear to have been directed specifically towards opposition to pipelines in general and the Pipeline Project specifically. Their public statements do not reference traditional Wet'suwet'en governance structures and upholding the authority of Chief Knedebeas, but rather describe the Unist'ot'en Camp as their focal point, part of a territorial "reoccupation" and strategically located in the Pipeline Project right-of-way as part of a resistance effort. They continue to encourage the establishment of new blockades and participation of individuals from outside the local community to join the blockades and establish new structures in locations designed to impede the Pipeline Project or its construction.

[152] While the defendants may well sincerely believe in their collective rights to title or ownership of their traditional Wet'suwet'en territories, it is clear that they are entirely aware that the legal rights claimed by them remain outstanding and are at odds with the permits and authorizations granted to the plaintiff to undertake the Pipeline Project. Despite that fact, the defendants chose not to engage in consultation with the plaintiff or to challenge the validity of the permits and authorizations when they were issued.

[153] As the British Columbia Court of Appeal noted in *R. v. Manuel,* 2008 BCCA 143 at para. 62:

> The appellants testified that they were familiar with *Delgamuukw* and the concept of aboriginal law and aboriginal title. As such, they must be taken to be aware of the attendant uncertainties and the processes for reconciliation of aboriginal and common law perspectives on land ownership, and that none of those processes includes blockades of highways. Such "self-help" remedies are not condoned anywhere in Canadian law, which includes aboriginal, common, and criminal law, and they undermine the rule of law.

[154] The defendants' affidavit materials clearly demonstrate that they are entirely familiar with *Delgamuukw* and the concept of Aboriginal law and Aboriginal title. They cannot help but be aware of the uncertainties and processes for reconciliation of common law and Aboriginal law perspectives.

[155] There is no evidence before me of any Wet'suwet'en law or legal tradition that would allow blockades of bridges and roads or permit violations of provincial forestry regulations or other legislation. There is also no evidence that blockades of this kind are a recognized mechanism of dealing with breaches of Wet'suwet'en law.

[156] As in *Manuel*, the defendants in this case have resorted to self-help remedies, which are not condoned in Canadian law or Indigenous law. Self-help remedies, such as blockades, undermine the rule of law and the administration of justice.

[157] The Supreme Court of Canada has made it clear that such conduct amounts to a repudiation of the mutual obligation of Aboriginal groups and the Crown to consult in good faith, and therefore should not be condoned. In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, the Supreme Court of Canada held that the actions of the plaintiff in blockading a road to prevent logging, when the logging had been permitted and not challenged, was an abuse of process. The court noted at para. 42 that:

> …The Behns clearly objected to the validity of the Authorizations on the grounds that the Authorizations infringed their treaty rights and that the Crown had breached its duty to consult. On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations by legal means when they were issued. They did not raise their concerns with Moulton after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

[158] Despite the manner in which counsel for the defendants attempted to frame their position, in my view the facts of this case are entirely analogous to those in *Behn*. I agree with the submission that the defendants cannot rely on their assertion

that their actions in blockading the Roads are in accordance with their Indigenous laws when they have failed to take any steps to challenge by legal means the permits and authorizations granted to the plaintiff.

[159] The defendants have obstructed lawfully permitted activity and their recourse to self-help remedies is contrary to the rule of law. Their actions are an abuse of process and cannot be condoned by the court. As was the case in *Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 2399, the reliance of the defendants on Indigenous law does not assist them on the facts of this application.

Test for an Injunction

[160] The test for an interlocutory injunction is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 334:

> …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. ...

[161] The British Columbia Court of Appeal in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) (aff'd [1991] 1 S.C.R. 62), endorsed an approach which treated irreparable harm as an element of the balance of convenience (at 348).

[162] I will now address each of the branches of this test.

Fair Question to be Tried

[163] At this stage of the proceeding, the onus on the plaintiff to establish a fair question to be tried is low. The plaintiff is not required to establish a strong *prima facie* case and need only establish that its case is neither frivolous nor vexatious. The court must make a preliminary assessment of the merits of the case to determine that the rights alleged exist and that there is an actual or apprehended

breach of those alleged rights. The plaintiff submits that it has met this branch of the test and established that there is a fair question to be tried.

[164] The defendants' position is that that their conduct has been in accordance with Wet'suwet'en law and that they were authorized by Chief Knedebeas. They argue that from their perspective, the plaintiff lacks Wet'suwet'en authorization to proceed with the Pipeline Project in traditional Wet'suwet'en territory and thus it is the actions of the plaintiff are illegal.

[165] Despite advancing that argument, the defendants chose not to engage in consultation with the plaintiff or to challenge the validity of the permits and authorizations granted to the plaintiff at the time they were granted. Instead, the defendants chose to resort to self-help remedies. As I have already noted there is no evidence before me of any Indigenous law which authorizes blockades of roads or bridges as a mechanism to deal with breach of Wet'suwet'en law.

[166] The conduct of the defendants and their supporters potentially amounts to a number of legal wrongs, including nuisance, breaches of sections 423 and 430 of the *Criminal Code*, R.S.C. 1985, c. C-46, intimidation, inducement of breach of contract, interference with economic relations by unlawful means, conspiracy, and breach of the *Forest Service Road Use Regulation*.

[167] Private nuisance is the interference with an occupier's use and enjoyment of land or property that is both substantial and unreasonable. The occupier need not hold title to the land or have exclusive possession in order to advance a claim for nuisance. The plaintiff has authorizations related to work on the Pipeline Project which is arguably an interest sufficient to ground a claim in nuisance.

[168] The actions of the defendants in blockading the Morice West FSR and other roads, for the purpose of stopping the plaintiff from constructing the Pipeline Project, interferes substantially with the plaintiff's ability to conduct such construction work. It is arguable that the conduct of the defendants is unreasonable because it is not

legally authorized and the plaintiff has complied with the legal requirements to conduct such construction work.

[169] The *Criminal Code* also deals with the type of behaviour engaged in by the defendants. Section 423 of the *Criminal Code* provides, in part:

> 423 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,
>
> …
>
> (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;
>
> …
>
> (e) with one or more other persons, follows that person, in a disorderly manner, on a highway;
>
> (f) besets or watches the place where that person resides, works, carries on business or happens to be; or
>
> (g) blocks or obstructs a highway.

[170] "Highway" is defined in the *Criminal Code* as a road to which the public has the right of access, and includes bridges over which or tunnels through which a road passes. A Forest Service Road has been found to be a highway under section 423(1)(g) of the *Criminal Code*: *Interfor v. Kern et al.*, 2000 BCSC 1141.

[171] There is a public right to access the Morice West FSR and the Morice FSR and thus it is arguable that by engaging in the construction of gates and other structures to obstruct access to the Morice West FSR and Morice FSR and block the passage of people and vehicles, the defendants are acting in violation of s. 423(1)(g) of the *Criminal Code*.

[172] Other evidence that individuals opposed to the Pipeline Project have threatened to seize the equipment of the plaintiff and its contractors, approached and directed employees of the plaintiff and/or its contractors to leave the area while

they were conducting work and have entered active work sites for the purpose of interrupting work may engage other subsections of s. 423 of the *Criminal Code*.

[173] The provisions of s. 430 of the *Criminal Code* may also have application in this case. That section provides:

> 430 (1) Every one commits mischief who wilfully
>
> …
>
> (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
>
> (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

[174] Erecting gates and other barriers on the Morice River Bridge and impeding passage along the Morice West FSR and the Morice FSR has arguably obstructed and interfered with the plaintiff's lawful use or enjoyment of its equipment that it seeks to move over the Morice River Bridge and may amount to mischief under the *Criminal Code*.

[175] The tort of intimidation arises when there is a threat to commit an unlawful act, or to use an unlawful means against the interest of the threatened person, which causes the threatened person to do or refrain from doing something he or she is entitled to do. The plaintiff submits that the defendants have used unlawful means to prevent construction of the Pipeline Project by committing mischief under s. 430 of the *Criminal Code*, engaging in intimidation under s. 423 of the *Criminal Code* and breaching sections of the *Forest Service Road Use Regulation*.

[176] With respect to the torts of inducement of breach of contract and interference with economic relations, it has been long established that the act of persuading a party to breach its contract with another party is of itself wrongful if done with knowledge of the contract and with the intention of securing its breach.

[177] The Supreme Court of Canada in *A. I. Enterprises v. Bram Enterprises*, 2014 SCC 12, explained that the tort is available in three-party situations in which the

defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. Conduct is "unlawful" for the purposes of this tort if it would be actionable by the third party, or would have been actionable if the third party had suffered a loss as a result of it.

[178] In *Verchere et al v. Greenpeace Canada et al*, 2003 BCSC 660 (aff'd 2004 BCCA 242) the court found protesters liable to a logging company for interfering with workers' ability to meet their contractual logging obligations to the company. The court also confirmed it is not necessary for the plaintiff to establish actual knowledge of the contracts in question but rather it is sufficient that the protesters knew or ought to have known that their conduct would interfere with the plaintiff's contractual relations. The plaintiff need not demonstrate that the defendants' intention was to cause harm to the contractor. If the defendants know or ought to know that their conduct would interfere with the company's contractual relations, and cause that company harm, they will be liable to the company.

[179] In this case, it is certainly arguable that the defendants knew or ought to have known that their conduct in blockading the Morice West FSR and preventing work beyond the Bridge Blockade would interfere with the plaintiff's contractual relations. The defendants have publicly stated that their purpose is to prevent the plaintiff and those who work for the plaintiff from accessing the area and completing their work. Other public statements by the defendants suggest that the defendants assert that their actions have "caused multiple multi-billion dollar projects to be delayed", which suggests an awareness that their conduct has caused significant financial harm to the plaintiff.

[180] The plaintiff may also have a claim for the tort of conspiracy, which arises when a person acting in agreement or in concert with another, either:

a) acts with the predominant purpose of causing injury to the plaintiff, whether the means used are lawful or unlawful; or

b) commits an unlawful act causing injury to the plaintiff, and the defendant should know in the circumstances that injury to the plaintiff is likely to, and does, result: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 74, 80.

[181] An "unlawful act" may include tortious acts, breach of a statute or conduct that violates the *Criminal Code*.

[182] The defendants have stated that the purpose of their conduct is to prevent the plaintiff from building the Pipeline Project, even though the plaintiff is authorized to do so through various provincial permits and authorizations.

[183] The actions of the defendants may well be unlawful and constitute tortious conduct, violations of ss. 423 and 430 of the *Criminal Code* and/or a breach of the *Forest Service Road Use Regulation*. There is evidence that the defendants' actions are part of a co-ordinated effort by the defendants to stop the Pipeline Project. It is arguable that the defendants' predominant purpose is to cause injury to the plaintiff or that the defendants ought to know that injury to the plaintiff is likely in the circumstances.

[184] The provisions of the *Forest Service Road Use Regulation* are also engaged by the defendants' conduct. Section 13 of the *Forest Service Road Use Regulation* provides that it is an offence to contravene s. 6(3) and s. 11(1).

[185] Section 6(3) of the *Forest Service Road Use Regulation* provides:

> A person must not erect a traffic control device on a forest service road without prior consent of the district manager in whose district the road is situated.

[186] Section 11(1) of the *Forest Service Road Use Regulation* provides:

> A person must not construct works on any part of a forest service road right of way for any purpose other than the passage of vehicular or pedestrian traffic, except under, and in accordance with, a permit issued by the district manager.

[187] The construction of the gates and obstructions across the Morice River Bridge and the obstruction at the KM 44 Blockade occurred without prior consent of the district manager and without a permit issued by the district manager.

[188] The threshold at this stage of the test is low and the plaintiff need only establish that its case is neither frivolous nor vexatious. In my view, the plaintiff has met its onus with respect to the first branch of the test. There is sufficient evidence to support the plaintiff's position that there are several fair questions to be tried in this case with respect to the alleged wrongs and I have concluded that the plaintiff's claims are neither frivolous nor vexatious.

Irreparable Harm

[189] The second branch of the test is to determine whether the plaintiff would suffer irreparable harm if the application for an interlocutory injunction is refused. Irreparable harm need not be clearly proven, as doubt as to the adequacy of damages may be sufficient to support the issuance of an injunction: *Wale*, at 346.

[190] Even where damages are quantifiable, irreparable harm may arise where a plaintiff cannot collect damages from a defendant: *RJR-MacDonald Inc*., at 341.

[191] When the conduct sought to be enjoined is clearly unlawful, there is authority that an injunction should be granted whether or not irreparable harm is established.

[192] The plaintiff submits that the defendants conduct constitutes a number of legal wrongs, including a breach of ss. 423 and 430 of the *Criminal Code*, offences under the *Forest Service Road Use Regulation* as well as various tortious wrongs, including intimidation, conspiracy, and interference with economic relations.

[193] The plaintiff also submits that it, together with its contractors, their employees, and various northern communities will suffer irreparable harm if an injunction is not granted. If the Bridge Blockade is permitted to continue and the plaintiff and its contractors are unable to access the area beyond the Bridge Blockade and the KM 44 Blockade, the entire Pipeline Project cannot proceed. The construction in the

area of the blockades is on the critical path for the construction of the Pipeline Project, such that delays in access could impact whether the Pipeline Project will proceed at all. If the Pipeline Project cannot proceed, it is likely that the export facility in Kitimat would also not proceed.

[194] The defendants appear to be well aware that their actions could impact whether the Pipeline Project proceeds at all and indeed it is their stated intention to prevent the Pipeline Project from being constructed.

[195] The magnitude of harm resulting from the defendants' actions will be significant and there is no reasonable prospect that damages can be recovered from the defendants. Although there is evidence that the defendants are soliciting financial donations from the public to fund their protest against Pipeline Project, there is no evidence that they are in a position to pay the magnitude of damages which will result from delay or cancellation of the Pipeline Project.

[196] There is evidence of harm to the plaintiff that has already occurred as a result of its inability to access areas beyond the blockades, which include significant costs and delays. Construction delays to the date of the chambers hearing had resulted in costs in excess of $5 million and the plaintiff estimated that the costs of managing further delays would be in the tens of millions of dollars.

[197] Other evidence of irreparable harm suffered by the plaintiff and its employees, contractors, local communities and First Nations includes interference by the defendants with valid and subsisting rights to construct a project that has been found to be in the public interest, interference with an ongoing business, and causing significant financial harm to third parties, including local communities and First Nations.

[198] There is no basis on which I can conclude that damages would be recoverable from the defendants, which also constitutes irreparable harm.

[199] Although it is open to me to conclude that the defendants' conduct is clearly unlawful and an injunction should issue regardless of whether or not irreparable

harm is established, I have concluded that there is ample evidence before me that the plaintiff would suffer irreparable harm if the defendants' conduct is not enjoined. The plaintiff has therefore met the second branch of the test for an interlocutory injunction.

Balance of Convenience

[200] The third branch of the test is an assessment of the balance of convenience and involves a determination of which party will suffer the greater harm if an injunction is granted or refused. This involves a consideration of factors such as the adequacy of damages as remedy, the likelihood that damages awarded will be paid, the preservation of contested property, which party has altered the status quo, the strength of the plaintiff's case, and factors affecting the public interest.

a) Harm to the Plaintiff and Others

[201] There is evidence of significant harm to the plaintiff and others if the Pipeline Project cannot proceed due to the plaintiff's inability to access the areas beyond the blockades. This would include harm to the plaintiff's contractors and sub-contractors from loss of contracts to the main contractors for each section and loss of sub-contracting opportunities, which total hundreds of millions of dollars, including $620 million in contracts that have been awarded to Indigenous businesses.

[202] Pre-development costs and other costs in the development of the export facility of several hundred million dollars would be lost if the export facility cannot proceed. There would be loss of employment opportunities for employees involved in the construction of the export facility and its operation, employees involved in the construction of the Pipeline Project, and loss of opportunity for members of Indigenous communities to take advantage of training and employment.

[203] There is evidence that those Indigenous governments who have entered into project agreements and pipeline benefit agreements with the Province of British

Columbia will suffer harm in terms of loss of employment and contracting opportunities, as well as loss of financial and other benefits.

[204] Local governments and the provincial government will suffer loss of tax revenue and loss of business development and economic growth and the harm to the Canadian economy from loss of procurement for the Pipeline Project and the export facility is estimated to be in excess of $20 billion.

[205] The harm to the plaintiff and others is not only irreparable in nature but significant in magnitude.

b) Harm to the Defendants

[206] The defendants submit that an interlocutory injunction would have the effect of restraining Chief Knedebeas from exercising his lawful power and authority over Dark House territory and the public interest specific to Dark House will suffer irreparable harm as a result of the “disregard” of Wet'suwet'en law.

[207] Other evidence of harm to the defendants is in the nature of harm that would flow to them as a result of the Pipeline Project itself and the plaintiff’s construction activities, rather than as a result of the interlocutory injunction. They point to the impact of the plaintiff’s construction activities on their hunting and trapping rights and concerns about the archaeological impacts of the plaintiff’s construction activities.

[208] It is not disputed that activities at the Unist’ot’en Camp have continued since the Interim Injunction and the plaintiff is not seeking to restrain the defendants from continuing to occupy the Unist’ot’en camp, operating their healing centre or otherwise using their traditional territories, provided that they do not block or prevent use of the Roads or interfere with the plaintiff’s construction activities. The interlocutory injunction order would only prevent the defendants from blocking the Roads when construction activities are underway.

[209] An injunction order will not directly impact the ability of the defendants to enjoy the use of the lands or in any way restrain Chief Knedebeas’ exercise of

authority in terms of traditional Wet'suwet'en governance. On the contrary, such an order would merely restrain the defendants from engaging in self-help remedies that are contrary to the rule of law and which do not appear to be part of Wet'suwet'en legal tradition, according to the affidavit materials before me on this application.

[210] The defendants allege that an injunction order would cause harm to their security at the Unist'ot'en Camp and their ability to monitor who enters their territory. Since the Interim Injunction, the plaintiff and the defendants entered into an Access Protocol that resulted in the removal and replacement of a metal gate over the Morice River Bridge and the provision of private 24-hour security to monitor the Morice River Bridge, funded by the plaintiff, to enable the defendants to continue to monitor who accesses their traditional territory.

[211] The defendants also allege that the plaintiff's activities since the Interim Injunction have not been in compliance with the conditions of the EAC and have interfered with their ability to trap and otherwise provide resources to the Unist'ot'en Camp and Dark House. I note that the defendants have raised such concerns with the Environmental Assessment Office, which conducted onsite inspections in response to those concerns. The Environmental Assessment Officer made findings of non-compliance with certain conditions and issued orders, including stopping work at construction sites for specific purposes related to trapping, requiring the plaintiff to take steps to ensure compliance with the conditions of the EAC.

c) Strength of the Plaintiff's Case and Status Quo

[212] The plaintiff argues that, through extensive public processes and consultation with First Nations, it has obtained all necessary permits and authorizations to access the Roads for the purpose of construction of the Pipeline Project. The Roads have been blockaded by the defendants, for the purpose of preventing construction of the Pipeline Project. The plaintiff submits that its claim against the defendants is strong and that the defendants do not have lawful justification for their actions and have not raised any defence to these claims that is recognized at law.

[213] It submits that it is the defendants who have moved to alter the status quo in this case by engaging in self-help remedies rather than challenging the validity of the permits and authorizations through legal means.

[214] The defendants submit that the plaintiff cannot establish a strong *prima facie* case in light of the defendants' reliance on the permission and authorization of Chief Knedebeas for "all conduct impugned in this proceeding". The defendants also submit that the Bridge Blockade had been in place for 10 years without any challenge by the plaintiff or the Province of British Columbia.

d) Public Interest

[215] Public interest has been found to be a significant factor in weighing the balance of convenience.

[216] The defendants submit that the issuance of an interlocutory injunction will restrain Chief Knedebeas from exercising his lawful power and authority over Dark House territory and that the public interest specific to Dark House will be irreparably harmed, which should weigh heavily in the balance of convenience. They assert that granting injunctive relief in these circumstances will harm the reconciliation process and harm the Wet'suwet'en legal order.

[217] The plaintiff submits that the issue of public interest must be looked at more broadly and that there is evidence that the Pipeline Project will have substantial benefits to First Nations, local communities, British Columbia and Canada.

[218] While the defendants suggest that there will be irreparable harm to the public interest specific to Dark House, 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.

[219] I must also consider that the plaintiff holds all necessary permits and authorizations to conduct the work it is attempting to perform, whereas the defendants have no legal right to blockade the Roads and obstruct the plaintiff, despite their honestly held belief that they are acting in accordance with the authority of Chief Knedebeas.

[220] The defendants did not challenge the validity of the plaintiff's permits and authorizations through legal means but rather chose to pursue unlawful self-help remedies in furtherance of their goal of preventing construction of the Pipeline Project. Use of self-help remedies is contrary to the rule of law and is an abuse of process.

[221] There is evidence to indicate that the defendants have engaged in deliberate and unlawful conduct, for the purpose of causing harm to the plaintiff and preventing it from constructing the Pipeline Project. There is a public interest in upholding the rule of law and restraining illegal behaviour and protecting of the right of the public, including the plaintiff, to access Crown roads.

[222] In my view, the public interest must viewed more broadly than the public interest specific to Dark House. The public interest in this case weighs heavily in favour of granting the interlocutory injunction.

Conclusion on Plaintiff's Application for Interlocutory Injunction

[223] Injunctive relief is an equitable remedy. I agree with the submission of the plaintiff that the equities in this case strongly favour an injunction.

[224] The plaintiff has raised a number of fair questions to be tried and the conduct of the defendants amounts to several apparent legal wrongs. The plaintiff has established a serious claim to the relief sought, and it is clear that refusing to grant the injunction would cause the plaintiff and many others serious and irreparable harm.

[225] The plaintiff acquired the permits and authorizations to conduct the work that it seeks to undertake. The defendants may genuinely believe in their rights under Indigenous law to prevent the plaintiff from entering Dark House territory, but the law does not recognize any right to blockade and obstruct the plaintiff from pursuing lawfully authorized activities.

[226] All three branches of the test for an interlocutory injunction are satisfied and in my view, it is just and equitable that an injunction order should issue. The plaintiff has provided its undertaking as to damages.

Enforcement Order

[227] I have also concluded that this is an appropriate case to include enforcement provisions within the injunction order, to inform the public of the consequences of non-compliance with an injunction order and to provide a mandate to the RCMP to enforce the terms of the order.

[228] In *West Fraser Mills v. Members of Lax Kw'Alaams*, 2004 BCSC 815, the court issued an enforcement order after consideration of the following factors:

> [26] As well, I am granting the enforcement order sought. Although enforcement orders such as the one sought here are not automatically granted I have considered the large number of potential participants in a roadblock, the remoteness of the area, identification difficulties and the position of the RCMP that they will not act without an order directing them to do so and have concluded that such an order is appropriate. …
>
> [27] As well, the inclusion of the enforcement provisions clearly spells out the consequences of non-compliance and may make the order fairer in that members of the public need not take the word of the police that the arrest and detention of violators is authorized as it is clearly set out in the order. …

[229] Similar factors were taken into account in *Board of School Trustees of School District No. 27 (Cariboo-Chilcotin) v. Van Osch et al*, 2004 BCSC 1827, where the court granted an enforcement order together with an injunction:

> [28] With reference to the enforcement order, I consider the large number of persons involved in the School's occupation numbering in excess of 100 persons on occasion, the relative remoteness of the area located as it is some distance from 100 Mile House, the disregard towards the no trespassing notices posted by the School Board in and around the School,

> the difficulties in identifying the participants occupying the School, the implied threat of harm to the process server, Lorna Gardiner, when she attended the School to post materials relating to this action and the RCM Police's position that the force will not act without an order directing them to do so. …

[230] Many of these elements are present in this case. The blockades are in remote locations, along forest service roads approximately 1.5 hours from Houston, British Columbia. The number of persons at the blockades has varied over time and there is evidence that they include persons from areas outside the region and even outside British Columbia. From time to time, persons present at the blockades have covered their faces, making it difficult to identify them.

[231] In the face of the Interim Injunction order, the defendants refused to voluntarily comply with the order and enforcement action by the RCMP, as well as ongoing RCMP presence, was required to ensure compliance.

[232] Other incidents since the Interim Injunction, including the KM 44 Blockade and the establishment of new protest camps, also tend to suggest that an enforcement order remains necessary in this case. The defendants have made numerous public statements that they intend to continue to engage in such self-help remedies in order to prevent the Pipeline Project from being constructed and their conduct continues to suggest that they will not respect an order of this court.

[233] I am satisfied that the facts of this case and the interests of justice warrant the inclusion of enforcement provisions in the order.

Form of the Interlocutory Injunction Order

[234] I will therefore grant the interlocutory injunction order sought by the plaintiff and in the form sought by the plaintiff in the draft order attached as Schedule "K" to the plaintiff's submissions with the following exceptions:

> Paragraph 1(i) and (ii) – the words "threatening to," should be deleted.

[235] Those words were not included in the Interim Injunction order. While I understand the rationale for the plaintiff's submission to include those words in the

interlocutory injunction order, I share the concerns of defendants' counsel with respect to interpretation and enforcement of those words, particularly in view of the events that have occurred to date.

"The Honourable Madam Justice Church"