THE B.C. SUPREME COURT'S DECISION IN COASTAL GASLINK: A MISSED OPPORTUNITY TO PROVIDE INSTRUCTION ON EXCLUSIVITY AND CONSENT

by Oliver MacLaren

On the last day of 2019, the Supreme Court of British Columbia released its decision in *Coastal GasLink Pipeline Ltd. v. Huson.* The decision of Madam Justice Church grants an interlocutory injunction and corresponding enforcement orders in favour of Coastal GasLink, a subsidiary of TC Energy Corporation (neé TransCanada Pipelines) to physically remove persons impeding access to roads needed to complete construction of a 670km natural gas pipeline from northeastern British Columbia to a liquefied natural gas export facility to be built near Kitimat (the "**Project**").

The decision and corresponding fallout is attracting international media attention. The RCMP has started making arrests while land defenders vow to remain where they are. The UN's *Committee on the Elimination of Racial Discrimination* and B.C.'s independent *Human Rights Commission* have urged Canada to stop work until it obtains free, prior, and informed consent ("**FPIC**") from all impacted First Nations. Premier John Horgan has vowed that the Project will be built, while the Canadian Association of Petroleum Producers has responded even more aggressively, calling alignment with the position of land defenders 'embarrassing'. For a province largely void of treaties and a string of high-profile projects recently stalled, the stakes are high.

As ground zero for the resolution of these conflicts, the court is uniquely privileged to provide instruction to those wrestling with what development of massive resource projects looks like in the era of UNDRIP. Unfortunately, this judgement does not rise to the occasion. Echoing decisions from eras long past, there's a clear undercurrent here that despite the Wet'suwet'en hereditary houses' claims to aboriginal title, Coastal GasLink has done enough. Details of the company's development efforts are repeatedly mentioned: that it has secured permits from the province; that it has reached community benefit agreements with the *Indian Act* band councils (as opposed to the hereditary houses) along the route; that a handful of Wet'suwet'en individuals support the Project and the Instagram account of one of the defendants doesn't.

But in discounting the influence of indigenous customary laws and repeating Coastal GasLink's checked development boxes, **what emerges as clearly absent from the judgement's fact summary is an unequivocal statement of consent from the Wet'suwet'en.** That's the effectiveness of a consent standard: it's clear, and its absence sticks out like a sore thumb. The Office of the Wet'suwet'en participated in the Environmental Assessment Office's Working Group for the Project and actively proposed an alternative route for it. Madam Justice Church notes that Coastal GasLink explored this option, but unilaterally rejected it. Unsurprisingly, subsequent offers to negotiate agreements with the Office of the Wet'suwet'en have not been accepted. Some members from Wet'suwet'en houses directly impacted by the Project (i.e. the defendants) have therefore taken a stand, acting in accordance with the exclusive rights their houses are claiming in the courts.

Aboriginal Title claims exist because the need for treaties were ignored by B.C.'s early settler governments. The test to prove Aboriginal Title was set out by the Supreme Court of Canada in its *Delamuukw* decision, in which the Wet'suwet'en hereditary chiefs, on their own behalf and on behalf of their houses, were the plaintiffs. Aboriginal Title recognizes the right of Aboriginal people to occupy and use their own lands and not to have these lands taken away by others without their consent.

Proving Aboriginal Title requires the demonstration of exclusive use of the land – the ability to keep others out - at the time of the assertion of Crown sovereignty, and continued use of the land since that time. About exclusivity, the court in *Delgamuukw* stated the following:

> "Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. **The proof of title must, in this respect, mirror the content of the right.** Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it." [Emphasis and Underline Added]

Contrary to the reasoning above, the *Coastal GasLink* decision holds that because aboriginal title claims of the Wet'suwet'en have yet to be resolved, present day demonstration of exclusivity must be relaxed to allow Coastal GasLink access to the lands. It's an untenable and head-scratching catch 22 that precisely demonstrates the predicament Canada's indigenous communities find themselves in as we enter the third decade of this century: the test for aboriginal title requires proof of exclusive use; once proven you will have exclusive use; but you have to give up exclusive use in the interim.

We've written in the past that in situations such as this one, the potential for conflict becomes increasingly more acute as the period between claims assertion and resolution is extended, and furthermore that fostering environments conducive to consent is the Crown's only choice in balancing competing priorities of economic development and indigenous reconciliation during this time. This is because, unlike the form-over-substance activities associated with proving adequacy of consultation, whether or not consent has been obtained is objectively clear. The United Nations Declaration on the Rights of Indigenous People adopted FPIC as its governing standard for this reason, a standard which has been operationalized internationally because the decreased risk associated with obtaining it is bankable. **Aspects of a project that stand to impact territory where consent has not been achieved do not proceed.**

Instructing all interested parties to roll up their sleeves and undertake the tough work necessary to foster an environment conducive to consent is the solution British Columbia needs, now. This is the solution the Premier should be vowing to achieve. The Court in *Delgamuukw* understood this, urging "a process of negotiation and reconciliation that properly considers the complex and competing interests at stake." More than 20 years later, the decision in *Coastal GasLink* misses the opportunity to serve as a timely reminder.