

CANADA / JUDGMENT

Coastal Gaslink Pipeline Ltd. v. Huson

2024 BCSC 509

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Supreme Court of British Columbia

DECIDED

20 February 2024

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2024 BCSC 509 Coastal Gaslink Pipeline Ltd. v. Huson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Coastal Gaslink Pipeline Ltd. v. Huson,

2024 BCSC 509

Date: 20240220

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

And

Attorney General of British Columbia

Intervenor

Before: The Honourable Justice Tammen

Oral Reasons for Judgment

(Re Chief Dsta'hyl)

Counsel for the Plaintiff appearing by videoconference:

K.D. Kaukinen

Counsel for the Intervenor:

M.W. Dull

K.E. Costain

P.G.R. Battin

Counsel for the Accused, Chief Dsta'hyl:

R. McConchie

Q.C. Candler

Place and Date of Hearing:

Smithers, B.C.

May 15-19, November 14-17,

November 29-December 1, 2023

Place and Date of Judgment:

Smithers, B.C.

February 20, 2024

[1] THE COURT: The accused, Chief Dsta'hyl, is alleged to have committed criminal contempt of court by wilfully breaching an injunction issued by Justice Church between October 17-26, 2021. The injunction order was made on December 31, 2019 (the "Injunction"). The terms of that Injunction allegedly breached by the accused are these:

1. Until judgment is rendered after the trial of this Action, the Defendants and anyone having notice of this Order are restrained, enjoined and prohibited from:
 - (i) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to prevent, impede, restrict or physically interfere with, any person or vehicle travelling to or accessing the vicinity of the area in and around the Morice River Bridge (being the bridge over the Morice River on the Morice West Forest Service Road) or any of the areas accessed by Morice Forest Service Road (also known as the Morice FSR 4656, Road Section 01), including the areas accessed by the following other forestry roads (and areas and roads accessed by those roads):

(A) the Morice West Forest Service Road (also known as Morice FSR West 9785, Road Section 01);

(B) Shea Creek FSR 9785, Road Section 04;

(C) CP 571 R07593 2 0; and

(D) CP 573 R07593 6 0.

(the "Blockaded Area");

(ii) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to prevent, impede, restrict or physically interfere with, the Plaintiff, its employees, agents, contractors or subcontractors carrying on its business in furtherance of the Plaintiff's Coastal GasLink pipeline project . . . and in particular pre-construction activities and construction of the Project in the Blockaded Area;

. . .

(vi) physically interfering with or counselling others to physically interfere with the performance by the Plaintiffs contractors or subcontractors of their contractual relations with the Plaintiff; . . .

[2] The plaintiff is Coastal Gaslink Pipeline Ltd. ("CGL"), which is constructing a natural gas pipeline between Dawson Creek and Kitimat, BC.

[3] In its written submissions, counsel for the Attorney General of British Columbia (the "AGBC") submits that the following actions of Chief Dsta'hyl amounted to criminal contempt.

- a) October 17, 2021: Chief Dsta'hyl and various individuals acting under his direction seized and rendered inoperable one piece of equipment, an excavator owned by a subcontractor of CGL;
- b) October 24, 2021: Chief Dsta'hyl and those accompanying him stopped their vehicles on the Shea Forest Service Road (the "Shea FSR") and refused to leave unless his demands were met, thereby blocking the passage of any other vehicles or equipment that might travel down that roadway;
- c) October 25, 2021: Chief Dsta'hyl and those acting at his direction blocked the roadway in to the CGL P2 Camp, stopping the flow of vehicles in or out of the camp; and
- d) October 26, 2021: Chief Dsta'hyl and those acting at his direction continued to block the roadway into the CGL P2 Camp, preventing the flow of vehicles in or out of the camp, and seized and rendered inoperable multiple pieces of machinery that were parked nearby.

[4] There is little dispute concerning the basic facts and defence counsel concedes that the actus reus has been proven to the criminal standard.

[5] Crown called viva voce evidence and tendered considerable video evidence which captures some of the central events at issue. Chief Dsta'hyl testified and acknowledged the impugned conduct. The defence also tendered video evidence.

- [6] In brief compass, Chief Dsta'hyl, acting as an enforcement officer for the Likhts'amisyu Clan, participated in the decommissioning of a piece of heavy equipment owned by a CGL subcontractor on October 17, 2021. That action consisted of removing the battery from the equipment, an excavator, thus rendering it inoperable.
- [7] On October 24, 2021, Chief Dsta'hyl was part of a group of people who wished to travel a portion of the Shea FSR to visit an area on the Clore River to assess the degradation being caused by the pipeline construction. That group included two wing Chiefs of the Likhts'amisyu Clan, the accused and Chief Tse'besa, whose non-chiefly name is Lillian Wilson. Chief Tse'besa was a defence witness at trial. She said that the specific region of the Clore River which they were trying to visit is part of the territory, or yintah, for which she is responsible.
- [8] On October 24, 2021, the Likhts'amisyu group was travelling in a small convoy of vehicles led by the accused in his pickup truck. The convoy was joined by Paul Sowers, a security officer working for Forsythe Security, with whom CGL had contracted. Mr. Sowers was in radio communication with his supervisor, who told him that the convoy would not be permitted to continue beyond the 25-kilometre mark of the Shea FSR. That is where the Shea turns off to the right-of-way for the pipeline. Mr. Sowers advised Chief Dsta'hyl of the news from the supervisor, but the group decided to continue to the 25-kilometre point nonetheless. Once they arrived there, they saw that the road was blocked by both construction tape and a large rock truck parked across the road surface of the right-of-way.
- [9] What next occurred is a matter of minor dispute between the parties, but the dispute is legally unimportant. It is clear that the Likhts'amisyu group, under the primary direction of Chief Dsta'hyl, formed their own blockade of the Shea FSR, which impeded the flow of vehicle traffic. The blockade may not have completely prevented all vehicles from passing, but it significantly impeded such traffic.
- [10] On October 25, 2021, the blockade moved some distance westward to an area near the CGL P2 Camp. For the next two days, that blockade, of which Chief Dsta'hyl was a part, completely prevented vehicles from getting into and out of the CGL P2 Camp where several hundred workers were staying. Only foot traffic could access the camp.
- [11] On October 26, 2021, people working under the direction of Chief Dsta'hyl rendered inoperable several pieces of heavy machinery parked near the CGL P2 Camp, by cutting electrical wires and removing batteries. Four of those batteries were placed into Chief Dsta'hyl's truck bed where they remained until October 27, 2021.
- [12] On October 27, 2021, Chief Dsta'hyl was arrested while driving in that truck eastbound away from the CGL P2 Camp.
- [13] The video evidence in this case fell into three main source categories:
- a) footage taken by members of Forsythe Security using Go-Pro devices, Exhibit 10;

- b) footage taken by videographers or journalists accompanying Chief Dsta'hyl and later posted on the Internet on websites associated to a group called "Sovereign Likhts'amisyu", Exhibit 2;
 - c) footage taken by Chief Tse'besa or those accompanying her for the purpose of documenting various matters, Exhibit 18.
- [14] There is also a single video clip, Exhibit 16, which captures a speech made by Chief Kloum Khun in January 2020, during an outdoor meeting of several members of the Wet'suwet'en hereditary leaders, including Chief Dsta'hyl.
- [15] The defence concedes that although Chief Dsta'hyl did not personally post videos to the internet, he consented to that occurring. Indeed, at various times video clips show him narrating his activities and intentions specifically for the viewers' edification. It is equally clear that Chief Dsta'hyl knew that his activities were being audio and video recorded, either by those accompanying him or by Forsythe Security personnel.
- [16] It is formally admitted as a fact that the events captured on video occurred within the geographic area covered by the terms of the Injunction.
- [17] The defence called four witnesses. In addition to the accused and Chief Tse'besa, they were Chief Hanamuxw or Don Ryan, who is a Gitksan Chief, and Chief Kloum Khun or Alphonse Gagnon, the brother of the accused and the head Chief of the Owl House of the Likhts'amisyu Clan.
- [18] All four defence witnesses testified about the Wet'suwet'en system of governance, which is matrilineal and divided along clan and house group lines. The Likhts'amisyu Clan is one of five clans within the Wet'suwet'en Nation and is itself divided into three houses. Both Chiefs Dsta'hyl and Tse'besa are wing Chiefs of the Sun House. The head Chief of the Sun House is Chief Smolgelgem, also known as Warner Naziel. Chief Smolgelgem is the nephew of Chief Dsta'hyl.
- [19] The Gitksan are closely affiliated with the Wet'suwet'en, share many traditions with them, and occupy much adjacent territory.
- [20] The defence witnesses describe the system of governance outside of Reserve lands revolving around the balhats, or feast hall gatherings. It is within that system that future chiefs are identified by matriarchs and current chiefs and groomed for leadership roles. That is how both Dsta'hyl and Tse'besa became wing Chiefs.
- [21] One of the important duties of all chiefs is preservation and protection of the territory or yintah, a vast area of largely unoccupied land in the north-central part of the province. The Wet'suwet'en claim approximately 22,000 kilometres as their yintah. That land mass is divided into much smaller parcels of land, each claimed by one of the house head chiefs as their territory. Exhibit 17 is a map reproduced from the trial exhibits in the case of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CanLII 302 (S.C.C.), depicting the territory divided in that fashion.

- [22] Each of the defence witnesses also described in detail the importance of the traditional Wet'suwet'en law of trespass, which requires permission of the house group to be on their territory beyond merely passing through it. Historically, a trespasser who took bounty from a territory was given one warning, then summarily shot and killed for a second transgression. In more recent times, the law of trespass has not been enforced in that manner, but retains great importance nonetheless.
- [23] In January 2020, after the Injunction order of Church J., several Wet'suwet'en hereditary chiefs signed and delivered an eviction notice to CGL based on Wet'suwet'en laws of trespass. The meeting depicted in Exhibit 16 was the same day as the execution of the eviction notice, which is Exhibit 14. Both Chiefs Smolgelgem and Dsta'hyl are among the signatories of the eviction notice, although Chief Kloum Khun is not. He said that was because the pipeline did not pass through his territory.
- [24] The meeting in January 2020 occurred on Chief Woos's territory, and he signed the eviction notice. There is little evidence as to what occurred between January 2020 and October 2021, when the central events took place. Chief Dsta'hyl said that CGL removed some of its equipment after the eviction notice was served, but they later returned with the RCMP to commence construction of the pipeline.
- [25] Exhibit 15 is a memorandum of understanding between Canada, BC, and the Wet'suwet'en (the "MOU"). It was agreed on February 29, 2020, after several days of negotiations, and signed on May 14, 2020. It is signed on behalf of Canada by the Minister for Crown-Indigenous Relations, and on behalf of BC by the Minister of Indigenous Relations and Reconciliation. Nine of the 12 head chiefs of the Wet'suwet'en house groups are also signatories, including Chiefs Kloum Khun, Woos, and Smolgelgem. Chief Dsta'hyl participated in the first part of the meetings in February, but could not attend the latter part, which he said were held in camera.
- [26] Both Chiefs Dsta'hyl and Kloum Khun agreed that the MOU sets out a framework for negotiations between the Wet'suwet'en and government. Importantly, the MOU recognizes that Wet'suwet'en rights and title are held by Wet'suwet'en houses under "their system of governance".
- [27] I heard no evidence as to what, if anything, occurred with respect to the negotiations contemplated by the MOU. There was a suggestion that the COVID-19 pandemic forestalled those negotiations.
- [28] There was another meeting in the late summer or early autumn of 2021 near Parrot Lake on Chief Smolgelgem's territory to discuss taking steps to enforce the eviction notice. Among those in attendance were all of the defence witnesses. A collective decision was made to appoint Chiefs Dsta'hyl and Tse'besa as enforcement officers to attempt to take action which would get CGL's attention. Seizing or disabling heavy equipment was thought by all to be a proportionate means of enforcing the law of trespass.

- [29] Chief Dsta'hył said that he was, during the events of October 17-26, 2021, enforcing the Wet'suwet'en law of trespass. He knew his actions ran afoul of the Injunction, but believed he was upholding Wet'suwet'en law at all times. He said he had the "green light" from the head chiefs to proceed as he did, specifically to seize CGL's assets. The enforcement action was aimed at forcing CGL to engage in dialogue about its ongoing trespass on Wet'suwet'en territory.
- [30] At the conclusion of his examination in chief, Chief Dsta'hył said he believed his conduct complied 100% with Wet'suwet'en law. Chief Dsta'hył said his intention was not to generate disrespect for the rule of law, but rather to uphold the law. He also said he did not believe his conduct would generate disrespect for the rule of law, because he was completely forthright with both the RCMP and CGL security people concerning his actions. He told them what his intentions were and he followed through with those intentions.
- [31] As earlier noted, counsel for the accused concede that the actus reus of criminal contempt has been proven beyond a reasonable doubt. Defence counsel submits that the mental element required for criminal contempt has not been proven. Further, the accused submit that, even if I am satisfied beyond a reasonable doubt that criminal contempt has been proven, I should nonetheless acquit pursuant to s. 8(3) of the Criminal Code, R.S.C. 1985, c. C-46 because the accused acted pursuant to a co-existing Indigenous legal order, specifically the Wet'suwet'en law of trespass.
- [32] Before addressing those submissions, I should address the essential elements of the offence of criminal contempt. The first three are identical to the elements of civil contempt, namely:
- a) the existence of a valid court order;
 - b) knowledge on the part of the accused of the existence of the order and its essential terms (i.e., that which was prohibited by its terms); and
 - c) an act or acts by the accused which amount to wilful disobedience of the terms of the court order.
- [33] In all contempt proceedings, the moving party must prove the foregoing beyond a reasonable doubt. Here, I am satisfied that counsel for the AGBC has done so. Indeed, the evidence of Chief Dsta'hył confirms his knowledge of the order and wilful disobedience of its terms.
- [34] The additional element that must be proven beyond a reasonable doubt in criminal contempt proceedings is that the disobedience of the court order occurred in a public way, in a manner calculated to depreciate the authority of the court. The public disobedience, which is not at issue here, is part of the actus reus of criminal contempt. Knowledge or recklessness that the public act of disobedience will tend to depreciate the Court's authority is the additional mental element of criminal contempt.

[35] In assessing the question of proof of the mental element, the Court must assess all the evidence, including that of the accused, to determine what was in his mind at the relevant time. Here counsel for Chief Dsta'hyl submits that the requisite intent is not proven. In particular, counsel relies on the unchallenged evidence of Chief Dsta'hyl at the end of examination in chief about his intentions. In written submissions, the accused submits at paras. 26-27 the following:

The Crown cannot prove that Chief Dsta'hyl engaged in this conduct in a manner "calculated to lessen societal respect for the courts". Chief Dsta'hyl's unchallenged testimony was that he did not engage in this conduct to diminish the authority of the court or the rule of law. To the contrary, he sought to uphold the law - Wet'suwet'en law - and protect Likhts'amisyu land. . . .

Chief Dsta'hyl also explained that he did not believe his conduct would generate disrespect for the courts or rule of law in the eyes of the public, given that he clearly explained his intentions and why he was doing what he was doing before following through with those intentions. . . .

[Emphasis in original.]

[36] The fatal problem with those submissions is that they mischaracterize the substance of Chief Dsta'hyl's evidence, which was wholly silent on the critical issue of his appreciation of the impact of his conduct on public respect for the authority of the court. He was clear that he was attempting to uphold the law, and implicit in that is Wet'suwet'en law. He said his actions were consistent with Wet'suwet'en laws, and by that I take him to be referring to their laws of trespass. He also said he was not intending to generate disrespect for the rule of law. I accept the sincerity of that evidence and Chief Dsta'hyl's underlying beliefs. However, that evidence does not address the central issue: whether he knew that his actions would tend to depreciate the authority of the court.

[37] In my view, the evidence that he knew, indeed intended, that his actions and accompanying words would tend to depreciate the court's authority is overwhelming. The most compelling evidence on this score is the commentary of Chief Dsta'hyl at the various times he was engaged in the contemptuous conduct. These comments included the following:

- a) October 17, 2021: Chief Dsta'hyl stated, "That injunction is bogus as hell": Exhibit 10.
- b) October 17, 2021: Chief Dsta'hyl stated, "Your law doesn't work on our territory. The Supreme Court of Canada has given us ownership and jurisdiction over this territory": Exhibit 10.
- c) October 24, 2021: Chief Dsta'hyl stated, "The injunction doesn't exist, doesn't -- the injunction is invalid at this point. There is no injunction. The Wet'suwet'en are looking after their own territory. The injunction is completely invalid, so Church, yeah, dishonourable Church's injunction is not applicable here": Exhibit 10.
- d) October 24, 2021: Chief Dsta'hyl stated, "Yeah, the injustice Marguerite Church there, you know, her piece of paper is completely invalid on our territory": Exhibit 10.

- e) October 25, 2021: In a video posted on the internet, Chief Dsta'hyl referred to the Injunction as invalid, stating, "As Wet'suwet'en, we are not recognizing that injunction because we're not a part of BC, we are not a part of Canada, so that injunction is completely invalid on Wet'suwet'en Territory": Exhibit 2.
 - f) October 26, 2021: Chief Dsta'hyl stated, "That Supreme Court injunction is not worth the words it is written on in Wet'suwet'en Territory": Exhibit 10.
- [38] It is difficult to conceive of a clearer case of knowledge that one's conduct would depreciate the authority of the Court than this. Chief Dsta'hyl's words showed his personal disdain, or contempt, for the Court and its order. He described the order as "invalid" and "bogus", and the issuing judge as "dishonourable". The submission that there is a reasonable doubt on intent is untenable.
- [39] Chief Dsta'hyl's testimony that he thought he was upholding Wet'suwet'en law and that, because he was forthright about what he was doing, his actions would not foster disrespect for the rule of law, is largely irrelevant to the central question. That is so in part because of Chief Dsta'hyl's misconception of the rule of law and actions which might imperil it. It is axiomatic that conduct which diminishes the authority of the Court, broadly speaking, will have the additional effect of eroding the rule of law as that concept is properly understood in Canada. There is no grey area or room for debate about that proposition.
- [40] As noted by Justice McLachlin in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, 1992 CanLII 99 (S.C.C.) at para. 50:

The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.

- [41] Based on all the evidence, in particular the above-quoted words of Chief Dsta'hyl uttered at the time he breached the order, I am satisfied beyond a reasonable doubt that the accused knew that his conduct would tend to depreciate the authority of the Court. The Crown has proved the allegation of criminal contempt beyond a reasonable doubt, subject to the application of the novel defence advanced under s. 8(3) of the Criminal Code.
- [42] The accused submits that it is open to the Court, by application of s. 8(3) of the Criminal Code, to expand the common law to recognize the proposed defence. Section 8(3) reads:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

[43] Because criminal contempt is a common law offence, the constraint noted by the closing portion of s. 8(3) has no application, submits the accused, a proposition with which I agree. I also accept that a line of authority from *Kirzner v. The Queen*, [1978] 2 S.C.R. 487, 1977 CanLII 38 (S.C.C.), through *Amato v. The Queen*, [1982] 2 S.C.R. 418, 1982 CanLII 31 (S.C.C.), and beyond, permits judges of this Court to expand the common law to recognize and develop new defences that are not inconsistent with the Criminal Code.

[44] In the present case, the accused submits that I should excuse the conduct and decline to convict Chief Dsta'hyil of criminal contempt because he was acting pursuant to a coexisting Indigenous legal order.

[45] In written submissions at paras. 51 and 56, the defence submits the following:

. . . The strict application of the law of criminal contempt in these circumstances punishes the accused for upholding Indigenous law because doing so breached a colonial court order. Subjugating Indigenous law to colonial law when they both form part of the law of the land in Canada brings the administration of justice into scorn - precisely the consequence that criminal contempt proceedings are meant to punish.

The proposed defence would not foster anarchy, disorder, or disrespect for the rule of law. Rather, it would allow the Court to show respect for the rule of law of the relevant Indigenous legal order, within the confines of the colonial court system.

[46] I will address the primary issue which leads me to conclude that I cannot accede to the position advanced by the defence shortly. However, the defence fails for a more fundamental reason. I agree with the Crown's submission that, at its core, the proposed defence is a thinly disguised collateral attack on the Injunction order of Church J.

[47] The rule barring collateral attack of a court order was summarized this way by the Supreme Court of Canada in *R. v. Bird*, 2019 SCC 7 at para. 1:

[1] The general rule against collateral attacks on court orders is well-established: with limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose. Th[is] rule has been consistently applied to prevent a person from attacking the validity of a court order when defending against a criminal charge stemming from its breach. . . .

[48] The rule barring collateral attacks on court orders is fundamental to preserving the rule of law and maintaining the authority of the court: *Hayes Forest Services Limited v. Krawczyk*, 2006 BCCA 156 at para. 69. In that case, the Court of Appeal quoted with approval the decision of this Court in *British Columbia Attorney General v. Mount Currie Indian Band*, 54 B.C.L.R. (2d) 129, 1991 CanLII 892 (B.C.S.C.), wherein Justice Macdonald characterized as a collateral attack a claim by Indigenous contemnors that the Court lacked jurisdiction over unceded Indigenous territory. Justice Macdonald held that:

c) . . . there are no exceptions to the collateral attack doctrine insofar as contempt of court proceedings are concerned.

[49] In the present case, it is abundantly clear that the eviction notice delivered by the hereditary chiefs in early January 2020 was a direct response to the Injunction. As noted, Chief Dsta'hyl is among the signatories and he was present at the meeting which occurred the same day the eviction notice was signed. At that meeting, as seen in Exhibit 16, Chief Kloum Khun made direct reference to the fact that the prior interim Injunction had become permanent. Chief Kloum Khun also expressed an intention to have Wet'suwet'en laws respected and recognized.

[50] Then, approximately two months prior to the events at issue here, various members of the Likhts'amisyu Clan decided to commence enforcement action in relation to the eviction notice. At that meeting, Chief Dsta'hyl became the main enforcement officer. His subsequent enforcement actions are the conduct with which we are here concerned.

[51] Chief Smolgelgem, also known as Warner Naziel, is the head chief of the Sun House or Sa Yikh, of which the accused is a wing chief. Warner Naziel was one of the defendants who directly participated in the proceedings before Church J. Chief Dsta'hyl swore an affidavit intended to be filed in those proceedings. Chief Dsta'hyl familiarized himself with the reasons given by Church J. at the time she made the Injunction. In his testimony, Chief Dsta'hyl said that Church J. either did not know about the Delgamuukw decision or she wilfully ignored it.

[52] In fact, Church J. referred to Delgamuukw several times in her judgment (indexed at 2019 BCSC 2264) and noted correctly that the Supreme Court of Canada's decision left unresolved the Aboriginal title claims of the Wet'suwet'en. Importantly, Church J. considered some of the very same claims now made at this criminal trial concerning trespass and Wet'suwet'en law. For example, in summarizing the position of the defendants, Church J. said this at para. 51:

[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.

[53] Then at paras. 127-159, Church J. dealt with the headings, "Indigenous Law as a Defence", "Indigenous Legal Perspective", and "Self-Help Remedies". She concluded at para. 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. . . .

- [54] Justice Church then considered the legal test for an Injunction and made the order in favour of the plaintiffs.
- [55] The self-help remedies there under consideration were blockades, said to be preventing the plaintiffs from violating Wet'suwet'en law. Here the conduct is blockades and seizure or decommissioning of equipment as part of what Chief Dsta'hyl says is enforcement action to uphold the Wet'suwet'en law of trespass. There is no legal distinction between the conduct considered by Justice Church and the stated rationale for it, and the actions of Chief Dsta'hyl and his stated motivation. If the Likhts'amisyu Clan and its hereditary chiefs were unhappy with the decision of Church J. and believed it was wrongly decided, the potential recourse was an appeal or an application to vary. Further resort to self-help remedies was not a legally-viable option.
- [56] The only way to properly characterize the novel excusatory defence advanced on behalf of Chief Dsta'hyl is as a collateral attack on the Injunction order of Church J. For that reason, the defence fails.
- [57] With respect to the merits of the claim that permitting the novel excusatory defence would be an appropriate means of harmonizing Indigenous law and colonial law, I make two comments:
- a) Contrary to the defence position that the Court would be showing respect for the "rule of law of the relevant Indigenous legal order, within the confines of the colonial court system", what is actually proposed is recognition of an imprecisely defined law of trespass to the exclusion of the Canadian law of contempt. The two legal orders cannot comfortably co-exist in the circumstances. The proposed defence advocates application of the Wet'suwet'en law of trespass to effectively render nugatory a valid order made by this Court; and
 - b) I tend to agree with the Crown's submission that if the novel defence were to be successfully advanced, it would likely need to be as a form of exemption from criminal liability premised on s. 35 of the Constitution Act. It would be difficult to envisage the defence succeeding absent a proven claim of Aboriginal title to the lands in question. In this case, the defence has consistently taken the position that it was not invoking nor relying on s. 35, and has not complied with the statutory requirements for making such a claim.
- [58] In conclusion, I decline to give legal effect to the proposed novel excusatory defence. The Crown has proved the case of criminal contempt against Chief Dsta'hyl beyond a reasonable doubt and I find him guilty of criminal contempt of court.

"Tammen J."

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