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INTRODUCTION

On 7 January 2019, the RCMP arrested 14 Wet'suwet'en land defenders, removing them from the path of the Coastal Gaslink Pipeline.[1] This police action sparked protests of solidarity across Canada.[2] On 6 February 2020, the RCMP was again deployed to clear protestors and allow pipeline construction to proceed. Over the next four days, over 20 individuals were arrested.[3] Once again, nationwide protests ensued and media attention turned to the conflict unfolding in northern British Columbia between First

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1 See Chantelle Bellrichard & Michelle Ghoussoub, "14 Arrested as RCMP Break Gate at Gidimt'en Camp Checkpoint Set Up to Stop Pipeline Company Access", *CBC News* (7 January 2019), online: <cbc.ca/news/indigenous/rcmp-injunction-gidimten-checkpoint-bc-1.4968391>.

2 See The Canadian Press, "Protests Follow RCMP Arrests at B.C. Pipeline Blockade", *The Province* (8 January 2019), online: <theprovince.com/news/local-news/protests-follow-rcmp-arrests-at-b-c-pipeline-blockade/wcm/36415504-71c1-41fc-9921-1f89fd28cc7f>.

3 See Chantelle Bellrichard & Jorge Barrera, "What You Need to Know About the Coastal GasLink Pipeline Conflict", *CBC News* (5 February 2020), online: <cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-pipeline-1.5448363>.

Nations, Coastal Gaslink, and the Crown.[4] And then once more, on 18 November 2021, the RCMP forcefully intervened. Fifteen individuals were arrested, including two journalists.[5] Predictably, solidarity protests emerged across the country.[6]

Across all these actions, the conflict over the Coastal Gaslink Pipeline has only escalated. As the federal and provincial government continue to push forward on an agenda of reconciliation, Coastal Gaslink—and the unresolved dispute with the Wet'suwet'en hereditary leadership—stands out as an example of how far things still need to come. And in each of the above instances, court-ordered injunctions have underpinned and enabled the RCMP's actions.

The Coastal Gaslink Pipeline has been at the centre of the debate concerning natural resource extraction, environmental protection, and Indigenous reconciliation in Canada for years.[7] It is also emblematic of the way in which injunctive relief has been deployed as a means for corporations and the Canadian government to move ahead with large-scale natural resource

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4 See Rhiannon Johnson, "RCMP Arrests in Wet'suwet'en Territory Spark Protests Nationwide", *CBC News* (10 February 2020), online: <cbc.ca/news/indigenous/wetsuweten-solidarity-actions-roundup-1.5458383>.

5 See Matt Simmons, "RCMP Arrest Journalists, Matriarchs and Land Defenders Following Gidimt'en Eviction of Coastal GasLink", *The Narwhal* (20 November 2021), online: <thenarwhal.ca/journalists-arrested-rcmp-wetsuweten/>.

6 See Matt Simmons, "'We Are Not Here to Get Killed': Wet'suwet'en Solidarity Actions Met with Armed Police Response", *The Narwhal* (26 November 2021), online: <thenarwhal.ca/wetsuweten-rcmp-solidarity-gitxsan/>.

7 See generally Amnesty International, "Criminalization of Wet'suwet'en Land Defenders" (1 March 2023), online: *Amnesty International* <amnesty.org/ en/latest/news/2023/03/criminalization-wetsuweten-land-defenders/>; Gavin Smith, "The Invisible Thread? The Coastal GasLink Decision and Why We Must Do More to Recognize the Application of Indigenous Law" (15 January 2020), online (blog): *Westcoast Environmental Law* <wcel.org/blog/invisible-thread-coastal-gaslink-decision-and-why-we-must-do-more-recognize-application>; Tyler McCreary, "Between the Commodity and the Gift: The Coastal Gaslink Pipeline and the Contested Temporalities of Canadian and Witsuwit'en Law" in Benjamin J Richardson, ed, *From Student Strikes to the Extinction Rebellion* (Cheltenham, UK: Edward Elgar Publishing, 2020).

infrastructure and extraction projects in the face of entrenched civil disobedience and unresolved First Nation title disputes.

Research has begun to highlight the imbalance in current injunction jurisprudence. One study provides, for the first time, a quantitative analysis of injunctions in the modern era in Canada.[8] Analyzing over 100 injunction cases concerning First Nations from 1958 to 2019, the study confirms anecdotal evidence that injunctions are disproportionally used in favour of extractive industries at the expense of Indigenous rights and interests. It found that 76% of injunctions filed against First Nations by corporations were granted, whereas 81% of injunctions filed by First Nations against corporations were denied.[9] Qualitative review of the injunction decisions revealed that this was in part explained by a court bias in favour of clear-cut private property rights over the seemingly amorphous and poorly understood (by the courts, that is) Aboriginal rights and interests in the land.[10] Irina Ceric, in a separate article, found further evidence for this conclusion by tracing the case law from the early 1990s.[11] She demonstrates how early hesitancy by some judges to issue injunctions in land rights disputes eventually gave way to a ful-blown reliance on them in pushing forward extractive projects.[12] Her critique centres on how injunctions have provided a flexible tool for courts to privatize what are in fact public law disputes, elevating private property rights at the expense of Aboriginal constitutional rights.[13]

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[8] See Marc Kruse & Carrie Robinson, "Injunctions by First Nations: Results of a National Study", *Yellowhead Institute* (14 November 2019), online: <yellowheadinstitute.org/2019/11/14/injunctions-by-first-nations-results-of-a-national-study/>.

[9] See Shiri Pasternak & Hayden King, *Land Back: A Yellowhead Institute Red Paper* (Toronto: Yellowhead Institute, 2019) at 10, online (pdf): *Yellowhead Institute* <redpaper.yellowheadinstitute.org>.

[10] See *ibid* at 29–32.

[11] See Irina Ceric, "Beyond Contempt: Injunctions, Land Defense, and the Criminalization of Indigenous Resistance" (2020) 119:2 South Atlantic Q 353.

[12] See *ibid* at 358–60.

[13] See *ibid* at 362.

These particular trends must be situated within the broader history of dispossession suffered by Indigenous peoples at the hands of the Canadian government and settler communities, which continues to this day. This paper cannot do justice to that history given space constraints. But it is important to recognize that these conflicts are not new. From the foundational legal fiction of the doctrine of discovery[14] through to the Crown's obstinate refusal to recognize existing treaty rights,[15] federal and provincial governments have favoured national economic interests and industrial expansion over the sovereign rights and interests of First Nations.

Writing for the Mackenzie Valley Pipeline Inquiry Report of 1977, Justice Berger stated: "If the pipeline is approved before a settlement of claims takes place, the future of the North—and the place of the native people in the North—will, in effect, have been decided for them."[16] Recognizing that "[t]he settlement of native claims is not a mere transaction" and that such a settlement "should be a beginning rather than an end of the recognition of native rights and native aspirations", he recognized that the project's approval would ultimately "determine the course of events, no matter what Parliament, the courts, this Inquiry or anyone else may say."[17] His findings were

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14 See generally Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

15 For example, the BC government finally settled a land claim dispute with the Blueberry River First Nations, the Doig River First Nation, the Halfway River First Nation, the Saulteau First Nations, and the West Moberly First Nations for violation of Treaty 8. BC premier David Eby acknowledged the government had wrongfully denied land rights under the treaty, noting that the settlement meant "restoring the rightful amount of land that was promised under the treaty and all the benefits that should have flowed at the time to those Nations": Leyland Cecco, "Canada to Pay $800m to Settle Land Dispute with Five First Nations", *The Guardian* (17 April 2023), online: <theguardian.com/world/2023/apr/17/canada-first-nations-land-claims-dispute-settlement>.

16 Justice Thomas R Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry: Volume One* (Ottawa: Supply and Services Canada, 1977) at xxiv.

17 *Ibid* at xxiv–xxv.

prescient; in the more than 40 years since the inquiry, the approval of industrial projects have, more often than not, dictated subsequent events and influenced the treatment of Indigenous sovereignty and rights. It is within this context that the use of injunctive relief by industrial and extractive projects to overcome First Nation resistance must be understood.

Other commentators have criticized the way in which injunctions, when issued against protestors, obscure the explicitly public role that civil disobedience is meant to play in society.[18] Rather than police and prosecutors using criminal law to detain illegal protestors, they rely on court-sanctioned injunctions and enforcement orders to remove protestors. Authors such as Amir Attaran have highlighted the serious due process concerns that this raises.[19] Rather than criminal prosecution and the attendant due process safeguards that come with it, the enforcement order itself becomes the de facto final remedy sought by corporations.[20] Particular concerns surround the treatment of journalists in such scenarios, where the enforcement of injunctions may both violate free press protections and impact the public's understanding of important issues.[21]

These two lines of critique—that current injunction jurisprudence both undermines Indigenous rights and reconciliation while also curtailing civil disobedience—deserve

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[18] See Amir Attaran, "*Mandamus* in the Enforcement of the Criminal Law: Ending the Anti-Protest Injunction Habit—Issues Arising from *MacMillan Bloedel v. Simpson*" (2019) 33:1 UBC L Rev 181.

[19] See *ibid* at 188.

[20] See *ibid*.

[21] Courts elsewhere in Canada have recognized this concern. The Court of Appeal of Newfoundland and Labrador held that the enforcement of an injunction against a journalist covering local Indigenous opposition to a hydro-electric project was unlawful due to the "undue and unnecessary interference with the *bona fide* exercise of the journalistic function": *Re Brake*, 2019 NLCA 17 at paras 78–81 [emphasis in original]. In keeping with the analysis I have put forward here, the Court noted that, "It is not a sufficient answer to this position to say that the journalist would always have the right to challenge the contempt order when ultimately brought into court. By that time, the potential damage to the reporting function may already have been done": *ibid* at para 80.

greater attention. Reconciliation is now a central pillar of both the federal and BC provincial governments' platforms. Both governments have passed legislation adopting the *United Nations Declaration on the Rights of Indigenous Peoples*[22] into law.[23] Yet conflicts between natural resource extraction projects and First Nation communities remain, and the use of interlocutory injunctions and police enforcement within these disputes seems poised to continue to undermine those broader efforts at reconciliation.[24]

Meanwhile, the issue of injunctive relief in the context of civil disobedience has continued to come before the courts. In *Teal Cedar Products Ltd v Rainforest Flying Squad*,[25] environmental activists squared off against Teal Cedar's logging of old growth forest in Fairy Creek, British Columbia. In that BC Supreme Court ruling, Justice Thompson rejected Teal Cedar's application for an injunction extension.[26] Adopting a more expansive interpretation of the framework for granting injunctions, Justice Thompson determined that the serious infringement of civil liberties that resulted from the RCMP's method of enforcement—which resulted in over 1000 arrests—weighed against granting the injunction.[27]

The BC Court of Appeal disagreed.[28] There, the Court ruled that it was an error to consider RCMP conduct as the police were a third party to the dispute; by considering their conduct, "the

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22 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [*UNDRIP*].

23 See *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021 c 14 [*UNDRIP Act*]; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*].

24 For a recent dispute, see e.g. *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133. For a more thorough summary of current land conflicts, see Pasternak & King, *supra* note 9.

25 2021 BCSC 1903 [*Teal Cedar* BCSC]. The dispute centres on old growth logging taking place in Fairy Creek on Vancouver Island. See *ibid* at para 3.

26 See *ibid* at para 2.

27 See *ibid* at paras 78–79.

28 See *Teal Cedar Products Ltd v Rainforest Flying Squad*, 2022 BCCA 26 at para 29 [*Teal Cedar* BCCA].

judge effectively turned a private law matter into a public law one".[29] The defendants sought leave to appeal to the Supreme Court of Canada, arguing that "the time is now ripe to address and clarify, in the specific context of civil injunctive relief directed against public protest, both the role and the content of the public interest and the rule of law in weighing the balance of convenience."[30]

The Supreme Court of Canada denied their request, passing on an opportunity to offer clarity how *RJR-MacDonald Inc v Canada (Attorney General)*[31] should be interpreted and applied in the context of civil disobedience.[32] Yet the courts continue to be forced to grapple with these issues: two of the journalists arrested as part of the *Coastal Gaslink v Huson*[33] injunction enforcement have brought a civil suit against the RCMP;[34] nineteen land defenders were charged with criminal contempt in July 2022 for allegedly disobeying the *Coastal Gaslink* injunction order; three land defenders were convicted of criminal contempt on 12 January 2024, and the BC Supreme Court is now considering abuse of process challenges brought by the convicted defender;[35] and confrontations over the Trans

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29 *Ibid* at para 71.

30 *Kathleen Code v Teal Cedar Products Ltd*, 40115 (29 September 2022) (Memorandum of Argument on Application for Leave to Appeal to SCC) at para 4 [*Teal Cedar* Application for Leave to Appeal].

31 [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald* cited to SCR].

32 See *Teal Cedar* BCCA, *supra* note 28, leave to appeal to SCC refused, 40115 (29 September 2022).

33 2019 BCSC 2264 [*Coastal GasLink*].

34 Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See "The Narwhal and Amber Bracken's Case Against the RCMP: What You Need to Know", *The Narwhal*, online: <thenarwhal.ca/bracken-rcmp-case-faq/>. Elsewhere in Canada, courts have recognized that "[t]he importance of considering the incidental effect of injunctions and contempt on the ability of the media to perform their jobs is . . . heightened in the context of the coverage of events about aboriginal issues": *Re Brake*, *supra* note 21 at para 81.

35 See Amnesty International, "Amnesty International Condemns Court Decision Regarding Wet'suwet'en, Other Indigenous Land Defenders" (16 January 2024), online: *Amnesty International* <amnesty.ca/human-rights-

Mountain Pipeline in Burnaby, British Columbia led the BC Supreme Court to sentence Will George of Tsleil-Waututh Nation to a 28-day jail sentence for an alleged breach of an injunction.[36] Canadian jurists should take these opportunities to reconsider injunction doctrine in light of Canada's renewed commitments to reconciliation and, in particular, the increased recognition—including by the Supreme Court of Canada—of the often strained and historically problematic relationship between First Nations and the police.[37]

This paper therefore aims to provide one answer to the question of how courts should reimagine the interlocutory injunction framework in the context of conflicts between First Nations, natural resource extraction companies, and the Crown. Currently, the doctrinal framework for injunctive relief calls on courts to assess the "balance of convenience", the interests of the parties to the case, in order to determine who would suffer the greatest harm if injunctive relief was awarded.[38] Using the Coastal Gaslink dispute as a case study, I argue that the current framing of the interests at play—particularly the "public interest" and the interest in the "rule of law"—are unduly narrow. This framing, in turn, leads to a tipping of the scales in favour of economic over environmental and Indigenous interests. Ultimately, this means that the current process for granting injunctive relief in cases of conflict between First Nations and natural resource extraction projects is poorly calibrated and detrimental to the reconciliation process.

I conclude by arguing that courts should be more cognizant of the way in which specific contextual factors—civil disobedience and unresolved Aboriginal title claims—transform the scope of what is included in the public interest and rule of law considerations. Far from being out of step with the underlying

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news/amnesty-international-condemns-court-decision-wetsuweten-land-defenders/>.

36 See *ibid.*

37 See *R v Lafrance*, 2022 SCC 32 (noting that the relationship between police and Indigenous persons has been characterized "by an overwhelming power imbalance and history of discrimination" at para 58).

38 See *RJR-McDonald*, *supra* note 31 at 334.

doctrine, this reorientation would provide greater clarity and, more importantly, truly serve the public interest that it aims to protect.

The argument is structured as follows. In Part I, I provide a brief recap of the current injunction framework, as articulated in *RJR-MacDonald*. In Part II, I critique the way in which the BC Supreme Court in *Coastal Gaslink* applied the *RJR-MacDonald* framework. In Part III, I take a step back and make the substantive argument of the paper. I point to two highly relevant contextual factors—civil disobedience and Aboriginal title disputes—as having the power to reshape how courts frame both the "public interest" and "rule of law" within the injunction framework. I conclude by considering how such a reconceptualization may not only lead to more balanced determinations consistent with the Canadian constitution but would also bring courts into alignment with the overarching need for reconciliation of Indigenous and Crown relations in Canada.

I. INJUNCTIVE RELIEF & THE *RJR-MACDONALD* FRAMEWORK

An interlocutory injunction, in simple terms, is a court order preventing one of the parties from taking certain actions while a case is pending.[39] Parties to a lawsuit can apply for an injunction to preserve their interests while the issue at hand works its way through the courts. It prevents the moving party from suffering the loss of their rights or privileges only to have them reinstated if they are successful at trial. A determination of whether to grant an injunction centres on whether the harm to the moving party's interests is severe enough to warrant the court intervening to block the action in question.

In Canada, the reference case for adjudicating applications for injunctive relief is *RJR-Macdonald*.[40] Under the framework

[39] See Jeff Berryman & Kiri McDermott-Berryman, "Rules of Civil Procedure Chapters, Preservation of Rights in Pending Litigation, Rule 40—Interlocutory Injunction or Mandatory Order" in Noel Semple, ed, *Civil Procedure and Practice in Ontario*, 2nd ed (2022 CanLIIDocs 1027), online: <canlii.ca/t/7hzz3>.

[40] *Supra* note 31.

articulated by the Supreme Court of Canada in that case, courts should apply a three-part test for determining such an application: first, the court in question considers whether there is "a serious question to be tried"; second, whether the applicant would suffer "irreparable harm" if relief was not granted; and third, "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."[41]

The first prong, "a serious question to be tried", is meant to ensure that the underlying claim "is not frivolous or vexatious."[42] Put plainly, it would make no sense to halt a given action if it was clear from the beginning that the underlying legal claim against that action was bound to lose. Overall, it is understood to be a low bar to entry, particularly when *Charter of Rights and Freedoms* claims are at issue.[43]

The second prong concerns whether the applicant would suffer "irreparable harm" if interlocutory relief was withheld. As

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41 *Ibid* at 334.

42 *Ibid* at 335, citing *American Cyanamid Co v Ethicon Ltd*, [1975] AC 396 at 407, [1975] 2 WLR 316.

43 See *RJR-MacDonald*, *supra* note 31 at 337. *RJR-Macdonald* provides two exceptions to this rule. The first is instances "when the result of the interlocutory motion will in effect amount to a final determination of the action": *ibid* at 338. In such cases, the granting or refusal of the injunction will essentially make the underlying issue moot, as the harm it causes to the losing party is "complete and of a kind for which money cannot constitute any worthwhile recompense": *ibid* at 338, citing *NWL Ltd v Woods*, [1979] 1 WLR 1294 at 1307, [1979] 3 All ER 614 [*Woods*]. In these circumstances, the judge should consider the likelihood that the party seeking interlocutory relief would prevail at trial as part of their overall determination. The Court notes that such cases are likely to be rare, but "cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception": *RJR-MacDonald*, *supra* note 31 at 338–39. As Ceric points out, this exception has rarely been engaged in the context of disputes between First Nations and corporations in BC, although it has been invoked in certain cases in Ontario. See Ceric, *supra* note 11 at 363. The second exception pertains to cases where there is a clear constitutional question of pure law that would be dispositive if ruled upon. See *RJR-Macdonald*, *supra* note 31 at 339. In such cases, the judge can ignore the second and third prongs if the constitutional ruling is clearly discernible. See *ibid* at 340.

the Court made clear, "[a]t this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."[44] "Irreparable" is defined as either harm that cannot be quantified or that cannot be remedied—usually because one party cannot collect damages from the other party.[45]

The third prong is often referred to as the "balance of inconvenience" and is the focus of this paper.[46] It is, in many respects, the most consequential, and determinations at this stage will often be dispositive.[47] At its most basic level, it is a balancing of the various harms that will result from the granting (or withholding) of the interlocutory injunctive relief.[48] *RJR-Macdonald* makes clear that the factors to be considered at this stage are "numerous and will vary in each individual case."[49]

It is important to keep in mind that *RJR-Macdonald* was not a dispute involving civil disobedience or Aboriginal title claims. It was a dispute between large tobacco distributors and the federal government over mandatory health messaging requirements on cigarette packages and therefore implicated the right to freedom of expression under section 2(b) of the *Charter*.[50] The reasoning in *RJR-Macdonald* is therefore largely targeted at delineating the injunction test for disputes of a constitutional nature.[51] This is particularly pertinent when considering the scope of the balance

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44 *RJR-MacDonald*, *supra* note 31 at 341.

45 See *ibid.*

46 See *ibid* at 342.

47 See *ibid*.

48 See *ibid.*

49 *Ibid*.

50 See *ibid* at 319–20.

51 See *ibid* ("[a]re there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief sought involves the execution and enforceability of legislation?" at 334).

of inconvenience.[52] In constitutional cases, an important factor to be considered is the public interest: "in all *constitutional* cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies".[53] The public interest is defined broadly, including harms to the public interest in general and to "the particular interests of identifiable groups."[54] The Court concludes: "In our view, the concept of inconvenience should be widely construed in *Charter* cases."[55]

II. APPLYING THE RJR-MACDONALD TEST IN COASTAL GASLINK

Coastal GasLink Pipeline Ltd v Huson centres on the conflict between Coastal GasLink Pipeline Ltd and the Wet'suwet'en First Nation's hereditary leadership over the construction of a liquefied natural gas pipeline through traditional Wet'suwet'en territory.[56] The case concerns Coastal GasLink's application for an interlocutory injunction accompanied by an enforcement order for the removal of Wet'suwet'en protest camps that were blocking pipeline construction.[57] It follows an earlier ruling

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[52] Although not considered in the present analysis, *RJR-Macdonald* also held that in *Charter* cases there is no consideration given to the status quo in weighing the various interests. The Court notes that in some private law disputes the status quo is sometimes factored into the balance of inconvenience test, whereby the party that was disrupting the status quo would be at a disadvantage. Although the Court refrains from making any definitive claim about its applicability in such private disputes, the Court is clear that, when it comes to *Charter*-based challenges, no such consideration is valid. This is because one of the functions of the *Charter* is to allow individuals to challenge the status quo. See *ibid* at 347. Interestingly, the Court in *Coastal Gaslink* briefly considers the status quo—but makes no definitive statement on the issue and does not acknowledge this caveat of the *RJR-Macdonald* framework. See *Coastal Gaslink*, *supra* note 33 at paras 212–14.

[53] *RJR-MacDonald*, *supra* note 31 at 343 [emphasis added].

[54] *Ibid* at 344.

[55] *Ibid* at 346.

[56] See *Coastal Gaslink*, *supra* note 33.

[57] See *ibid* at para 1.

granting an interim injunction to Coastal Gaslink on similar grounds.[58]

Writing for the BC Supreme Court, Justice Church grants Coastal Gaslink's application for injunctive relief. She first dismisses the defendant's reliance on Wet'suwet'en law as a basis for their claims. In doing so, the Court argues that Wet'suwet'en law is not yet incorporated into Canadian law.[59] Although the Court concedes that Wet'suwet'en law can be admitted as factual evidence, the Court points to ongoing conflicts about the content of the law within the Wet'suwet'en community as additional grounds for diminishing its importance in the present case.[60] Finally, the Court asserts that regardless of the content of Wet'suwet'en law, the Wet'suwet'en hereditary leadership do not have a right to resort to "self-help" remedies via the unilateral assertion of Wet'suwet'en Aboriginal law to the exclusion of BC and Canadian law.[61]

The Court then applies the three-part *RJR-MacDonald* test for determining injunctive relief.[62] In brief, the Court finds that the economic benefits of the project to both the corporation and other third-party actors (including other First Nations along the pipeline route) heavily outweigh any harm to the defendant's interests.[63] The Court grants both the injunction and the enforcement order.[64]

In this section, I critique the application of the *RJR-Macdonald* framework by the Court in *Coastal Gaslink.* My focus is on the third prong of the test, the balance of convenience.[65] Pointing to

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58 See *ibid* at para 2.

59 See *ibid* at paras 127–29.

60 See *ibid* at para 134.

61 See *ibid* at paras 146, 156, 159.

62 See *ibid* at paras 160–226.

63 See *ibid*.

64 See *ibid* at paras 226, 233.

65 Although beyond the scope of this paper, Justice Church also fails to contend with the full framing of the first prong of the *RJR-Macdonald* test. She overlooks the exception that *RJR-Macdonald* provides to this rule, "when the result of the interlocutory motion will in effect amount to a final

the way in which the Court balances the interests of the plaintiff, defendants, and the broader public, I first aim to highlight how the opinion repeatedly undervalues the harms suffered by the Wet'suwet'en First Nations.[66] I then turn to a critique of the way in which Justice Church conceptualizes the "rule of law" as a specific component of the public interest. Finally, I point out how the narrow conception of the public interest and the rule of law also blinkered the Court's reasoning and prevented it from considering additional factors in its analysis.

A. TIPPING THE SCALES WHILE BALANCING INTERESTS

The Court in *Coastal Gaslink* repeatedly diminishes potential harms to Indigenous and environmental interests. By applying inconsistent and opaque rationales for what is included or

determination of the action": *supra* note 31 at 338. *RJR-Macdonald* provides a carve out when the grant or refusal of interlocutory relief results in the losing party suffering harm that is "complete and of a kind for which money cannot constitute any worthwhile recompense": *ibid* at 338, citing *Woods*, *supra* note 43 at 1307. In such cases, more scrutiny should be applied to the potential merits of the applicant's claims. See *RJR-MacDonald*, *supra* note 31 at 338. This seems particularly applicable in the present case. For the Wet'suwet'en hereditary leadership, losing at this stage effectively means the pipeline will be built. The building of the pipeline is what is at issue in the conflict between Coastal Gaslink and the defendants in this case. The defendants have made clear that financial compensation "cannot constitute any worthwhile recompense". A trial held at a later date on the merits of this case, likely long after the pipeline has been built, offers little opportunity for the potential injustice of the said pipeline to be remedied. In her work on injunctive relief, Irina Ceric notes that some recent cases concerning Aboriginal claims have applied this exception. See Ceric, *supra* note 11. However, she concludes that "the exclusion of substantive Aboriginal rights claims from the injunction process effectively cancels out the potential impact of a slightly more demanding assessment": *ibid* at 363. My focus here is therefore on how those substantive claims might come to be considered by the courts.

66 Justice Church first considers "Harm to Plaintiff and Others" and "Harm to Defendants", and then later considers the "Public Interest": *Coastal Gaslink*, *supra* note 33 at paras 201–05, 206–11, 215–22. However, there is considerable overlap between some of her "public interest" analysis and the specific harm analysis with regards to plaintiffs and defendants. My analysis here attempts to synthesize across the sections in order to make sense of her various considerations.

excluded from the balance of convenience, the Court unduly tips the scales in favor of Coastal Gaslink's interests.

Justice Church is inconsistent when defining the scope of what can and cannot be considered "harm" in considering injunctive relief—excluding certain claims by the defendants while permitting analogous claims by the plaintiff. For example, she dismisses the Wet'suwet'en concerns about the impact of the injunction order on hunting and trapping rights, arguing that such harms would not result from the injunction per se but would "flow to [the defendant] as a result of the Pipeline Project itself and the plaintiff's construction activities".[67] She reasons:

> 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 . . .[68]

The Court reasons that because these concerns about hunting and trapping rights do not stem from the injunction itself but from the resulting construction of the pipeline, they are beyond consideration within the balance of convenience analysis.

Yet the Court does not apply the same narrow conception when considering the harm done to the plaintiff or other stakeholders aligned with Coastal Gaslink. While cataloguing the harms they will endure, she notes the loss in contracts and subcontracts, employment, and several hundred million dollars in costs if the pipeline project and export facility cannot be completed.[69] She even includes the fact that, "[l]ocal governments and the provincial government will suffer loss of tax revenue and loss of business development and economic growth", concluding that "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."[70]

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67 *Coastal Gaslink*, *supra* note 33 at paras 207–09.

68 *Ibid* at para 209.

69 See *ibid* at paras 201–04.

70 *Ibid* at para 204.

It is perplexing how the potential impact of the pipeline on hunting and trapping rights cannot be considered given that these harms would "flow to them as a result of the pipeline project itself . . . rather than as a result of the interlocutory injunction", yet the *tax revenues generated from the pipeline* can be considered.[71] Justice Church makes no effort to resolve the apparent contradiction.

This inconsistency is reflective of a broader issue, whereby Justice Church consistently devalues indigenous interests and environmental concerns as compared to commercial interests. The financial costs presented by the plaintiffs are accepted, repeatedly, without challenge.[72] The defendants' claims of environmental degradation, by contrast, are diminished.[73] This occurs even after the Justice acknowledges that the government's own Environmental Assessment Officer confirmed that Coastal Gaslink had already violated certain environmental conditions of the project.[74] Rather than incorporate this demonstrable and independently verified evidence of already existing harm into the calculus of potential future harms, the Justice instead seems to indicate that the remedies issued by the Environmental Assessment Officer provided a sufficient avenue for resolving these issues.[75] Because there is one avenue for potentially protecting the natural environment from the damage of the pipeline, the potential harms to the natural environment do not register in the balance.

According to this line of reasoning, if one of the harmed interests enumerated by a party can be secured via other means,

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71 *Ibid* at para 207

72 See *ibid* at paras 189–205.

73 See *ibid* at para 211.

74 See *ibid*.

75 See *ibid*. It is worth noting that environmental violations have continued to occur in relation to the Coastal Gaslink project, providing further evidence of the—potentially irreversible—harm that this project could cause to the natural environment, with or without the presence of a government Environmental Assessment Officer. See Matt Simmons, "Coastal GasLink could Face Million-Dollar Fines for Repeated Environmental Infractions", *The Narwhal* (8 December 2021), online: <thenarwhal.ca/ coastal-gaslink-pipeline-november-infractions/>.

then it cannot be justifiably included as part of the balance of interests. Yet this would mean that Coastal Gaslink's inclusion of the loss in government tax revenues as part of their harms suffered is equally invalid, given that those tax revenues could be secured via a whole host of other means. The *RJR-Macdonald* test at no point calls for a consideration of how alternative remedies that could alleviate potential harms resulting from the injunction might factor into the balancing test.

Similarly, Justice Church provides only limited acknowledgement of the Indigenous interests and potential harms at stake. She concludes that the injunction would not directly inhibit "Chief Knedebeas' exercise of authority in terms of traditional Wet'suwet'en governance."[76] Although she acknowledges the hereditary leadership's argument, "that granting injunctive relief in these circumstances will harm the reconciliation process and harm the Wet'suwet'en legal order", she nevertheless concludes, "[w]hile 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."[77]

Wet'suwet'en governance is no doubt complicated. The Court's decision to refrain from making sweeping generalizations about the nation's interests as a whole is therefore advisable.[78] However, this does not necessarily justify the Court's overall discounting of the potential harms to both the Wet'suwet'en legal order and the reconciliation process writ large. Her conclusion here appears to rest on earlier analysis within the opinion, in which she juxtaposes the unsettled title

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[76] *Coastal Gaslink*, *supra* note 33 at para 209.

[77] *Ibid* at paras 216, 218.

[78] As pointed out by Gavin Smith, both the Supreme Court of Canada in *Delgamuukw v British Columbia* and the BC Supreme Court in *Canadian Forest Products Inc v Sam* have acknowledged the fundamental governance role that the Hereditary Chiefs play in Wet'suwet'en law. In their effort to diminish Aboriginal law, the Court also seems to have overlooked these important holdings in Canadian law. See Smith, *supra* note 7; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR]; *Canadian Forest Products Ltd v Sam*, 2011 BCSC 676.

claims of the Wet'suwet'en against the clearly authorized pipeline project:

> 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* . . . . 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.[79]

I have no doubt that the defendants are familiar with *Delgamuukw*.[80] What I am left wondering is why the (seemingly) settled private property rights of Coastal GasLink *necessarily* trump the unsettled—yet constitutionally protected and Supreme Court of Canada recognized—title rights of the Wet'suwet'en? By ruling in favor of Coastal GasLink the Court is inserting itself into this unresolved claim in a context—an interlocutory injunction hearing—that is unfit for constitutional determinations of that nature. The idea that the Coastal Gaslink pipeline can be built through unceded Wet'suwet'en territory without effecting Wet'suwet'en governance, legal order, treaty negotiations, and broader nation-to-nation reconciliation efforts is naïve and does not properly account for the complexities involved in the reconciliation process.

B. WHOSE RULE OF LAW?

Intimately linked to the issue of Wet'suwet'en treaty rights, and underpinning the entirety of the Court's opinion, is the steadfast

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79 *Coastal Gaslink*, *supra* note 33 at para 152 [emphasis added].

80 See *ibid* at para 149. The *Delgamuukw* case concerned disputes over Wet'suwet'en and Gitxsan title claims in interior British Columbia. Although the Court did not settle the claims outright, it acknowledged that there were claims in dispute and urged the parties to negotiate a settlement. The Coastal Gaslink Pipeline transgresses the territory disputed in *Delgamuukw*, *supra* note 78.

commitment to the idea that "[s]elf-help remedies, such as blockades, undermine the rule of law and the administration of justice."[81] The Court, faced with deliberate violations of the law and recourse to "self-help" remedies, has an interest in "upholding the rule of law and restraining illegal behaviour".[82] Appealing to the broad interest of the public in maintaining the rule of law, the Court concludes that "[t]he public interest in this case weighs heavily in favour of granting the interlocutory injunction."[83]

As part of its emphasis on the illegality and illegitimacy of "self-help" remedies, the decision repeatedly criticizes the defendants for failing to exercise legal challenges to the pipeline project.[84] This ignores the fact that the Wet'suwet'en *have* exercised legal challenges in an attempt to establish their title rights to the land in question.[85] In *Delgamuukw*, the Wet'suwet'en (in partnership with the Gitxsan) pursued their title claim to the Supreme Court of Canada and won.[86] Although the Court ordered another trial at the conclusion of *Delgamuukw*, it specifically urged the parties to pursue good faith negotiations to resolve the claims in question.[87] The government, rather than resolve those treaty negotiations, pursued the Coastal Gaslink Pipeline.[88]

The narrow focus on whether the Wet'suwet'en hereditary leadership mounted specific legal challenges to the narrow

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81 *Coastal Gaslink*, *supra* note 33 at para 156.

82 *Ibid* at para 221.

83 *Ibid* at para 222.

84 See *ibid* at paras 158, 220.

85 See Smith, *supra* note 7 ("[a]fter millions of dollars spent on some 13 years in court, including 318 days of presenting evidence at trial, the Wet'suwet'en together with the Gitxsan won a landmark title victory in the Supreme Court of Canada's 1997 *Delgamuukw* decision").

86 See *ibid*.

87 See *Delgamuukw*, *supra* note 78 at para 186.

88 See Martin Lukacs & Shiri Pasternak, "Industry, Government Pushed to Abolish Aboriginal Title at Issue in Wet'suwet'en Stand-Off, Docs Reveal", *The Narwhal* (7 February 2020), online: <thenarwhal.ca/industry-government-pushed-to-abolish-aboriginal-title-at-issue-in-wetsuweten-stand-off-docs-reveal/>.

pipeline approvals ignores the fact that they have previously mounted, and won, much more consequential constitutional legal challenges only to have the Crown and industry forge ahead with their own plans.[89] The idea that they must re-litigate their title claims via challenges to the pipeline approval processes does not necessarily square with a typical conception of the rule of law.

The Court in *Coastal Gaslink* also relies, in part, on the argument that Wet'suwet'en law (as a form of Indigenous customary law) has not yet become an effectual component of Canadian common law. Other commentators have already demonstrated why that argument fails, and how Indigenous law already applies as a component of Canadian law.[90] A full consideration of their arguments is beyond the scope of this paper. However, it is worth noting that the Court acknowledges that the present forum is not the proper venue for a determination of the content of Wet'suwet'en law:

> 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

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89 See Eugene Kung & Gavin Smith, "The Unist'ot'en Stand-Off: How Canada's "Prove-It" Mentality Undermines Reconciliation" (16 January 2019), online (blog): *Westcoast Environmental Law* <wcel.org/blog/unistoten-stand-how-canadas-prove-it-mentality-undermines-reconciliation>.

90 See Kent McNeil, "Indigenous Law, the Common Law, and Pipelines", *ABlawg* (8 April 2021), online: <ablawg.ca/2021/04/08/indigenous-law-the-common-law-and-pipelines/>. Commenting on Justice Church's reasoning, the author notes at 3–4 [emphasis original]:

> Her position seems to be that Indigenous law does not exist *as a matter of law* until it is acknowledged as such by a treaty, statute, or court decision. This extreme positivist attitude is at odds with the common law . . . . This requirement of evidence of Indigenous law is simply a practical matter—it does not mean Indigenous law is any less part of the domestic law of Canada than the common law and civil law. Evidence through the testimony of experts is similarly required for proof of foreign law and international law because Canadian judges are not expected to be familiar with them.

See also Smith, *supra* note 7.

> with little or no factual matrix. This is not the venue for that analysis and those are issues that must be determined at trial.[91]

Despite this acknowledgment, Justice Church goes on to make determinations about the content of Wet'suwet'en law. She repeatedly claims that there is no evidence presented that Wet'suwet'en law would allow for blocking off roads, controlling access to Wet'suwet'en land, or engaging in actions to prevent the pipeline from being built.[92] Her claim that the present forum is not adequate for making determinations about the content of Wet'suwet'en law is incongruous with her claims about the specific content of the Wet'suwet'en body of law and what it does and does not include.

Furthermore, as Gavin Smith has previously pointed out in a separate critique of the opinion, this reasoning puts the Wet'suwet'en in a Catch-22.[93] On the one hand, the Court in *Coastal Gaslink* is telling them that blockades that prevent access to Wet'suwet'en are not a part of Wet'suwet'en law.[94] On the other hand, Supreme Court of Canada opinions have repeatedly held that Aboriginal title requires proof of "the intention and capacity to retain exclusive control" of the land.[95] These tensions of legal interpretation need to be reconciled with each other. What is ultimately important here is that an interlocutory injunction motion is the improper context for resolving these complex issues.

Ultimately, by discounting the applicability of Wet'suwet'en laws and neglecting to acknowledge previous Wet'suwet'en attempts to use legal means to remedy the situation, the Court privileges the violation of private property rights over the broader undermining of constitutionally enshrined Indigenous rights.

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91 *Coastal Gaslink*, *supra* note 33 at para 138.

92 See *Coastal Gaslink*, *supra* note 33 at paras 151, 155, 165, 209.

93 See Smith, *supra* note 7.

94 See *ibid*.

95 *Ibid* citing *Delgamuukw*, *supra* note 78 at para 156, citing Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 204.

C. WHY MUST THE PUBLIC INTEREST BE SO PRIVATE?

In addition to issues pertaining to the weight courts attach to Indigenous or environmental interests when assessing the balance of interests, there is also the question of what it left out entirely. One feature that has come under increased scrutiny in public discourse is the issue of RCMP conduct and its impact on basic civil liberties.[96] The RCMP play a central role in the enforcement of interlocutory injunctions; courts now regularly issue enforcement orders concurrently with injunction decisions that provide the RCMP with authorizations to impose exclusion zones and carry out arrests.[97] The RCMP have been critiqued for the way in which they have interpreted and enforced those orders, including via extensive and indefinite "exclusion zones" that have been rebuked, in part, for the way in which they have limited media access to protest sites.[98]

In the specific instance of the Coastal Gaslink dispute, the RCMP were called upon to enforce the interim injunction prior to the ruling on the interlocutory injunction analyzed above.[99] They were criticized by a number of civil society organizations, the UN Committee on the Elimination of Racial Discrimination, and the RCMP Civilian Review and Complaints Commission for their heavy-handed treatment of the land defenders and the media.[100]

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96 See *Teal Cedar* BCSC, *supra* note 25.

97 See e.g. *Coastal Gaslink*, *supra* note 33 at para 227.

98 See *Teal Cedar* BCSC, *supra* note 25 at para 78.

99 See *Costal Gaslink*, *supra* note 33 at paras 33–34.

100 See e.g. Jaskiran Dhillon & Will Parrish, "Exclusive: Canada Police Prepared to Shoot Indigenous Activists, Documents Show", *The Guardian* (20 December 2019), online: <theguardian.com/world/2019/dec/20/canada-indigenous-land-defenders-police-documents>; Letter from British Columbia Civil Liberties Association to Chairperson Michelaine Lahaie, "Re: Policy Complaint and Public Interest Investigation Concerning RCMP Exclusion Zone and RCMP Operations on Morice West Forest Service Road" (9 February 2020), online: *BCCLA* <bccla.org/our_work/bccla-and-ubcic-alarmed-at-increasing-rcmp-policing-powers-in-wetsuweten/>; Ketty Nivyabandi, "Open Letter: Amnesty International Urges Federal Government, BC and RCMP to Protect the Rights of Wet'suwet'en Land Defenders" (18 November 2021), online (pdf): *Amnesty International*

Yet none of the harms to civil liberties resulting from these actions were factored into the Court's analysis of the public interest or rule of law. Perhaps unsurprisingly, the more recent enforcement action in Wet'suwet'en following the interlocutory injunction decision included the arrest and detention of two journalists for three days.[101]

Concerns around police enforcement are particularly salient in the context of Indigenous rights, given the historical role of the RCMP in the dispossession and subjugation of First Nation peoples in Canada. As mentioned at the outset of this article, the enforcement actions of the RCMP have repeatedly sparked nationwide protests by First Nation's groups in solidarity with the Wet'suwet'en. These protests in turn led to additional confrontations with the RCMP. These confrontations are deeply harmful to reconciliation. They are also a predictable outcome of these enforcement orders. Yet their harmful effects are nowhere to be found in the Court's balance of convenience analysis.

III. RE-THINKING THE *RJR-MACDONALD* FRAMEWORK

If we are to distill the above analysis, the *Coastal Gaslink's* interpretation of the *RJR-Macdonald* test is narrow in its consideration of the harms that can be quantified within its balancing, the elements that can be included as part of the public interest, and the way in which the "rule of law" is to be defined. Even when the Court claims to be considering the public interest "more broadly", a synthesis of its reasoning amounts to two overarching considerations: the economic benefits of the pipeline project and the protection of the rule of law via the

<amnesty.ca/wp-content/uploads/2021/11/OpenLetter_Wetsuweten_18.11.2021.pdf>; Michelaine Lahaie, "CRCC Response to Concerns about RCMP Actions in Wet'suwet'en Territory Raised by the BCCLA, the Wet'suwet'en Hereditary Chiefs and the Union of B.C. Indian Chiefs" (13 February 2020), online: Civilian Review and Complaints Commission for the RCMP <crcc-ccetp.gc.ca/en/CRCC-Response-Concerns-RCMP-Actions-Wetsuweten-Territory>.

[101] See Matt Simmons, "RCMP Arrest Journalists, Matriarchs and Land Defenders Following Gidimt'en Eviction of Coastal GasLink", *The Narwhal* (20 November 2021), online: <thenarwhal.ca/journalists-arrested-rcmp-wetsuweten/>.

"restraining [of] illegal behaviour".[102] This narrow perspective is due to an overarching failure by the Court to recognize the implications of two important contextual features of this case (and others like it): that it involves acts of civil disobedience and that it concerns conflict over Aboriginal title and rights. Both of these factors carry with them constitutional claims, and both therefore call for an expansion of the balance of convenience in such cases.

Such an expansion does not run counter to *RJR-Macdonald*. Instead, it is in line with its emphasis on the special considerations that need to be made in constitutional cases. Recall that the Supreme Court of Canada in *RJR-Macdonald* emphasized that the factors to be considered in the balance of convenience are "numerous and will vary in each individual case" and that "the concept of inconvenience should be widely construed in *Charter* cases."[103] The context within which this framework is being applied *matters*, and if that context includes constitutional claims, then the factors considered should be broad. Here, I briefly chart the basis for why these two particular contextual features should be given greater consideration and what implications that may have on the balance of convenience going forward.

A. CIVIL DISOBEDIENCE, CIVIL LIBERTIES, AND THE RULE OF LAW

It is important that courts, including the Court in the *Coastal Gaslink* injunction ruling, recognize that they are adjudicating matters involving civil disobedience and that this implicates constitutional rights in ways that purely private law matters do not. Civil disobedience is not akin to an individual criminal law violation; rather, it is "[a] deliberate but non-violent act of lawbreaking to call attention to a particular law or set of laws of questionable legitimacy or morality."[104] As the Supreme Court of

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[102] *Coastal Gaslink*, *supra* note 33 at para 221.

[103] *RJR-MacDonald*, *supra* note 31at 342, 346.

[104] *Slocan Forest Products Ltd v Doe*, 2000 BCSC 150 at para 34 [*Slocan Forest Products*], citing Bryan A Garner, ed, *Black's Law Dictionary*, 7th ed (Saint Paul, Minnesota: West Group, 1999).

Canada itself has pointed out, this means that such disputes involve a mixed matter of private and public law:

> The conflict is between the right to express public dissent on the one hand, and the exercise of property and contractual rights on the other. Thus, the appellants are wrong in asserting that the orders in question are nothing more than "government by injunction" aimed at suppressing public dissent. The respondent is equally wrong in asserting that this case has nothing to do with the public expression of dissenting views and pertains only to private property. This case is about both.[105]

The Court in *Coastal Gaslink* takes no notice of this.[106]

Yet recognizing the public nature of this dispute is essential to understanding its relationship to basic civil liberties and properly conceiving of the public interest at stake. The rule of law, for example, is not simply the need to condemn illegal behavior (although it is inclusive of that need). Instead, it should be seen as "a highly textured expression . . . conveying, for example, a sense of orderliness, of subjection to known legal rules and of *executive accountability to legal authority*".[107] Other authors have noted how the overuse of injunctive relief alters the relationship between the executive and judiciary, transforming "what is essentially a criminal law dispute between *protestors*

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[105] *MacMillan Bloedel Ltd v Simpson*, [1996] 2 SCR 1048 at para 13, 137 DLR (4th) 633.

[106] The dispute involving Teal Cedar, referenced at the outset of this paper, largely revolves around this issue. The BC Supreme Court recognizes a broader scope of public interest considerations in such cases. See *Teal Cedar* BCSC, *supra* note 25 at paras 60–89. The appellate court disagreed: "Accepting that there is a public interest in protecting lawful protest, 'there are no competing equities' to weigh or balance as between protesters engaged in illegal acts and Teal Cedar with its legal right to use logging roads and harvest timber": *Teal Cedar* BCCA, *supra* note 28 at para 71, citing *Cermaq Canada Ltd v Stewart*, 2017 BCSC 2526 at paras 60–61 [emphasis removed]. The protestors, in seeking leave to appeal to the SCC, argue—as I do here—that the Court of Appeal mischaracterizes the issue at hand and fails to recognize the broader public interest at play. See *Teal Cedar* Application for Leave to Appeal, *supra* note 30.

[107] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, 161 DLR (4th) 385, citing *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 805–06, 125 DLR (3d) 1 [emphasis added].

and the Crown into a dispute between *protestors and the courts*—a step that risks, in the long run, bringing the administration of justice into disrepute."[108]

The overuse of injunctions in such scenarios also poses risks to due process rights of protestors, given the way in which enforcement orders combine with contempt of court charges to curtail protestor action without recourse to the full protections in criminal law.[109] Members of the judiciary have acknowledged this dynamic, stating that interlocutory injunctions in the context of conflict between the natural resource extraction industry and protestors "arguably deprives demonstrators of due process."[110] Due process is a *Charter*-protected right and a fundamental component of the rule of law; why it stands outside the balance of convenience is therefore perplexing.[111]

In addition to these due process considerations, the rule of law, properly conceived, also concerns *Charter*-protected rights of freedom of assembly and freedom of expression.[112] The fact that the protestors' actions may be illegal (under Canadian law) may diminish the weight given to the issue of freedom of assembly, but it does not extinguish it. The executive branch appears to have acknowledged as much, with both the BC Attorney General and the RCMP issuing policies clarifying that they will not seek to enforce criminal code offences against protestors participating in civil disobedience unless they are violent or cause serious property damage.[113]

The value of free expression, especially as it pertains to media freedom and media access, is another fundamental component of maintaining the rule of law in democratic society. This is particularly the case when there is a *public* dispute between different interest groups within our society over questions of national importance (such as the proper balance between

[108] Attaran, *supra* note 18 at 188 [emphasis in original].

[109] See *ibid*.

[110] *Slocan Forest Products*, *supra* note 104 at para 49.

[111] See *Charter*, *supra* note 34, ss 7–11.

[112] See *ibid*, s 2.

[113] See Attaran, *supra* note 18 at 182–83.

natural resource development, climate change and environmental protection, and Indigenous/Crown reconciliation). Without media access to these protest sites, a critical public accountability function of our broader democratic system is precluded from taking effect.[114]

By recognizing that conflicts such as *Coastal Gaslink* are not mere private disputes but are sites of public debate involving civil disobedience, courts would have a stronger contextual framework from which to broaden important concepts such as "rule of law". This would allow for a more effective balancing overall, in which the admittedly important need to ensure condemnation of criminal law violations by protestors can be balanced against important due process rights of protestors, *Charter*-protected media rights, and citizens' interest in accessing information about these important public debates. It would also allow for the courts to examine the conduct of other actors—such as the RCMP—to assess the probability and impact of future harms to these interests.

This is not to say that such considerations would always necessarily win out against the interests of private industry. All that is argued here is that these countervailing interests should be considered. Justice Thompson's reasoning in *Teal Cedar*, outlined at the outset of this article, is emblematic of how such considerations, when taken seriously, may tip the scales in favour of protestors.[115]

B. Aboriginal Title, Rights, and Reconciliation

The Court in *Coastal Gaslink* also does not adequately grapple with the fact that it is superimposing a private property claim on an underlying dispute that is fundamentally about Indigenous/Crown reconciliation. As previously discussed, the Court does touch on elements of this issue: the conflict of laws between Wet'suwet'en law and Canadian law and the underlying title claim acknowledged in *Delgamuukw*, for example. But the Court's frame of reference remains squarely one of a private

[114] See Amnesty International, *supra* note 35.

[115] See *Teal Cedar* BCSC, *supra* note 25 at paras 46–89.

dispute between the Wet'suwet'en hereditary leadership and Coastal Gaslink, and it therefore casts these particularized issues of Indigenous rights within that private dispute mold. This, in effect, subordinates constitutional law claims to private property ones. Instead, the Court here (and in similar disputes) should recognize that it is the broader issue of reconciliation that should frame the context within which the private law dispute is occurring. That broader context would allow for proper notice of the serious constitutional dimension at hand, with implications on the factors that should be considered in the balance of convenience.

Centering reconciliation as a core contextual factor in injunctive decision making has implications for our understanding of both the "rule of law" and the various interests at play within a broadly conceived "public interest".

Two issues present themselves with regards to the rule of law. First, as discussed previously, a determination of the content of the rule of law relies on a decision as to what law applies—which is in turn reliant on the reconciliation between pre-existing Wet'suwet'en law and Canadian federal and provincial law. To even begin to balance interests with respect to the rule of law, some resolution of that underlying conflict is necessary.

As the *Coastal Gaslink* Court acknowledges itself, "This is not the venue for that analysis and those are issues that must be determined at trial."[116] Yet the Court then fails to incorporate that indeterminacy about what law applies into their balancing of potential harms. The Court also fails to recognize how its determinations at this stage—within a request for interlocutory injunction—could materially affect future determinations about what law applies and the harms that this may cause. Finally, the Court does not acknowledge that the case at hand is unlikely to ever reach trial, and the interlocutory injunction decision is therefore poised to definitively change conditions on the ground without any opportunity for the Wet'suwet'en hereditary leadership to make a fully-fledged merits argument for the application of Wet'suwet'en law in their territory. A cursory nod

[116] *Coastal Gaslink*, *supra* note 33 at para 138.

towards a future, yet to be determined, and unlikely to occur trial is simply not an adequate safeguard given the interests at stake.

Second, the constitution's integrity is fundamental to the rule of law. In the context of *Coastal Gaslink*, the Supreme Court of Canada has acknowledged that there are serious questions of First Nations' constitutional rights at stake.[117] Although the Court ultimately failed to delineate the geographical extent of those rights, they are clearly implicated in the present dispute. As one commentary correctly notes,

> To truly uphold the rule of law, the constitutional recognition of Aboriginal title and governance must be meaningfully applied in Crown decision-making, *before* crucial decisions are made about Indigenous territories.[118]

This is not just a Wet'suwet'en concern. Much like we all share an interest in ensuring criminal behaviour faces sanction, we all share an interest in the consistent and effective application of our Constitution.

Beyond rule of law considerations, there is also a broader public interest in the national project of Indigenous-Crown reconciliation. The duly elected government at both the provincial and federal level have made express commitments in this regard. Both the federal and BC provincial government have enshrined their commitments to UNDRIP in law.[119] The broader public also clearly has an interest in this dispute and its implications on the project of reconciliation—as demonstrated by the nationwide rallies that occurred following enforcement actions against the Wet'suwet'en.[120]

Injunctions and their accompanying enforcement orders have real potential to undermine this underlying interest. A number of observers have noted the way in which the government and industry have failed to make progress on treaty negotiations while pushing for projects that will change the situation on the

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[117] See *Delgamuukw*, *supra* note 78 at paras 204–07.

[118] Kung & Smith, *supra* note 89 [emphasis in original].

[119] See *UNDRIP Act*, *supra* note 23; *DRIPA*, *supra* note 23.

[120] See Kung & Smith, *supra* note 89.

ground in disputed territory.[121] The UN Committee on the Elimination of Racial Discrimination issued a decision calling for the suspension of work on the Coastal Gaslink Pipeline, citing the violation of free, prior, and informed consent—a hallmark of UNDRIP.[122] Others have noted that cases such as Coastal Gaslink are wildly out of step with the provincial government's agenda and actions on this issue.[123] RCMP enforcement actions in such cases, as previously noted, have only served to sow discord between First Nation communities and the Crown. Indigenous and non-Indigenous communities alike have an interest in whether the government is prioritizing the promotion of private industry over the protection of their constitutional rights.

The primary counter argument to the above is that, although First Nations have constitutional rights, these do not constitute a "veto" power. The Supreme Court of Canada in *Haida Nation v British Columbia*[124] clarified the Crown's duty to consult in instances of unresolved First Nation title claims. The Court made clear that the duty did not equate to a "veto" for First Nations.

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[121] See Lukacs & Pasternak, *supra* note 88; Kung & Smith, *supra* note 89. It is also worth noting the injunctions are not the only tool being used to transform Aboriginal constitutional rights via private law. Shiri Pasternak documents how Impact Benefit Agreements agreed between industry and some First Nations are cause for concern given the role they give to private law and commercial interests in delineating Aboriginal constitutional rights. She notes that the Impact Benefit Agreements do not "rise to the legal standard required for consent at the public law or nation-to-nation level": Pasternak & King, *supra* note 9 at 38. See also Shiri Pasternak, "Wet'suwet'en: Why are Indigenous Rights Being Defined by an Energy Corporation?" *The Conversation* (7 February 2020), online: <theconversation.com/ wetsuweten-why-are-indigenous-rights-being-defined-by-an-energy-corporation-130833>.

[122] See Sarah Cox, "'What Cost are Human Rights Worth?' UN Calls for Immediate RCMP Withdrawal in Wet'suwet'en Standoff", *The Narwhal* (9 January 2020), online: <thenarwhal.ca/what-cost-are-human-rights-worth-un-calls-for-immediate-rcmp-withdrawal-in-wetsuweten-standoff/>.

[123] See Arno Kopecky, "The BC Government Tapes: Pipelines and Reconciliation", *The Tyee* (15 February 2022), online: <thetyee.ca/Analysis/2022/02/15/BC-Government-Tapes-Pipelines-Reconciliation/>.

[124] 2004 SCC 73 [*Haida Nation*].

Instead, the duty to consult and accommodate First Nation interests "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[125]

In *Behn v Moulton Contracting Ltd*,[126] the Supreme Court of Canada addressed the specific issue of disputes involving civil disobedience by First Nation communities in response to natural resource extraction projects. The Court in *Behn* held that the blockading of duly authorized logging activities was an abuse of process and that resort to such "self-help" remedies could not be tolerated.[127] The BC Supreme Court in *Coastal Gaslink* relies exclusively on the reasoning and language of *Behn* in arriving at their conclusions regarding the "self-help" nature of the Wet'suwet'en actions.[128]

Although a full treatment of the jurisprudence around Indigenous consultation is far beyond the scope of the present paper, there are a few preliminary rejoinders that should be considered. As a preliminary point, the *Coastal Gaslink* case is distinguishable from *Behn* on a number of grounds. First, the defendants in *Behn* did not hold leadership positions within their community (the Fort Nelson First Nations) equivalent with the hereditary leadership of the Wet'suwet'en.[129] Second, there was no unresolved title claim in *Behn*—the Fort Nelson First Nations are party to Treaty 8.[130] Therefore, a material change in the conditions on the ground would not have harmed future treaty negotiations in the same way that they could in the case of the Wet'suwet'en.

This takes me to the final and most important point on this issue: Neither *Haida Nation* nor *Behn* were decided in the context

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125 *Ibid* at para 39.

126 2013 SCC 26 [*Behn*].

127 See *ibid* at para 42.

128 *Coastal Gaslink*, *supra* note 33 at paras 157–58.

129 *Behn*, *supra* note 126 at paras 30–31.

130 See *ibid* at para 5.

of injunctive relief.[131] Neither case was considering which factors may or may not be included within the balance of convenience. Neither, therefore, precludes the inclusion of additional factors into the balance of convenience—such as the potential impact on Wet'suwet'en title claims, harms to Wet'suwet'en law and self-governance, and the broader project of reconciliation.[132] None of these factors necessitate a veto—in certain circumstances, a court might consider them and still decide in favour of the private property interests in question. What is important is that they are given the full weight that they carry within our constitutional system. As Chief Justice of British Columbia Robert J Bauman remarked:

> Now is the time to do what we should have done when we arrived here as uninvited guests—demonstrate that we care enough to discover and learn, and to act responsively within the matrix of Indigenous customs, traditions, and protocols. Now is the time for humility.[133]

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[131] In *Haida Nation*, it was the Haida bringing forward the claim, relying on the "obligation flowing from the honour of the Crown toward Aboriginal peoples" to seek a duty to consult, rather than an injunction: *Haida Nation*, *supra* note 124 at paras 12–14. In *Behn*, the plaintiff was not seeking an injunction but was instead seeking damages for the violation of a contract agreement. See *Behn*, *supra* note 126 at para 11. Neither case implicated the *RJR-Macdonald* framework.

[132] A number of pre-*Behn* decisions by the Ontario Court of Appeal had pointed towards a broader conception of the rule of law that included reconciliation as a key interest to be balanced by the courts. This line of reasoning appears to have ended post-*Behn*, but without a SCC decision on-point to guide courts. See Ceric, *supra* note 11 at 363, citing *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, [2006] OJ No 4790, 154 ACWS (3d) 183 (Ont CA) and *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534.

[133] Chief Justice Robert J Bauman, "A Duty to Act" (Remarks delivered at the Canadian Institute for the Administration of Justice's 2021 Annual Conference: Indigenous Peoples and the Law, Vancouver, 17 November 2021), online (pdf): <bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/A_Duty_to_Act_CIAJ_%20Indigenous_Peoples_and_the_Law.pdf>.

CONCLUSION

The Supreme Court of Canada ultimately turned down the opportunity to clarify the RJR-Macdonald framework in the *Teal Cedar* case.[134] But when it eventually does so, it is imperative that the Court consider not only the issue of civil disobedience—as called for by the appellants—but also the implications that any changes may have on disputes between the private parties and First Nations in Canada. Proper notice of these two contextual factors would allow for a more nuanced conceptualization of the rule of law, taking into consideration the potential harm to fundamental *Charter* rights as well as constitutionally protected Aboriginal rights. It would also provide for a richer understanding of the public interest, both in terms of the public's interest in having access to information concerning such disputes and, more importantly, the urgent need to address the demands that a true commitment to reconciliation entails.

[134] See *supra* note 32.