Blockades in the Resource Sector in British Columbia
Or "Blockades 101: How to Prepare for and Deal with Them"[1]

I. Blockades in the Resource Context

While the practical reality is that resource development is a primary economic driver in this province, there are frequently opponents to resource development whether that development is on a large (e.g. Site C and Trans Mountain Pipeline) or small (e.g. an individual cut block) scale. From time to time, those opponents – whether environmentalists, local community groups, or First Nations – choose to take matters into their own hands and blockade, either as a means of peaceful protest or as a direct attempt to stop the development from proceeding. The jurisprudence arising out of such incidents has helped shape the law in several areas, including injunctions, standing, consultation and abuse of process.

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The trend in the jurisprudence indicates a clear willingness on the part of the British Columbia courts to grant injunctive relief to remove blockades and to push challenges to resource development into more lawful arenas, such as judicial review of the relevant approvals and/or the political realm. Perhaps in response to this, the authorities show an increasing number of attempts by opponents to resource development to use injunctive relief to prevent the development from proceeding. While most of these attempts have proven unsuccessful to date, this will be in an interesting area for observation going forward.

What follows is a brief summary of the law surrounding blockades, followed by some practical comments and lessons learned from the author's experience. It is not intended to be exhaustive or to serve as a 'how to' manual for project proponents or opponents in dealing with a blockade situation. Rather, it is intended to provide readers a general overview of some of the issues and to provide some tips, strategies and coping mechanisms for navigating that situation in a manner that hopefully protects and serves your client's interests.

Finally, the commentary in this paper is drawn largely, if not exclusively, from the author's experience representing and assisting industry participants in the resource sector. It is anticipated that not every participant in this session will share the views expressed and what follows should be taken in that context.

II. The Role of Injunctive Relief

The courts have repeatedly commented that "[p]hysical obstruction is not an acceptable demonstration of dissent in a democratic society."[2] Indeed, our Court of Appeal has said that "self-help" remedies, such as blockades, "are not condoned anywhere in Canadian law, which includes aboriginal, common, and criminal law, and they undermine the rule of law."[3] As a result, injunctive relief has developed as the most obvious and most frequent response to blockades in the resource sector. Indeed, our courts have generally proven themselves willing to

[2] *Red Chris Development v Quock et al*, 2006 BCSC 1472 at para 34 [*Red Chris #1*]. See also: *Slocan Forest Products Ltd. v. Valhalla Wilderness Society*, [1998] BCJ No 1255 (SC) at paras 22-23.
[3] *R. v. Manuel*, 2008 BCCA 143 at para 62.

grant injunctions to force protesters to dismantle blockades erected to prevent parties engaged in resource extraction from conducting lawful business.[4]

A. The Legal Test

In British Columbia, a court's authority to grant injunctive relief is grounded in the inherent jurisdiction of the court, s 39 of the *Law and Equity Act*[5] and Rule 10-4 of the *Supreme Court Civil Rules*.[6] The test for obtaining such relief is well-established:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[7]

In British Columbia, this test has also been characterized as a two-part test where the question of whether the plaintiff would suffer irreparable harm is subsumed within the balance of convenience analysis,[8] although the courts have confirmed that the distinction is likely without any practical effect.[9] In the resource context, the courts generally (although not always) adopt the three-part test confirmed in *RJR*. As such, the following sections summarize all three stages of the *RJR* test and, where appropriate, illustrate some of the particular issues arising in the resource context using examples from the cases.

a. <u>Serious question to be tried</u>

The threshold for determining whether there is a serious question to be tried is a low one[10] and there are no specific requirements that must be satisfied at this stage of the analysis.[11] Instead, a

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[4] See, for example: *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133 [*Trans Mountain*]; *Red Chris Development Company Ltd v Quock*, 2014 BCSC 2399 [*Red Chris #2*]; *British Columbia Hydro and Power Authority v Boon*, 2016 BCSC 355 [*Site C*]; *AJB Investments Ltd v Elphinstone Logging Focus*, 2016 BCSC 734 [*Elphinstone*]; *Peninsula Logging Ltd v Muirhead*, 2016 BCSC 1921 [*Peninsula*]; *DNT Contracting Ltd v Abraham*, 2016 BCSC 1917 [*DNT*].
[5] RSBC 1996, c 253.
[6] BC Reg 168/2009.
[7] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at para 43 [*RJR*].
[8] *British Columbia (Attorney General) v Wale* (1986), 9 BCLR (2d) 333 (BCCA) at para 56 [*Wale*].
[9] See, for example, *Expert Travel Financial Security (ETFS) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5 at paras 54-55.
[10] *RJR* at para 54; *Red Chris #2* at paras 48-49; *Revolution Infrastructure Inc v Lytton First Nation*, 2016 BCSC 1562 at para 69 [*Revolution*].
[11] *RJR* at para 54; *Revolution* at para 69.

court must simply be satisfied that the case before it is not frivolous or vexatious[12] and that "a preliminary assessment of the merits of the claim [confirms] that the rights or rights alleged exist, and there is actual or apprehended breach of those rights."[13] A prolonged examination of the merits by the court is unnecessary.[14]

i. Exceptions

There are two notable exceptions to the general rule that a plaintiff must demonstrate a serious question to be tried. When one of these exceptions applies, "a more extensive review of the merits of the case must be undertaken"[15] and plaintiffs will have to meet a higher threshold, demonstrating that they have what is described as either a strong *prima facie* case[16] or a strong arguable case.[17]

The first exception arises

> when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.[18]

When this exception applies, the strength of a plaintiff's case becomes a more significant consideration and a higher threshold is imposed, typically by inserting consideration of the likelihood the plaintiff would succeed in establishing a right to an injunction at trial into the balance of convenience analysis.[19]

This exception can and often does arise in cases involving protests against logging,[20] "because the injunctive relief sought usually has the effect of amounting to a final determination of the

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[12] *RJR* at para 55.
[13] *Red Chris #2* at para 48.
[14] *RJR* at para 55.
[15] *Ibid* at para 59.
[16] *Trans Mountain* at para 78.
[17] *Doubleview Capital Corp v Day*, 2016 BCSC 231 at para 21 [*Doubleview*], referencing *Relentless Energy Corporation v Davis et al*, 2004 BCSC 1492 at paras 10-13 [*Relentless*].
[18] *RJR* at para 56.
[19] *Doubleview* at para 22, referencing *RJR* at paras 56-59. See also, *RJR* at paras 51 and 54 and *Relentless* at paras 13-14.
[20] *International Forest Products Ltd v Kern*, 2000 BCSC 888 at para 41; *Relentless* at para 11.

action"[21] in the sense that the trees the protesters are seeking to protect will ultimately be felled should the injunction be granted. In such circumstances, the higher threshold will apply.

The second exception, which does not typically arise in the resource context, applies "when the question of constitutionality presents itself as a simple question of law alone."[22] In such circumstances, the chambers judge "need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary."[23]

The plaintiff bears the burden of demonstrating that there is either a serious question to be tried or a strong *prima facie* case. When faced with a blockade, the usual approach is to allege and bring forward evidence of various tortious and/or criminals acts. Some of the most common allegations arising out of blockades of resource development include the torts of trespass, nuisance, intimidation, interference with economic relations, inducing breach of contract, and conspiracy, and the criminal offences of intimidation and mischief. As is highlighted in the following sections, each of these has been found sufficient to give rise to a serious issue to be tried.[24] Other potential causes of action, such as intentional interference with economic relations, are often pleaded, but can be very difficult to make out at an interlocutory stage, often because of the intention requirement to establish the tort.[25]

ii. Tortious conduct

(a) Trespass

The tort of trespass is usually predicated on the plaintiff having an exclusive right to occupy land. As such, plaintiffs alleging trespass must demonstrate that they enjoyed an exclusive right to occupy the lands at issue in order to meet the *prima facie* case threshold. While it is often pleaded in the resource context, claims in trespass are not strenuously advanced in the resource context in the absence of evidence of a significant property interest in the area/land at issue. *Doubleview* is a good example of this. There, the land at issue was located within the unceded

[21] *Trans Mountain* at para 80.
[22] *RJR* at para 60.
[23] *Ibid*.
[24] See, for example, *Red Chris #2* at paras 49-62.
[25] See, for example, *Doubleview* at para 55.

traditional territory of the Tahltan Nation and the plaintiff's interest consisted of a permit for exploratory drilling.[26] Adding to the difficulty faced by the plaintiff in *Doubleview* was the fact that the defendants had been invited to enter the lands at issue when they arrived.[27]

Conversely, as noted by Mr. Justice Butler in the *Site C* decision, ownership of the land is not necessary to establish a *prima facie* case in trespass. Where a plaintiff can demonstrate that it holds a *profit a prendre* such as the right to cut and remove timber, that will be "a sufficient interest in land to support an action in trespass."[28] *Elphinstone* was to similar effect. In that case, Mr. Justice Greyell found there was a serious claim of trespass raised where the defendants erected a blockade across a forest service road preventing the plaintiff and its contractors from accessing an area of private managed forest land slated for harvest.[29]

(b) Nuisance

The tort of nuisance is made out where there has been a substantial and unreasonable interference with the plaintiff's use or enjoyment of land.[30] Under this definition, "the blockading of lawful business resulting in interference with its use of its land has been found on numerous occasions to engage"[31] the tort.

However, if the defendants do not physically obstruct or interfere with a plaintiff's ability to use or enjoy its land, a serious issue or *prima facie* case of nuisance will not be made out. *Doubleview* again provides a good illustration of this. In that case, the defendants' interference was with the willingness of the drilling company's employees to continue drilling, rather than with Doubleview's use and enjoyment of its land per se.[32]

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[26] *Doubleview* at paras 2-4 and 36.
[27] *Ibid* at para 36.
[28] *Site C* at para 53;
[29] *Elphinstone* at paras 15 and 23.
[30] See *Doubleview* at para 37, citing *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at para 18.
[31] *Red Chris #2* at para 51, citing *Hudson Bay Mines & Smelting Co Limited v Dumas*, 2014 MBCA 6 at para 74, and *Tlowitsis Nation v MacMillan Bloedel Ltd* (1991), 53 BCLR (2d) 69 (CA) at paras 29-30.
[32] *Doubleview* at para 38.

(c) Intimidation

Intimidation is an intentional tort which requires that the defendant intend to cause harm to the plaintiff.[33] It arises "where a party compels another, by threatening to commit an unlawful act, to act or abstain from acting in a manner that causes harm to the party subject to compulsion (two-party intimidation), or to act or abstain from acting in a manner whereby a third party is harmed (three-party intimidation)".[34] Whether a serious issue to be tried is raised in any given case will be highly fact driven and turn on the specific evidence in each case. In the blockade context, the courts have found that the misuse of bullhorns, aggressive and threatening language, as well as general and specific efforts to physically block the plaintiff and/or its representatives from accessing work sites will be sufficient evidence to make out the tort.[35]

Doubleview was to opposite effect. Based on the evidence in that case, the court found that there was no serious issue relating to the tort of intimidation. Because the defendants had "relied entirely on moral suasion to achieve their desired outcome"; there was no unlawfulness found nor any threat of physical obstruction.[36] Rather, the evidence showed that the defendants simply met with the employees of the drilling company (who were mostly members of the Tahltan Nation), and asked them to respect the wishes of their elders and the Tahltan people and to stop drilling. [37] "After that meeting, the drillers declined to participate further in the drilling, and it came to a halt".[38]

(d) Inducing breach of contract

The tort of inducing breach of contract consists of several elements. To successfully base an injunction on this tort, the plaintiff must establish that:

(a) the plaintiff was party to a valid and enforceable contract at the time of the alleged interference;

(b) the defendant(s) knew of the existence of that contract;

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[33] *Ibid* at para 40, referencing *Central Canada Potash Co v Saskatchewan*, [1979] 1 SCR 42 at 81 and *Sauvé v Canada*, 2011 FC 1074 at para 44, aff'd 2012 FCA 280.
[34] *Red Chris #2* at para 55, citing *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 at para 65, and *Circuit Graphics Ltd v Canadian Association of Industrial Mechanical and Allied Workers, Loc 1* (1981), 31 BCLR 5 (SC) at para 9.
[35] See, for example, *Trans Mountain* at para 113.
[36] *Doubleview* at paras 50-51.
[37] *Ibid* at paras 3, 5 and 43.
[38] *Ibid* at para 5.

(c) the defendants definitely and unequivocally persuaded, induced or procured the plaintiff to break his or her contract;

(d) the defendants intended that the plaintiff breach his or her contract;

(e) the plaintiff did breach the contract as a result of the defendants' interference;

(f) the defendants' interference was wrongful; and

(g) the plaintiff suffered damages as a result.[39]

In the blockade context, this test does not, however, "demand that the blockaders have actual knowledge of the contracts between the plaintiff and [the third party]. It is enough if the blockaders knew, or ought to have known that their activities would interfere with the plaintiff's contractual relations."[40] In addition, interference with a plaintiff's contractual relations need not be direct; instead, a defendant's actions may be aimed at a third party and still constitute inducing breach of contract if the breach by the third party was a "necessary consequence" of the alleged conduct.[41] For example, in *Doubleview* the court found that the plaintiff established a strong arguable case for the tort in circumstances where the protesters had persuaded the employees of a drilling company to breach their contracts with their employer by refusing to continue drilling. This, in turn, resulted in the employer breaching its contract with the plaintiff, who then suffered loss.[42]

(e) Conspiracy

The tort of conspiracy "involves two or more parties agreeing to do an unlawful act, or agreeing to do a lawful act by unlawful means."[43] More specifically, there are two forms of actionable conspiracy: (a) predominant purpose conspiracy; and (b) unlawful means conspiracy. The former occurs when the defendants' primary purpose is to injure the plaintiff, whether the means of injury were lawful or not. The second occurs where the defendants direct unlawful conduct at the plaintiff, causing loss.[44] Both types of conspiracy can occur in the blockade context.

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[39] *Verchere et al v Greenpeace Canada et al*, 2003 BCSC 660 at para 29, aff'd 2004 BCCA 242 [*Verchere*].
[40] *Red Chris #2* at para 58, citing *Verchere* at paras 35-37 and 48.
[41] *Doubleview* at paras 58-63.
[42] *Ibid* at para 58.
[43] *Red Chris #2* at para 60, citing *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57 at para 72.
[44] *Ibid*.

For example, there have been several recent examples where a blockade that was erected to shut down the activities of the proponent of a resource development and cause them harm was sufficient to establish a predominant purpose conspiracy.[45] However, even where a predominant purpose cannot be made out, such as the case in *Doubleview* where the purpose of the blockade was not to cause harm to the plaintiff but rather to protect the area,[46] an unlawful means conspiracy will be made out where the evidence shows unlawful conduct (e.g. inducing breach of contract).[47]

iii. Criminal conduct

As noted above, the criminal offences of intimidation and mischief have been found to constitute serious issues to be tried within the meaning of the first stage of the *RJR* test in the blockade context.

(a) Intimidation

Section 423(1)(g) of the *Criminal Code* defines intimidation as the wrongful or unlawful blocking or obstruction of a highway for the purpose of compelling someone to abstain from doing anything that they have the lawful right to do.[48] Courts have found that standing on a highway with the purpose of preventing the passage of others is conduct constituting an offence.[49] Section 2 of the *Criminal Code* defines highway as "a road to which the public has the right of access." Under this broad definition, intimidation has been made out in several blockade cases where protesters physically prevented the passage of resource proponents or their contractors over public roads.[50]

(b) Mischief

Section 430(1) of the *Criminal Code* states that any person who: "(c) obstructs, interrupts, or interferes with the lawful use, enjoyment, or operation of property; or (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property", commits

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[45] *Red Chris #2* at para 61; *Trans Mountain* at para 114.
[46] *Doubleview* at para 65.
[47] *Doubleview* at para 67.
[48] RSC 1985, c C-46.
[49] *Red Chris #2* at para 53.
[50] See, for example, *Interfor v Kern et al*, 2000 BCSC 1141 at paras 73–74, where a forest service road was expressly found to be a highway within the meaning of s. 2 of the *Criminal Code*. See also: *Red Chris #2* at para 53, and *DNT* at para 32.

mischief. Section 428 of the *Criminal Code* defines 'property' as "real or personal corporeal property". This means that "[i]nterference with the use or exercise of permits or options, which are incorporeal, cannot constitute mischief."[51] As a result, in the blockade context, something more than interference with the exercise of rights under a permit will usually be necessary to establish mischief. For example, a serious issue to be tried was found where protesters prevented vehicles containing supplies and personnel from accessing a mine site.[52]

b. <u>Irreparable harm</u>

The second step in the injunction analysis involves consideration of irreparable harm. Here, a plaintiff must generally demonstrate that they would suffer irreparable harm if an injunction is not granted. However, as in the labour context, where it is clear that the defendant has engaged or is engaging in unlawful conduct there is no need to demonstrate irreparable harm.[53]

Irreparable harm can be established in several ways, including where there is doubt as to the sufficiency of damages.[54] Indeed, the sentiment expressed by the Supreme Court in *RJR* that "irreparable harm arises where a plaintiff cannot collect damages from a defendant"[55] has been picked up by the courts in the blockade context, and in many cases the impecuniosity of the blockaders is sufficient to establish irreparable harm.[56]

Defendants in blockade cases continue to argue that interference with business interests and the resulting economic loss do not constitute irreparable harm because they are quantifiable or compensable in damages. However, that position has not gained much traction recently in the blockade context.

The proposition that an applicant must show evidence that its business will close or it will lose its market position[57] appears to have been rejected or superseded by more recent authority. It seems clear now that the proposition that interference with a business as an ongoing concern may

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[51] *Doubleview* at para 69. See also *Relentless Energy* at para 14; and *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348 at para 199, rev's on other grounds 2015 BCCA 89, leave to appeal to SCC denied, 2015 CanLii 67634. Cf: *DNT* at para 32.
[52] *Red Chris #2* at para 54.
[53] See *TNT Canada Inc v General Truck Drivers and Helpers Union*, 1990 CanLII 1637 (BCSC), citing *International Union v Pacific Western Airlines Ltd*, 1986 ABCA 38 at para 13.
[54] *Red Chris #2* at para 63; *Wale* at paras 48 and 51.
[55] *RJR-MacDonald Inc.* at para 64.
[56] *Trans Mountain* at para 122; *Red Chris #2* at paras 64 and 66; *Site C* at para 67.
[57] *Zeo-Tech Enviro Corp v Maynard*, 2005 BCCA 392 at para 43.

constitute irreparable harm "is supported by the weight of authorities in spite of the comment in *Zeo-Tech*."[58] As the court commented in *Elphinstone*:

> There are many decisions of this court which stand for the proposition that interference with a business as an ongoing concern has been regarded as irreparable harm within the context of the test for an injunction.[59]

It has also been held that loss, even where it is primarily economic, will nonetheless constitute irreparable harm where it is not recoverable.[60] The courts have also commented that irreparable harm may result where a blockade causes downsizing and layoffs which result in emotional and psychological harm to workers, their families and their communities that cannot be compensated through damages.[61]

c. Balance of convenience

The third branch of the *RJR* test requires the court to "consider whether it is just or convenient to grant the injunction."[62] The breadth of this stage of the analysis is why considerations of irreparable harm often get subsumed into this stage as the court considers, broadly speaking, "which party will suffer the greatest harm if an injunction is granted or refused."[63] In considering this issue, the jurisprudence provides that the court should:

(a) consider the *status quo*,

(b) assess the strength of the plaintiff's case;

(c) assess the relative magnitude of harm as between the parties, and

(d) determine whether the public interest is engaged.[64]

The BC Courts recently confirmed that irreparable harm and the remaining considerations in the balance of convenience analysis "ought not to be seen as separate, watertight categories. These

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[58] *Revolution* at para 80.
[59] *Elphinstone* at para 31, citing W*est Fraser Mills v Members of Lax Kw'Alaams*, 2004 BCSC 815 at paras 21-22; *International Forest Products Ltd v Kern*, [2000] BCJ No 1533 (SC); *MacMillan Bloedel Ltd v Simpson*, [1993] BCJ No 1798 (SC), aff'd (1993), 96 BCLR (2d) 201 (CA); *Tlowitsis-Mumtagila Band v MacMillan Bloedel Ltd* (1990), 53 BCLR (2d) 69 (CA) at 78; and *McLeod Lake Indian Band v British Columbia*, [1998] BCJ No 2058 (SC) at 4.
[60] *Trans Mountain* at para 118, cited by *Elphinstone* at para 32, *Revolution* at para 78, and *Red Chris #2* at para 67.
[61] See *Snuneymuxw First Nation et al v HMTQ et al*, 2004 BCSC 205 at para 35; *Red Chris #2* at para 68; *Elphinstone* at para 33; and *Revolution* at para 78.
[62] *Site C* at para 69; *Elphinstone* at para 34.
[63] *Red Chris #2* at para 75.
[64] *Site C* at para 69; *Elphinstone* at para 34 and *DNT* at para 40.

factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another."[65]

In considering the *status quo*, a court "must compare the interests of the parties in the context of their legal rights to maintain the positions which they advocate on [their] application."[66] Where a plaintiff has a legal right to do what the defendants are preventing them from doing via illegal means like a blockade, there is usually little that can outweigh the plaintiff's claim.[67]

This is true even where aboriginal defendants seek to justify their illegal actions (i.e. the blockade) on grounds that they are seeking to advance aboriginal rights and/or title. Such considerations do not constitute valid defences in the context of an injunction application[68] and the courts have generally equated giving effect to such arguments with condoning the use of self-help remedies, an outcome which can bring the administration of justice into disrepute.[69]

In considering the balance of convenience, pending litigation will have no impact on a court's assessment of the *status quo*, because it is "faced with the state of affairs as they exist today, not as they may become in the future."[70]

Moreover, where a plaintiff establishes a strong case to be tried at the first stage of the *RJR* analysis, this "must weigh heavily in favour of granting the injunction" when assessing the balance of convenience.[71]

Finally, where the public interest is affected, this can be of particular significance in assessing the balance of convenience. The public has an interest in "upholding the rule of law and enjoining illegal behaviour, protecting gainful employment of members of the public, allowing the project to proceed to benefit the public, and protection of the right of the public to access on Crown roads."[72] This will weigh in favour of granting injunctive relief to stop a blockade. In addition, where a project has been evaluated and approved by provincial and federal governments and subsequent challenges to those approvals have been dismissed by the courts,

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[65] *Yahey v. British Columbia*, 2017 BCSC 899 [*Yahey #2*] at para 36, citing *Wale* at 346-347.
[66] *Peninsula* at para 12.
[67] *Slocan Forest Products Ltd v Valhalla Wilderness Society*, 1998 CanLII 2079 (BCSC) at para 23.
[68] *Red Chris #1* at para 34; *Red Chris #2* at para 70; *DNT* at para 41.
[69] *Site C* at para 76; *Elphinstone* at para 38; *DNT* at para 74.
[70] *Trans Mountain* at para 76; *Site C* at paras 73-74.
[71] *Elphinstone* at para 35.
[72] *Red Chris #2* at para 77.

the public interest will weigh in favour of allowing the project to proceed (i.e. in favour of the injunction to remove the blockade).[73]

B. Injunctive Relief as an Alternative to Blockades

The preceding section focussed on the use of injunctive relief to remove a blockade. While it does not relate directly to blockades, there is a growing strand in the jurisprudence that should be noted. The authorities show an increasing number of attempts by opponents to resource development to use injunctive relief to try to prevent the development from proceeding. To date, most of these attempts have been either in the context of cross-applications brought in response to an application to remove a blockade, usually as part of a challenge to the authorization relied upon by the person seeking to remove the blockade. However, the scope of these challenges appears to be growing.

The most recent example in this regard is found in the decision of Madam Justice Burke in *Yahey v. British Columbia* which was released on May 31, 2017.[74] In the underlying action in that case, the Blueberry River First Nation ("BRFN") alleges that the Province has caused or permitted industrial development within their traditional territories to such an extent that there are almost no areas left in which the members of the BRFN can "meaningfully pursue their constitutionally protected cultural and economic activities" under Treaty 8. The asserted traditional territory of the BRFN is comprised of approximately 38,000 square kilometres in the upper Peace River Region. The action claims various declaratory and injunctive relief relating to the alleged infringements.

The recent decision arises out of an application by the BRFN to enjoin the Crown from allowing any further development (logging and oil and gas development, processing and transportation) within portions ("critical areas" covering approximately 10,000 square kilometres)[75] of its traditional territories pending trial of its action regarding treaty rights within their broader territories. This was the second interlocutory attempt by the BRFN to enjoin industrial activities within its traditional territory in this action. An earlier, more focussed attempt to enjoin the

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[73] *Site C* at para 79.
[74] *Yahey #2*.
[75] Alternatively, the BRFN sought injunctive relief over "critical area portions" comprising approximately 40% of the critical areas (approximately 3,900 km^2).

Crown from proceeding with the auction of 15 timber sale licences was denied on the grounds that the balance of convenience did not support granting the injunction sought.[76]

This broader attempt was similarly denied. The Court found that the BRFN met the low threshold of the first branch of the *RJR* test and had adduced sufficient evidence to establish irreparable harm. However, the Court concluded the balance of convenience did not support the application.

A few interesting aspects of the decision included:

(a) The Court's conclusion that BRFN had established irreparable harm was made in the face of deficient, or at least questionable, opinion evidence advanced by the First Nation. The Court instead relied on the evidence advanced by members of the First Nation, which was found to be sufficient to establish that the extent of industrial activity at issue has a detrimental impact on their Treaty 8 rights in the areas in question.[77]

(b) Of further note is that the Court confirmed that the BRFN was not required to adduce sufficient evidence to establish a certainty of irreparable harm, only that sufficient evidence was required to predict the likelihood of harm. Here, the evidence of the members regarding "the importance of the critical areas for the practice of treaty rights from a cultural and spiritual perspective" was persuasive.[78]

(c) The balance of convenience analysis required the Court to weigh the potential impacts of industrial development on treaty rights and aboriginal culture and the public interest in upholding aboriginal treaty rights and the honour of the Crown (the factors advanced by BRFN) against the potential harm to the province and the public interest in terms of the potential to undermine resource development decisions made by government in accordance with government policy, lost Crown revenues, potential lost employment and the economic harm to third parties, including resource companies, contractors and other aboriginal groups with

[76] *Yahey v. British Columbia*, 2015 BCSC 1302 at para 64.
[77] *Yahey #2* at paras. 85 – 93.
[78] *Yahey #2* at paras. 87 -88.

competing interests to the BRFN (the factors advanced by the Province). The Court concluded that the balance of convenience "ultimately weighs in favour of the Province" for several reasons, including:

(i) the evidence established loss of Crown revenues, including royalties, authorization fees and tax revenues;[79]

(ii) the evidence established adverse impacts to third parties, including business losses and job losses in an area already hit by an economic downturn. These third parties included various aboriginal owned or aboriginal run businesses and individuals within the industry.[80]

(iii) while the potential harm to the economy did not "tip the scales" alone, the lack of clarity and the breadth of the injunction sought meant that the injunction would not simply preserve the "status quo" by preventing future projects from being authorized, as asserted by the BRFN. The terms of the injunction sought would potentially have far-reaching effects given the myriad of requirements for authorization renewals, ancillary authorizations required to ensure proper maintenance and safety throughout the lifespan of a project and the potential impacts of the injunctive relief outside the "critical areas" due to the far reaching nature of some of the projects at issue. This further weighed in favour of the Province.[81]

(iv) Granting the injunction would require the Court to make findings of fact that "are essentially the basis for and at issue at trial". The competing evidence on the application made clear that those issues must be dealt with and tested at trial.[82]

(v) Finally, the proximity of the trial, which is set to commence in March 2018, weighed against granting an injunction at this time, although the

[79] *Yahey #2* at paras 99–102.
[80] *Yahey #2* at paras 103–104.
[81] *Yahey #2* at paras 105–112.
[82] *Yahey #2* at para 116.

> Court did note that the application could be renewed if the trial was delayed and circumstances warranted.[83]

This case highlights the complexity that can arise when weighing competing interests in the resource base. While this case did not arise in the context of a blockade, these issues can and often do arise in that context either because they are raised by the protesters in their response to the injunction application or because the opponents to the development at issue bring a cross-application seeking to challenge and enjoin activities under the permit or licence that is relied upon by the resource user.[84]

III. Lessons Learned - Some Practical Thoughts

The preceding section outlined some of the legal principles and issues arising in the resource context. What follows are some practical tips aimed at assisting resource proponents in mitigating the risk of encountering a blockade and responding appropriately when they encounter a blockade. It is not intended to be a comprehensive list, nor is it intended to stand in place of proper advice obtained based on the specific circumstances encountered.

A. Avoiding Blockades

Are there ways to minimize or mitigate the risk of blockades? Experience tells us that it may be impossible to eliminate the risk of a blockade, but there are steps that can be taken to reduce that risk, probably the most important of which is to engage with your stakeholders and develop strong relationships. Indeed, the importance of developing strong relationships with stakeholders cannot be overstated. Early engagement with affected parties can provide opportunities to diffuse or address opposition, such that the risk of blockades may be mitigated. At a minimum, it can assist in assessing the nature and extent of the potential opposition and, in turn, the risk of a blockade so you can plan accordingly.

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[83] *Yahey #2* at para 122–124.
[84] See, for example, *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675; and *Canadian Forest Products Ltd. v. Sam*, 2011 BCSC 676, rev'd 2013 BCCA 58.

B. Responding to a Blockade

When a blockade occurs, how a company responds to it can be important in determining the ultimate outcome on an injunction application. Involving counsel and getting advice at an early stage is critical. Gathering proper and fulsome evidence to support an injunction application, including evidence that addresses or anticipates the issues that may be raised by the protesters, greatly increases the likelihood of success.

It is also important that the parties encountering the blockade respond appropriately and non-confrontationally (which can be difficult in some contexts). While this is not always possible, it is a better story for you to tell the court if your client has behaved reasonably and is not the party provoking confrontation.

While the specific approach can, and generally will, vary depending on the context, the following steps and/or rules of thumb will assist in maintaining control over the situation and in setting the stage for an injunction application, if necessary:

(a) notify supervisors, the police and/or counsel as the situation dictates;

(b) stop well short of any physical blockade and approach peacefully;

(c) call out a greeting if no one is visible at the blockade until someone appears;

(d) be polite and non-confrontational;

(e) determine who is on the blockade, if you do not already know;

(f) ask to pass through the blockade and, if refused, ask why;

(g) take notes of all observations and discussions (in real time, or as soon thereafter as possible); and

(h) take photographs, if possible.

This process should be repeated daily by the contractor, the license holder and other parties seeking access to the area at issue until the application is filed. After filing, depending on the time between filing and the hearing, it may also be useful to continue to attend the blockade and to provide supplemental affidavits to the court. This is necessary to demonstrate to the court that the interference and/or obstruction is ongoing and actually precluding access to the area in

question, thereby preventing the authorized development or other activity (e.g. drilling, testing, layout, recce, etc).

An alternative to this approach, where (or when) the protesters obtain counsel, is to negotiate a without prejudice standstill agreement with the protesters to the effect that they do not need to man the blockade, nor does the resource company need to continue to attempt to access the development site at issue during the interim period between erection of the blockade and the injunction hearing. Such agreements should expressly be without prejudice to either party's asserted rights in the injunction proceedings. This can be useful where the blockade is in an extremely remote location or occurring during difficult weather conditions, or where the protesters on the blockade are members of vulnerable groups.

While the field evidence relating to the blockade is gathered, the project proponents should be taking steps to gather the information necessary to establish their right and/or interest in the area in question and the potential losses suffered. This will include:

(a) copies of any permits, licences or other authorizations for the development at issue;

(b) copies of any applicable road permits or road use permits relating to either the road being blockaded or other roads required to access the development area at issue;

(c) copies of any applicable planning documents that form part of or act as a pre-requisite for the authorizations noted above;

(d) documents relating to consultation and/or information sharing if the protesters are asserting or potentially asserting aboriginal rights or title or any failure in consultation; and

(e) evidence of the potential economic and other harm caused by the blockade, including harm to the project proponent, any affected contractors or the broader community.

All of this information should be passed onto counsel for incorporation into the affidavit and application materials.

C. Tips for the Hearing and for Hearing Preparation

In terms of preparing for the hearing of an injunction application, counsel for a resource company seeking injunctive relief, should consider or turn their minds to the following issues, among other things:

(a) ensuring that you have the proper materials compiled, including a Notice of Civil Claim (assuming it is a new proceeding), Notice of Application, supporting Affidavits and a draft Order;

(b) whether the application is to be without notice and, if it is to be on notice, what form should the notice take;

[Proceeding *ex parte* can often result in a two stage process, where a short term injunction is granted *ex parte* and a subsequent hearing is necessary to fully argue the injunction (including the protesters' position in opposition) on its merits. Also, as noted below, there is a general presumption that interlocutory injunctions should not be sought *ex parte* or on short notice unless there is real urgency. The evidence on the application should address the issue of urgency if intending to proceed in this manner.]

(c) the necessary terms of any short leave required;

(d) the undertaking as to damages;

(e) whether enforcement terms are necessary or advisable; and

[Enforcement orders are generally not automatically granted in the first instance in blockade situations. Often the court will require a two stage process where an injunction is granted, and the proponent will be required to serve it on the blockade to see if it will come down peaceably without police involvement. If the blockade is not taken down, a second application is brought seeking enforcement terms.

That said, enforcement terms are appropriate and have been granted at first instance in circumstances where the location of the blockade is remote, the number of participants varies from day to day and may be difficult to identify, the

protestors have disregarded signs or indicated they will disobey an injunction order, there are safety concerns, the time for the plaintiff to perform the work being blocked is limited, and the RCMP have indicated they will not enforce the injunction order without enforcement terms.[85]]

(f) the location for the hearing of the injunction application.

[The courts have held that applicants have a duty to be forthcoming in this context and applications for interlocutory injunctive relief are generally not to be brought *ex parte*, on short notice or in registries located far from the events in question unless there is real urgency.[86]]

IV. Concluding Remarks

Resource development, while a primary economic driver in this Province, has its opponents. The competing interests in the resource base mean that all forms of development will likely face opposition from some sector. Put another way, resource companies will generally always face some risk of a blockade in their operations. A review of the jurisprudence makes clear that blockades can arise in any context, from small (or relatively small) scale industrial forestry operations on private managed forest land to larger industrial developments like Site C or the expansion of the TransMountain pipeline. The opposition can come from a variety of sources – environmental groups, First Nations, community organizations, sometimes even individuals or families. Often the nature and degree of opposition can depend on the location and nature of the development, rather than its scale.

The law in this area is, on one hand, well established in the sense that the test for injunctive relief is well established. However, how that test is applied in any particular circumstance is the function of a complex intersection of issues of law and policy. As such, it is critical to get early advice and to ensure that your response to any blockade is thorough, thoughtful and complete.

[85] *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 at para 81.
[86] *Slocan Forest Products Ltd. v. Rutowsky et al*, 2000 BCSC 961 at para 15.