

Kawaskimhon Moot Problem - 2023

The Coastal GasLink (CGL) pipeline is a partially constructed 670-kilometre pipeline, the objective of which is to move natural gas from near Dawson Creek, in northeastern British Columbia, to a coastal LNG Canada export terminal in Kitimat. The estimated costs of constructing the pipeline approximate \$6 billion. It is part of a larger project agreed to by the federal government, the government of British Columbia, and several oil and natural gas companies. The larger project also has the objective of liquifying natural gas brought to the Kitimat terminal for overseas export. The provincial ministry of Energy and the provincial ministry of Finance both estimate that the project will generate at least \$22 million in direct government revenue. The government of British Columbia estimates that construction work will employ at least 10,000 people, and that the project will generate at least 950 full-time positions.¹

The official B.C. CGL [website](#) sets out the following historical timeline for the pipeline project:

2012 — Our team established a “conceptual corridor” based on aerial inspection, mapping and online information sources. Numerous meetings were held with Indigenous communities, local governments, landowners and community residents to gather feedback.

2013 — Over 100,000 hours of environmental and engineering field studies provided detailed knowledge of the terrain about the proposed route.

2014 — In January, we filed an application with the B.C. Environmental Assessment Office (EAO) with detailed information about the proposed route. In October, after a period of public review, the B.C. EAO accepted our application with conditions, issuing an Environmental Assessment Certificate.

2015 — After extensive consultation with Indigenous communities in the area of the Morice River near Houston, Coastal GasLink applied for an alternate route in November. Both the approved route and the alternate route being proposed are constructible and respect the environment through which we would pass.

2016 — We received [10 permits](#) from the B.C. Oil and Gas Commission, finalizing all of the major provincial regulatory approvals required for the construction and operation of the proposed pipeline and related facilities.

After feedback from Wet’suwet’en leaders, we decided to conduct field work on the potential [South of Houston Alternate Route](#), a route that moves us even further away from cultural areas that are important to them.

Our team would like to acknowledge the positive advice and expertise that northern B.C. Indigenous communities, local governments, landowners and community residents contributed to the project. To date, more than one-third of all field work completed on the project has been conducted by Indigenous people.

¹ Rhianna Schmunk, “\$40B LNG project in Northern B.C. gets go-ahead”, *CBC News* (2 October 2018), online: cbc.ca/news/canada/british-columbia/kitimat-lng-canada-1.4845831.

2017 — Coastal GasLink filed its amendment applications for the South of Houston Alternate Route with the B.C. Environmental Assessment Office and the Oil and Gas Commission in November 2017. Coastal GasLink’s consideration of a proposed alternate route was entirely initiated as a potential solution to the feedback received from Indigenous groups in the area.

In late 2014, Coastal GasLink initiated a program to provide local Indigenous groups with the opportunity to participate in field study activities, information sharing and intergenerational transfer of traditional and cultural knowledge along sections of the Coastal GasLink pipeline corridor.

After extensive consultation with Indigenous people from various groups through that program, Coastal GasLink initiated additional studies and engineering work to create the South of Houston alternate option to help further reduce effects on traditional and cultural land.

2018 — Coastal GasLink was given approval for the South of Houston Alternate Route by the Environmental Assessment Office in May 2018.

Coastal GasLink announced it will proceed with construction on the project following a positive Final Investment Decision from its partner, LNG Canada on October 2, 2018.

2019 — Coastal GasLink received approval from the Oil and Gas Commission (OGC) on May 1 of an application to amend the pipeline permit for construction of the re-routed section known as the South of Houston Alternate Route (SHAR).

On Oct. 15, 2019, the B.C. Environmental Assessment Office approved [a five-year extension](#) to the previously issued Environmental Assessment Certificate.

Band councils with several reserves in Wet’suwet’en territory approved the project after the consultations indicated in the timeline. CGL also changed from its original route to the “South of Houston” route following consultations. CGL has also promised \$1 billion in benefits and employment contracts. Substantial numbers of Wet’suwet’en people support the band council approvals, citing the need to use the benefits provided by CGL to get their communities out of perpetual poverty.² The map for the intended project after the “South of Houston” rerouting is provided as Appendix 1.

The Office of the Wet’suwet’en (OW) is an administrative organization that administers services throughout the traditional territory of the Wet’suwet’en people, particularly in areas such as: “Lands and Resources, Fisheries & Wildlife, Human and Social Services and Governance”. It is not an elected band council for purposes of the *Indian Act*. It is led by six hereditary chiefs of the Wet’suwet’en, who are opposed to the pipeline. They claim that the hereditary chiefs were not consulted by CGL and that any rightful decision with respect to land use or allowing the pipeline would have been theirs to make. The OW and their supporters are also convinced that the pipeline as currently proposed will have harmful effects on water, wildlife, and the Wet’suwet’en people themselves. Wet’suwet’en supporters of the hereditary chiefs have frequently blockaded access points for CGL construction, including the Unist’ot’en Camp, the Gidimt’en Camp, and the Wet’suwet’en Checkpoint camp. Wet’suwet’en territory is unceded territory, as the Wet’suwet’en have not been signatories to any land surrender treaty.

² David Carrigg, “Wet’suwet’en members back to work on Coastal GasLink pipeline”, *Vancouver Sun* (13 February 2020), online: [vancouversun.com/news/local-news/wetsuweten-members-back-to-work-on-coastal-gaslink-pipeline](https://www.vancouversun.com/news/local-news/wetsuweten-members-back-to-work-on-coastal-gaslink-pipeline).

Not all members of the hereditary system are opposed to the pipeline. The Wet'suwet'en Matrilineal Coalition (WMC) was formed by five hereditary chiefs in response to a perceived unwillingness on the part of the OW to even meet with members of CGL. Three women who had hereditary chief titles (Theresa Tait Day, Gloria George, and Darlene Glaim) were publicly shamed, had their titles removed, and were replaced with male hereditary chiefs.

Members of the WMC dispute the legitimacy of OW's actions within Wet'suwet'en law. Gloria George has stated: "House Chief titles are held for life and after the death of the holder are passed to someone in the matrilineage. Titles are only removed in the most extreme scenarios such as murder." Darlene Glaim adds: "Matters related to a house should never be discussed at the Office of the Wet'suwet'en, which is meant to conduct administrative tasks for the Wet'suwet'en," she said. "House Chiefs from outside a house cannot just take another House Chief's name. Each name is connected to a house territory, so it is not appropriate for other House Chiefs to get involved in such a manner."³

CGL has been flagged for numerous breaches of environmental regulations. The British Columbia Environmental Assessment Office has issued two enforcement orders against CGL with respect to failures to prevent erosion and waterway sediment build up on at least 20 points along the now partially constructed pipeline. Erosion and the entrance of sediment into waterways has the potential to reduce biodiversity and make waterways uninhabitable for native plant and wildlife species. At least one of the breaches is alleged to have occurred in the Clore River watershed, which is in Wet'suwet'en traditional territory.⁴ The British Columbia Ministry of Environment and Climate Change affirmed that CGL can face an administrative penalty of \$75,000 for each day a contravention continues. A first-time conviction of an offence under the *Environmental Assessment Act* can lead to a \$1 million fine, while a subsequent conviction can lead to a fine of \$2 million.⁵

More recently, Green Party MP Paul Manly returned from a January 2020 visit to the region. He told news reporters: "The Wet'suwet'en hereditary chiefs provided alternative routes to Coastal GasLink that would have been acceptable to them as a pipeline corridor. Coastal GasLink decided that it did not want to take those acceptable options and instead insisted on a route that drives the pipeline through ecologically pristine and culturally important areas."⁶ The alternative that was proposed is known as the McDonnell Lake route, which requires a significant deviation from the original route as it curves northward towards Smithers. A map of the proposed McDonnell Lake alternative route is provided as Appendix 2.

Coastal GasLink, in a 2014 letter, rejected the route. The letter indicated the following reasons:

- It would increase the pipeline's length by as much as 89 kilometres, upping both the environmental impact and as much as \$800 million in capital costs.

³ Josiah Haynes, "Wet'suwet'en women leaders under fire from anti-development faction", *Resource Works* (30 November 2021), online: resourceworks.com/wetsuweten-women-under-fire.

⁴ Betsy Trumpener, "Coastal GasLink failed to fix nearly 2 dozen environmental violations along pipeline route, B.C. officials say", *CBC News* (6 December 2021), online: cbc.ca/news/canada/british-columbia/cgl-failure-to-comply-environmental-problems-1.6275468.

⁵ Matt Simmons, "Why tensions are escalating on Wet'suwet'en territory over the Coastal GasLink pipeline", *The Narwhal* (14 October 2021), online: thenarwhal.ca/wetsuweten-coastal-gaslink-explainer/.

⁶ Mark Armao, "Canada sides with a pipeline, violating Wet'suwet'en laws — and its own", *Grist* (18 November 2021), online: www.grist.org/indigenous/wetsuweten-land-defenders/.

- The pipeline's diameter, at 48 inches (121 cm), is too large to safely be installed along the route. (Pacific Northern's pipeline is between 10 and 12 inches (25-30 cm), and the proposed upgrade would be 24 inches or 60 cm.)
- The McDonnell Lake route would be closer to the urban B.C. communities of Smithers, Houston, Terrace and Kitimat.
- Re-routing the pipeline would impact an additional four First Nations who had not already been consulted by Coastal GasLink, which would add up to one year of delays to the construction process.

In a follow-up email with the Canadian Broadcasting Corporation, CGL spokesperson Terry Cunhain explained: “From our perspective, the [McDonnell Lake] route was not feasible on the basis of those significant environmental and technical issues and therefore route examination ceased”.⁷ That same letter indicates a willingness to use a “Morice River North” alternative route which would be closer to the original “South of Houston” route. But the “Morice River North” alternative still takes construction three to five kilometers away from the Unist'ot'en healing centre that has been established by the hereditary chiefs.⁸

Hereditary chiefs that had opposed the pipeline had been willing to meet with members of the elected chief and council of the Wet'suwet'en, as well as members of both the B.C. provincial government and the federal government. Preparations were underway for meetings in Prince George to be held in February 2022. Those hereditary chiefs pulled out of the meeting after the RCMP arrested 29 land protectors in mid-November of 2021. The hereditary chiefs in question made it clear at the time that any willingness to negotiate in the future would be dependent on withdrawal of the RCMP from Wet'suwet'en lands.⁹

Assume that the hereditary chiefs in opposition to the pipeline are now willing to come back to the table, represented by the OW. **The objective of the Moot** is for the parties to reach a consensus that all parties at the table can agree to. The position paper of each party provides a starting point and foundation on which to begin the negotiations. The position paper may consider some or all of the following issues:

- 1) Whether (pursuant to s. 35 of the *Constitution Act, 1982*) the Wet'suwet'en have land title over the lands claimed by the hereditary chiefs and through which CGL wishes to complete construction of the pipeline.
- 2) What rights Wet'suwet'en people have under:
 - The United Nations *Declaration on the Rights of Indigenous Peoples* (2007) (*UNDRIP*) adopted by the United Nations General Assembly on Thursday, 13 September 2007, Res. 68, 61, UN Doc. A/RES/61/295.

⁷ Andrew Kurjata, “Why Coastal GasLink says it rejected a pipeline route endorsed by Wet'suwet'en hereditary chiefs”, *CBC News* (16 February 2020), online: www.cbc.ca/news/canada/british-columbia/wetsuweten-coastal-gaslink-pipeline-alternative-path-1.5464945.

⁸ Letter from Richard Gateman (President, CGL) to Office of the Wet'suwet'en (21 August 2014), online: coastalgaslink.com/siteassets/pdfs/whats-new/2020/2020-02-14coastal-gaslink-statement---pipeline-route-selection/cgl-statement-route-selection-august-21-2019.pdf

⁹ Matt Scace, “Talks between Wet'suwet'en hereditary chiefs and provincial, federal government reach standstill”, *Prince George Post* (14 March 2022), online: princegeorgepost.com/news/local-news/talks-between-wetsuweten-hereditary-chiefs-and-provincial-federal-government-reach-standstill

- British Columbia’s *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019](#), c 44 (*UNDRIPA*).
- Canada’s *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021](#), c 14 (*UNDRIP Act*).

Whether any actions by the B.C. provincial government or the federal government violate rights recognized in *UNDRIP*, *UNDRIPA* or the *UNDRIP Act*.

3) Whether prior consultations with band councils were sufficient for the purpose of discharging the duties described in *Haida v. The Queen*, 2004 SCC 73, or whether the OW needs to be included in consultations.

4) Whether Wet’suwet’en law (the Indigenous legal order) pertaining to land use requires that the Wet’suwet’en insist that CGL abandon the “South of Houston” route in favour of the McDonnell Lake route. Or can Wet’suwet’en law be applied to accommodate the “South of Houston” route so long as CGL and the government of B.C. provide sufficient assurances that the project will avoid contamination or harm to Wet’suwet’en land?

5) Whether the OW acted properly within the scope of Wet’suwet’en law in stripping Tait, George, and Glaim of their hereditary chief titles. Or alternatively, whether members of OW exceed the scope of their lawful authority under Wet’suwet’en law.

With respect to questions 4 and 5, you may confer with the following sources or other sources you find:

Leslie M. Johnson Gottesfeld, “Conservation, Territory and Traditional Beliefs: An Analysis of Gitksan and Wet’suwet’en Subsistence, Northwest British Columbia, Canada” (1994) 22:4 *Human Ecology* 443.

Leslie Main Johnson, “Traditional Tenure among the Gitksan and Witsuwit’en: Its Relationship to Common Property, and Resource Allocation” (Conference Paper) Available at: <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1377/johnson.pdf?sequence=1>

Michael Luoma, “Collective Self-Determination, Territory and the Wet’suwet’en: What Justifies the Political Authority of Historic Indigenous Governments Over Land and People?” (2022) 55 *Canadian Journal of Political Science* 19.

*** NOTE 1*** The questions invite consideration of a number of legal issues, but they are ultimately a springboard for negotiations that are the main activity and focus of the Kawaskimhon Moot. The key objective is to negotiate and finalize an agreement with terms that all participating parties can agree to. That particular facts may not necessarily satisfy a particular legal test raised in the questions does not necessarily preclude a term of agreement that may depart from the parameters of the legal test. Negotiations can involve either compromise or hard-line positions, depending on the preferences of moot participants as they roleplay according to the parties they represent.

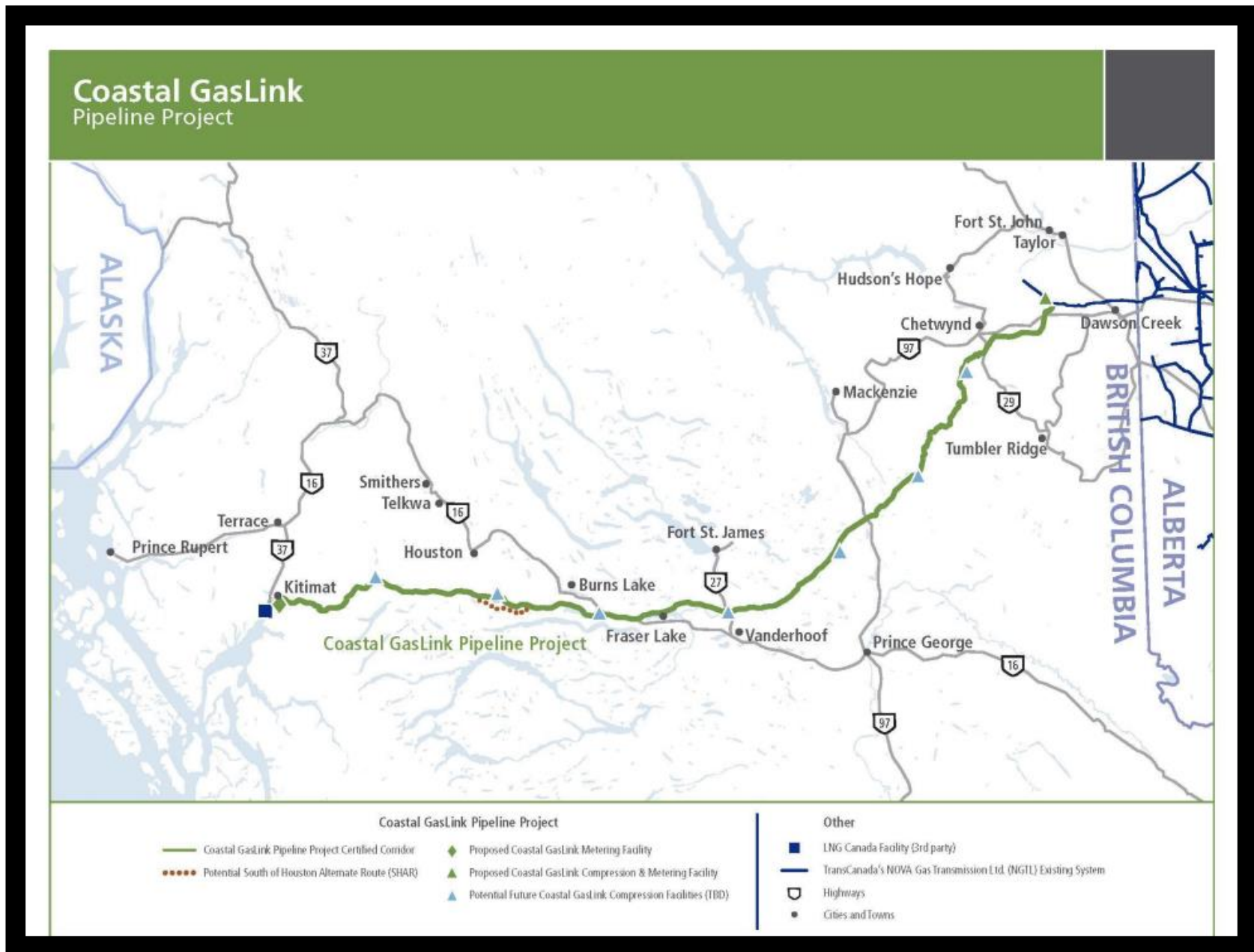
*** NOTE 2*** There have been concerns about the level of violence employed by the RCMP against Wet’suwet’en land defenders. Withdrawal of the RCMP from Wet’suwet’en territory may be a point of negotiation. However, **DO NOT** discuss any civil liberties concerns with respect to RCMP handling of the blockades. The focus of the position paper must be on the pipeline itself, and the constitutional and legal issues surrounding the pipeline. Likewise, while the pipeline is real, this is an academic exercise –

you **MUST NOT** contact the respective parties NOR is your Position Paper a reflection of the current parties' positions or negotiating strategies.

The following parties will be represented by counsel at each table during the negotiation sessions:

- 1) CGL will want the pipeline to go through with minimum delay and expense. CGL would like to proceed with the "South of Houston" route. But there is a question of whether continued blockades and protests by Wet'suwet'en land defenders will continue to exacerbate expenses and delays if the OW do not join an agreement. There may also be negative public relations implications if CGL is perceived to be party to violating Indigenous rights or damaging Indigenous lands.
- 2) The government of B.C. will want the pipeline to go through. Its primary concern is the enhancements the project will provide for local economies. At the same time, it is anxious to avoid human rights criticisms, particularly on account of any perceived failures to abide by *UNDRIP*. Canada has guaranteed that the *Oil Tanker Moratorium Act*, [SC 2019, c 26](#) will not be extended to Liquefied Natural Gas [LNG] tankers by way of a Ministerial Exemption in section 6.
- 3) The federal government of Canada will also want the pipeline to go through. At the same time, they are anxious to avoid human rights criticisms, particularly on account of any perceived failures to abide by *UNDRIP*.
- 4) Several hereditary chiefs as represented through the OW remain opposed to the pipeline as it is presently proposed under the "South of Houston" route. They indicate a willingness to continue to use blockades and other actions if their demands are not met.
- 5) The WMC will likewise want the pipeline to go through, but they will be concerned with matters above and beyond what the elected band councils are pursuing. They will want Day, George, and Glaim reinstated to their hereditary chief titles. They will also want an ongoing understanding affirming their interpretation of Wet'suwet'en law: that it was not adhered to when the three were stripped of their titles and that in the future such an action can only occur for the most serious and narrow of reasons. They will also want to emphasize that female Wet'suwet'en authority figures must also have roles and inputs with respect to any decisions or processes involving the pipeline.
- 6) Environmental Justice is an environmental advocacy organization. Their primary concern is to avoid any lasting environmental damage to the lands in question. Their interests may align with those of the hereditary chiefs represented by the OW to the extent that there remain concerns about the impacts of the pipeline on Wet'suwet'en lands. They may be willing to agree to the pipeline if it is rerouted to avoid animal migration routes and watersheds and waterways, or otherwise receive assurances that any environmental impacts will be minimal, even if the hereditary chiefs represented by the OW still do not agree with the pipeline.

Appendix 1 – South of Houston Route



Appendix 2 - McDonnell Lake Alternative Route

