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Beyond Contempt: Injunctions, Land Defense, and the Criminalization of Indigenous Resistance

There is much that can be gleaned from the lawyers of our opponents. In a 2017 law journal article, four commercial litigators from one of Canada's largest law firms contended that because the "criminal justice system will generally not intervene to prohibit civil disobedience," injunctions have become the "new normal" (Williams et al. 2017: 286). Their conclusion is clearly both description and prescription, as it is directed at their corporate clients: "an injunction has emerged as the only practical remedy available to project proponents who may be impacted by civil disobedience" (286). These lawyers argued—and I have to agree, even if I do not see it as a welcome development—that recent jurisprudence suggests that any reservations that judges had about "whether civil injunctions are an appropriate means of resolving civil disobedience" appear to have largely dissipated. But whereas these lawyers spend the rest of the article explaining how to exploit the current state of the law from the perspective of resource extraction companies, I want to think about how to challenge the pervasive use of injunctions and contempt in struggles over resource extraction by Indigenous peoples, their allies, and environmental justice movements.

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Even a cursory review of protest policing in Canada reveals that state intervention in resistance movements is alive and well and that Indigenous peoples and allied social movements are made subject to repression, surveillance, and criminalization through the mechanism of injunctions, among other legal tools. The reliance on injunctions by extractive industries embroils the courts and police in struggles over public and/or collectively held lands and resources that are nonetheless constructed by the law as private disputes, largely insulated from the reach of constitutionally-derived Aboriginal rights. In this article, I address the claim that injunctions are the "new normal"—and the policy prescriptions that flow from it—based on my direct experience with injunctions and contempt in British Columbia (BC) as an activist legal support organizer and a settler ally. The combined impacts of injunctions and the subsequent use of contempt charges carve out a distinctly colonial space within Canadian law for the criminalization of Indigenous resistance. I begin by outlining the basic operation of injunction and contempt law in the context of protest and land defense. I proceed to zero in on BC to demonstrate the long history of that province's "injunction habit," examining the judicial and policy practices that make the "new normal" claim possible—and show how it is ultimately not accurate. Finally, I argue that injunctions and contempt serve as crucial tools in the legal arsenal of settler-colonial states, facilitating access to resources and lands and easing the operation of extractive capitalism. I conclude by considering how to break BC's injunction habit by uncovering and challenging the doctrinal and procedural underpinnings of the so-called "new normal."

Injunctions 101

An *injunction* is a court order issued by a judge after an application is filed by a party to a lawsuit and is meant to protect the interests or rights of that applicant while the case is pending. In most of the cases discussed in this article, the applicant is a corporation worried that people, such as Indigenous land defenders or environmental activists, will do certain things adverse to their interests (e.g., block a particular road or impede access to a project site). If the injunction application is successful, the court issues an order forbidding the feared actions. An injunction can be interim (temporary) or interlocutory, meaning that it will stay in effect until trial. In cases involving protests or blockades, injunctions will usually bind not only the named defendants in the underlying lawsuit (however tenuous), but also "John and Jane Doe and persons unknown"—meaning anyone who becomes aware of the injunction (Lawn 1998; Ward 1993).

In deciding whether to issue an injunction, the court's key concern is whether doing so would be "just and equitable" given the circumstances of the case. A 1994 decision of the Supreme Court of Canada [SCC], *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, set out the most widely applied test for the issuance of an interim or interlocutory injunction. It requires the applicant seeking an injunction to satisfy the court that: (1) there exists a serious or fair question to be tried in the underlying lawsuit (even if it is unlikely to ever get to trial); (2) the applicant will suffer irreparable harm if the injunction is not granted (usually, this means damage that cannot be financially compensated); and (3) the balance of convenience between the parties favors granting the injunction (at 334). In deciding the balance of convenience, the court asks which side would suffer more harm if the injunction was granted or refused, weighing the "maintenance of the status quo" among factors. In cases involving struggles over resource extraction, the balance of convenience often turns on how the court identifies the status quo; what is to be maintained, the unimpeded progress of the extractive project or the pre-development status of the lands and waters? Most often, the answer is the former and as a result, the *RJR-Macdonald* test for whether an injunction is warranted has generally proven to be a very low bar and as detailed below, this balancing of proprietary claims to lands and resources against Aboriginal rights ought be understood as a key component of the legal framework that underpins the "new normal" claim of Williams et al. (2017).

Violating the terms of an injunction generally results in contempt of court charges. In BC, the general practice with injunctions targeting land and water defense is to include an enforcement order empowering police to arrest such alleged "contemnors." There are two types of contempt—civil and criminal—and both remain common law (judge-made) offences not found in Canada's *Criminal Code*. Contempt of court is the only remaining common law offence permitted by the *Code*, an unreconstructed legal relic deriving directly from ancient British law. Since the twelfth century, the SCC notes, courts have exercised the right to punish contempt "to maintain their process and respect" (*United Nurses of Alberta v. Alberta (Attorney General)*, (1992) 71 CCC (3d) 225: 252; see also Miller 2016: 1). Then, as now, a perceived attack on the rule of law lies at the heart of both the contempt sanction generally and the distinction between criminal contempt of court and the less serious civil version. Criminal contempt requires an "element of public defiance of the court's process in a way calculated to lessen societal respect for the courts" and is proven by evidence of "open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court" (*United Nurses*: 252).

How We Got to the "New Normal": A Brief History of BC's "Injunction Habit"

My first direct encounter with what I would come to call BC's "injunction habit" was in 2014, when an injunction prohibiting obstructing or interfering with exploratory drilling for the proposed Trans Mountain Pipeline expansion project was issued. In the midst of mounting opposition to the pipeline expansion, Kinder Morgan, a Texas-based energy company, filed a multi-million-dollar lawsuit against five named defendants, all of them vocal pipeline opponents, as well a local community organization and "John and Jane Doe and persons unknown" (*Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133). The company sought damages (for nuisance, assault by threat, trespass, intimidation, and interference with contractual obligations), costs, and most crucially, an injunction prohibiting interference with its drilling site on Burnaby Mountain, just east of Vancouver. The resulting civil disobedience campaign, in which protesters deliberately violated the injunction by stepping onto the prohibited drilling site, led to 112 arrests over six days. During the course of that campaign, I was among several *pro bono* lawyers who appeared in court to represent two Indigenous arrestees charged with civil contempt of court, who, unlike most of the participants, had not been released by police pending trial. Our opposing counsel were not Crown prosecutors, but Kinder Morgan's high-priced corporate lawyers, and as we stood in the cavernous Vancouver courtroom built for the Air India terrorism trial, it turned out that all of us were unsure what the court's unwritten "summary procedure" for contempt charges would actually entail. Once the not-quite-criminal, not-quite-civil hearing began, the province's Chief Justice quickly released both accused on promises to appear but the court's contempt process remained opaque. The contempt charges against all arrestees were later dropped after it was revealed that the GPS coordinates setting out the injunction zone were inaccurate, rendering further court appearances unnecessary.

This brief glimpse into the strange world of injunction and contempt procedure would come in handy four years later, when Kinder Morgan obtained another injunction directed at opponents of the Trans Mountain project. This time, the injunction covered Kinder Morgan's existing facilities, restraining activists from blocking access to key sites, including a petroleum product "tank farm" on the shores of the Burrard Inlet. Another civil disobedience campaign followed, with a total of 229 people arrested for violating the injunction (Mazur 2019). Despite the long legacy of injunctions and subsequent contempt charges in BC, legal support organizers quickly realized that

neither technical nor movement knowledge about these legal tools had been adequately preserved or passed down. As the number of arrests mounted and it became clear that—unlike in 2014—these charges would stick, a group of lawyers and legal support providers—some with injunction experience going back to the 1980s, most with none—met to strategize in Vancouver. Listening to a senior defense lawyer explain that the summary procedure for trying alleged "contemnors" was always somewhat *ad hoc*, I was relieved to learn that my confusion with the contempt process was entirely warranted. The lawyer went on to suggest that if, as in 2014, the company's corporate lawyers were still prosecuting contempt charges, we should throw all our criminal defense vocabulary and procedure at them—"they'll get scared," she chuckled. But apparently, that was a big "if"; the civil contempt of court charges activists arrested at Kinder Morgan's tank farm were facing could be converted into criminal contempt at any point during the trial process. The long-standing practice in BC was that lawyers for the corporation invite, either publicly or behind the scenes, the province (via the Attorney General) to take over prosecution in criminal contempt cases. This practice had evolved in the 1980s we were told, because it was not seen as right to see a private party put people in jail. A few weeks after the meeting, the Crown did step in to take over the prosecutions and a series of trials for criminal contempt followed in BC's Supreme Court, many resulting in jail sentences.

The need to reconstruct and revive both technical and movement knowledge about defending contempt charges required digging into the history of BC injunctions, starting with the mass arrests during the mid-1990s battle against old-growth logging in Clayoquot Sound. The group trials of the hundreds of people arrested over a summer of civil disobedience resulted in key legal precedents on the conduct of contempt cases, as well as the imposition of significant jail sentences (*MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 SCR 1048), but there was a scant record of the activists' legal defense tactics in those cases or other anti-logging contempt trials. A memoir written by Betty Krawczyk, an activist known for enduring multiple prison stays during various environmental justice struggles, underscored that the absurd public-private partnership between the state and extractive industries on display in the contempt charges arising out of the Trans Mountain injunctions was nothing new in BC:

> If anti-logging protesters were treated like all other citizens, we would be arrested and charged under the *Criminal Code*, which makes provisions for an accused's defence. The reasons for the crime and the circumstances surround-

> ing the crime would then be taken into consideration by a judge or jury. . . . Instead, an unholy threesome—corporate companies like Interfor, the Attorney General's office and the judiciary—circumvents justice in the province of British Columbia by refusing protestors the protections of the *Criminal Code*. They do this by arresting us under an injunction. (Krawczyk 2002: 12)

The most useful resources turned out to be materials written for lawyers, especially those coming "from the perspective of counsel acting for a party seeking to obtain or enforce an injunction" in a so-called "land use dispute," as a representative Continuing Legal Education guide from 2009 puts it (Saul and Vanderburgh). Despite this orientation, R. Patrick Saul and Eileen E. Vanderburgh acknowledged that criminalization of environmental and Indigenous movements via injunctions often means that when struggles over land and water are diverted to the courtroom, the "proceedings are the protest" (§3.3). Their advice to counsel for project proponents rests on BC's legal and policy approach to the management of Indigenous and environmental struggles as it has developed since the mid-1980s. By 1990, note Saul and Vanderburgh, the BC Prosecution Service had initiated a policy to "not criminalize civil disobedience *per se*," recognizing that the "the use of the minor offence sections of the *Criminal Code* was found to be neither effective nor efficient" (§3.43). This policy is still in effect today and states that individuals whose interests are affected by civil disobedience "may be advised to seek legal advice regarding the availability of a civil injunction" and that "in the event that civil disobedience continues after an injunction is granted, the party obtaining the injunction should be encouraged to proceed with civil contempt proceedings in the court in which the injunction was obtained" (BC Prosecution Service 2018: 2). Reflecting this policy, the BC courts had standardized the wording of an enforcement order to be included in protest-related injunctions by the late 1980s, at least partially in an attempt to overcome Royal Canadian Mounted Police (RCMP) reluctance to interfere in supposedly private, civil matters (Saul and Vanderburgh 2009: §3.43). This comprehensive and now engrained policy approach is a key piece of the legal framework underlying Williams et al.'s championing of injunctions as the "new normal"—as well as an explicit rejoinder to the claim of newness. The second—and related—component is the history of BC judicial pronouncements critiquing the reliance on injunctions.

A review of BC case law on the use of injunctions and contempt charges to criminalize protest activity reveals a surprising amount of judicial resentment of BC's injunction habit. The earliest such pronouncement

is from a 1990 case involving the contempt trials of anti-choice demonstrators arrested outside a Vancouver abortion clinic (*Everywoman's Health Centre v. Bridges* (1990), 62 C.C.C. (3d) 455 (BCCA)). Justice Southin lamented that no arguments about the applicability of case law developed in the context of labor disputes to the context of modern civil disobedience had been put before the court:

> There is today the grave question of whether public order should be maintained by the granting of an injunction which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the *Criminal Code*. (467)

A few years later, in an appeal arising from one of the Clayoquot Sound contempt trials, Justice Wood (writing in dissent), argued that the inherent jurisdiction of the Supreme Court to punish contempt of court "is and always has been a jurisdiction to be exercised sparingly and as a last resort. It was never intended to be used to preserve law and order on our streets, or in our forests, any more than equity was ever intended to be used as an instrument of crowd control." (*Greenpeace Canada et al. v. MacMillan Bloedel Ltd.*, (1994) 118 D.L.R. (4th) 1 (BCCA): 49). In *Slocan Forest Products Ltd. v. John Doe*, 2000 BCSC 150, Justice McEwan took direct aim at BC's injunction habit after a detailed review of both RCMP and Crown Counsel policy, with a particular focus on the claims of police witnesses that injunctions ought to be preferred to criminal charges because they allow for a "cooling off" period, do not "criminalize" the process, and allow the police to remain "neutral" (para. 31). Rejecting all these claims, McEwan noted that "*by definition* acts of civil disobedience are not *in essence* civil disputes between individuals" (para. 35, emphasis in original) and concluded that he was

> simply not convinced that the rule of law is enhanced by the present [injunction] process which:
>
> (a) forces innocent bystanders to seek their own protection by manufacturing ill-fitting "civil" suits;
>
> (b) places the court in a position where it must fashion some remedy at the expense of repeatedly putting its authority in issue;
>
> (c) arguably deprives demonstrators of due process. (para. 49)

Justice McEwan reiterated his opposition most recently in 2014, stating that the "Crown's apparent preference for turning these [environmental] matters into contests not between those who have committed an illegal act and society,

but with the judge, is highly regrettable. It is the standard in our law that injunctions are a last resort, not a first resort" (*Galena Contractors Ltd. v. Zarelli,* 2014 BCSC 324: para. 20). But Justice McEwan is now something of a lone holdout and as Williams et al. demonstrate, this thread of judicial critique is no longer evident in the case law (2017: 293–4). Recent decisions, they say, "tend to adopt the civil injunction framework without criticism of police refusal to intervene" under their criminal law powers alone (293) and injunctions remain the only "practical recourse" for private parties faced with civil disobedience (315).

The apparent acquiescence of BC's judiciary to the injunction habit is buttressed by tacit legislative approval. Despite the fact that civil lawsuits filed against Indigenous land and water defenders and environmental activists are, for all intents and purposes, merely a means to an injunction, the province's new anti-SLAPP (Strategic Lawsuits Against Public Participation) legislation, introduced in March of 2019, allows applications for injunctions even while a motion to dismiss a lawsuit as a SLAPP is pending (*Protection of Public Participation Act*, SBC 2019, ch 3, s. 5(2)). BC's famed 2001 SLAPP legislation, the first of its kind introduced in Canada, included a similar provision. Like the current statute, that law stated that an application to dismiss a lawsuit as a SLAPP did not prevent a "court from granting an injunction pending a determination of the rights under this Act of the parties to a proceeding" (*Protection of Public Participation Act*, SBC 2001, ch 19, s. 4(3) (repealed)). These are astonishingly brazen exceptions, given that as early as 1992, one BC judge presiding over an injunction application by a logging company noted that "I expect that the only reasons for the actions is to build a foundation for the injunction applications" (quoted in Ward 1993: 863).

I do not want to suggest however, that the path of BC's injunction habit has been a straightforward one. Just as a judicial critique of the use of injunctions and contempt has waxed and waned, the orientation of First Nations' engagement with this legal tool has shifted as well. The still evolving "new normal" of injunctions in BC has tread a convoluted path and injunctions have not always been a tool only in the hands of corporations. Lawyer John Hunter writes that

> Between 1985 and May 1990, the interlocutory injunction was the primary remedy in Aboriginal rights litigation in British Columbia. It was used to stop activities, primarily resource-based projects seen to be inconsistent with Aboriginal rights claims. During those years, Aboriginal people enjoyed considerable success in obtaining injunctions to halt resource activity on claimed lands. (2009: §4.1)

Nick Blomley's study of First Nations' blockades in BC between 1980 and 1995 finds similar evidence for the use of counter-injunctions against logging companies and other extractive industries during the same period (1996). This practice ended, argues Hunter, after the SCC issued its landmark decision in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, in which the court interpreted the Aboriginal rights "guaranteed and affirmed" by section 35(1) of the *Constitution Act, 1982* for the first time, holding that fishing rights claimed by the Musqueam people had not been "extinguished" (terminated) and were in fact constitutionally protected. Rather than further expanding the use of injunctions to assert and protect Indigenous rights claims however, the *Sparrow* decision largely marked the end of the successful use of injunctions by First Nations. Two years after *Sparrow*, the BC Supreme Court issued its ruling in *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97, holding that rights to Aboriginal title in BC had been extinguished prior to Confederation. Although the BC Court of Appeal and ultimately the SCC (*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010) overturned this decision, all land-based injunction claims made by First Nations in the ensuing years were unsuccessful (Hunter 2009: §4.5). Hunter attributes this change to several factors, most of which center on how the balance of convenience in injunction applications has been shaped by shifting understandings of the scope of Indigenous rights in Canadian state law. As the SCC's section 35 jurisprudence has evolved, the court has itself recognized the limitations of injunctions sought by First Nations: "the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to 'lose' outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns" (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73: para. 14).

Toward a "Newer Normal": Breaking the Injunction Habit

The legal and policy framework of BC's injunction and contempt habit is a formidable one, but it can and must be challenged. In the remainder of this article, I explore the operation of "the new normal" on the ground as a means of contributing to the project of breaking this habit: first, situating the injunction process as a specific technique of settler-colonial legality that plays a key role in maintaining Canada state control and jurisdiction over Indigenous territories, and second, recognizing—and responding to—the subsequent use of contempt charges as a similarly specific, and especially pernicious, form of criminalization. I do not suggest that the solution to the

criminalization and marginalization of Indigenous and allied resistance is going to be found inside Canadian state law, but I do argue that the contempt power is vulnerable and can be made unenforceable.

Breaking BC's injunction habit requires understanding it as more than a series of misguided policy decision and bad precedents. Injunctions are unavoidably implicated in what Brenna Bhandar refers to as racial regimes of property ownership in modern settler colonial states and in those states' need for "flexibility in the legal devices and rationales" used to "maintain state control—and possession—of indigenous lands" (2018: 14). The injunction, coupled with contempt charges and flexibly interpreted and applied by settler courts with shifting rationales, has proven to be a near-perfect legal device for the maintenance of settler colonial property relations. Recent injunction cases that preclude the consideration of Aboriginal and Treaty rights during the injunction process have effectively insulated these mechanisms from the reach of section 35 constitutional scrutiny, including the duty to consult. A 2017 decision of the Ontario Superior Court involving allegations of interference with pipeline work by members of the Haudenosaunee Confederacy canvasses this line of reasoning, concluding that "the question of whether the Crown has made efforts to comply with its duty to consult and accommodate is not relevant to the exercise of the court's decision to deny an injunction sought by a private party such as Enbridge with an interest in land" (*Enbridge Pipelines Inc. v. Williams et al*, 2017 ONSC 1642: para. 23). *Enbridge* relies on a previous injunction decision arising from the struggle over the Muskrat Falls dam project in Labrador, in which an appeal court held

> that the principles applicable to the granting of an injunction are no different just because aboriginal claims for consultation and accommodation may be involved in the issues regarding the cause of action being asserted and the specific remedy being sought. There is no pre-condition to application of the general principles for granting or refusing an injunction that the claimant satisfy the court that the duty to consult and accommodate has been exhausted and that the court must take steps to facilitate such consultation and accommodation. If there were such pre-conditions, a defendant resisting a remedy for vindication of claimed rights would always be able to stymie, or at least significantly delay, an injunction by simply asserting that the duty to consult has not been exhausted. That result would run counter to reassertion in *Behn* that the duty to consult does not give aboriginal peoples "a veto." (*NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46: para. 41)

Behn was not an injunction case but rather addressed the ability of Indigenous defendants in a civil suit to assert Treaty rights and the duty of consult in their defense after being sued by a logging company for blocking access to the company's work sites (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26). Yet the SCC's conclusion that allowing such a defense "would be tantamount to condoning self-help remedies [a blockade] and would bring the administration of justice into disrepute" has had an enormous impact on subsequent injunction cases (para. 42). The *Behn* decision has effectively carved out a space within an area of Canadian law inextricably bound up with the exercise of Aboriginal rights that is nonetheless shielded from the application of those same rights. Injunction decisions issued in its wake have also rejected the application of a more nuanced, multi-dimensional conception of the rule of law, potentially encompassing "reconciliation of Aboriginal and non-Aboriginal interests through negotiations," that had been tentatively articulated by the Ontario Court of Appeal in two cases decided in 2006 (*Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649 (ON CA)) and 2008 (*Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534; see also Newell 2012: 54).

These recent cases have also engaged with the rarely applied exception to the first part of *RJR-MacDonald* test which states that "when the result of the interlocutory motion will in effect amount to a final determination of the action," a judge should undertake a "more extensive review of the merits of the case" while determining if there is a serious issue to be tried (338–39). Although injunctions seeking to restrain picketing in the labor context are specifically cited by the SCC as cases that "may well fall within the scope of this exception" (338), Naiomi Metallic's research indicates that "for reasons unknown, [this] exception has largely been ignored in the picketing and protest contexts," particularly in cases involving Indigenous resistance to extractive projects (2015: 7–8, 10). The injunction decision will often amount to a determination of the action in instances where project work will be completed during the life of the interlocutory injunction, yet most such cases have failed to engage in a "more extensive review" at the first stage of the *RJR-MacDonald* test before moving on to the irreparable harm and balance of convenience calculations (Metallic 2015: 24). A number of the post-*Behn* cases do apply this exception, assessing the injunction claimant's case according to the standard of a "strong *prima facie* case" rather that the lower "serious question to be tried" threshold (see, e.g., *Enbridge*: para. 40), yet the exclusion of substantive Aboriginal rights claims from the injunction process effectively cancels out the potential impact of a slightly more demanding assessment.

The "new normal" injunction is, in sum, a "legal billy club," the means by which "assertion of [Indigenous] rights on the ground is instantly criminalized by the Canadian state," as Art Manuel put it (2018: 215). At the enforcement stage of the injunction process, however—a stage anticipated and shaped inside BC courtrooms, where counsel for the RCMP are routinely granted leave to make submissions—the club is often not metaphorical. Both the case law and legal commentary on contempt of court rely on the reification of non-violent civil disobedience, eliding the use of force inherent in the "public-private" partnership between resource extraction industries and the state, with its police and its courts. Understanding contempt charges and the enforcement process as "legal devices and rationales" of the settler colonial state foregrounds enforcement as criminalization. In something of a postscript to the now defunct judicial critique of injunctions in BC, an Ontario judge expressed discontent with the *lack of force* used by police tasked with enforcing injunctions aimed at dismantling blockades set up under the banner of Idle No More, inadvertently contradicting the claim that civil injunctions, unlike criminal law, allow police to remain neutral (Scott 2013).

As a technique of criminalization, the contempt charges that enforcement portends, whether civil or criminal, operate differently from the use of *Criminal Code* or other statutory charges against protesters and land defenders. My experiences providing legal support to movements caught up in BC's injunction habit have revealed that this legal tool gives rise to a specific set of access-to-justice problems. As alluded to above, the "summary procedure" used to try contempt cases is confusing and difficult to navigate, even for lawyers. Alleged "contemnors"—even the term is anachronistic and baffling!—have an even harder time understanding and effectively engaging in the process, even when they are represented by counsel. Contempt charges lie within the exclusive jurisdiction of provincial superior courts, leading to practical difficulties based on geography (there are fewer superior courts, and the closest one may not be all that close) and reduced access to on-site legal assistance. Even civil contempt charges are in effect criminal or quasi-criminal (Miller 2016: 37), but especially given the very real possibility of jail time for criminal contempt convictions, contempt defendants are generally surprised by the limited application of the *Charter*. Alleged contemnors are "charged with an offence" and the prosecution (whether corporate or Crown counsel) must prove their guilt to the criminal standard of guilty beyond a reasonable doubt (37), but they have no right to a jury trial (*MacMillan Bloedel Ltd. v. Simpson*) and almost no viable defenses, including necessity (Mazur 2019: 6). Applying long-established criminal law doctrine in the contempt context

can be a fight. In the on-going struggle over the Muskrat Falls dam in Labrador, some land defenders faced both *Criminal Code* and contempt charges for more than two and a half years until the Crown finally withdrew the criminal charges, citing the clearly applicable doctrine of "double jeopardy" (Barker 2019). While this length of time is unusual (perhaps the only good thing that can be said of the summary procedure is that it is generally faster than the *Criminal Code* trial process), the imposition of any charges imposes costs—financial, psychological, and practical—on activists and movements and as in SLAPP suits, diverts energy and resources from organizing into courtroom battles.

But for most contempt defendants, the most contentious and disappointing element of the contempt process is the "collateral attack" doctrine that precludes any challenge to the basis for the injunction itself. This rule rests on the notion that a court order is to be obeyed until it is set aside, varied, or reversed on appeal and that the validity of an injunction cannot be attacked in any other proceeding, including a contempt of court trial (hence the term collateral—or indirect—attack) (Saul and Vanderburgh 2009: §3.55; Mazur 2019: 7). In the contempt trials arising out of the 2018 Trans Mountain pipeline injunction, the collateral attack doctrine was used to exclude defenses based on the inadequacy of the National Energy Board's regulatory and approval processes, climate change, and in a variation of the *Behn* ruling, the applicability of Indigenous law. The BC Supreme Court's rejection of Indigenous sovereignty-based challenges to its jurisdiction in contempt cases is long-standing. In a 1991 decision, the court held that the "issue of Indian sovereignty may not be raised or argued" in contempt proceedings, rejecting the argument that the questions about the jurisdiction of the court over sovereign nations and unceded territories is an exception to the collateral attack doctrine (*British Columbia (Attorney General) v. Mount Currie Indian Band*, (1991) 54 BCLR (2d) 129 (BCSC): para. 53; see also Newell 2012: 59–61).

The imperative to challenge the procedural and doctrinal foundations of BC's injunction habit is illustrated by the Coastal GasLink injunction issued in late 2018. The injunction targeted a blockade established in 2012 on the traditional territories of the Unist'ot'en clan, one of the house groups making up the Dark House (Yex T'sa wil_k'us) of the Gilseyhu or Big Frog clan of the Wet'suwet'en nation. Coastal GasLink's injunction application claimed that that blockade, generally referred to as the Unist'ot'en camp, now stood in the way of the company's proposed liquefied natural gas (LNG) pipeline. The Unist'ot'en response argued that their actions "are fully in accordance with Wet'suwet'en law and the Wet'suwet'en legal process, and

the actions of the plaintiff are not" (*Coastal GasLink Pipeline Ltd. v. Huson*, 2018 BCSC 2343: para. 28). To no one's surprise, the court issued an interim injunction, later expanding its reach to the Gidimt'en Access Point blockade erected by another Wet'suwet'en clan to support of the Unist'ot'en camp. The Wet'suwet'en nation, in conjunction with the Gitxsan, had brought the suit that resulted in the SCC's landmark 1997 *Delgamuukw* decision recognizing the existence of Aboriginal title on the very territories now being encroached upon via a simple interlocutory injunction. Shiri Pasternak (Forthcoming) puts it this way: "the very nation that first succeeded in defining Aboriginal title as an underlying proprietary interest was now being removed from these same lands through a low-level lever—the equivalent of an emergency stop cord on a train." As the RCMP prepared to enforce the Coastal GasLink injunction, it invoked the *Delgamuukw* decision in a press release issued on the eve of the police raid on the Gidimt'en Access Point:

> For the land in question, where the Unist'ot'en camp is currently located near Houston, BC, it is our understanding that there has been no declaration of Aboriginal title in the Courts of Canada. In 1997, the Supreme Court of Canada issued an important decision, Delgamuukw v. British Columbia, that considered Aboriginal title to Gitxsan and Wet'suwet'en traditional territories. The Supreme Court of Canada decided that a new trial was required to determine whether Aboriginal title had been established for these lands, and to hear from other Indigenous nations which have a stake in the territory claimed. The new trial has never been held, meaning that Aboriginal title to this land, and which Indigenous nation holds it, has not been determined. Regardless of the outcome of any such trial in the future, the RCMP is the police agency with jurisdiction. (RCMP 2019a)

The next day, in the aftermath of the violent arrest of fourteen people at the access point (Bellrichard and Ghoussoub 2019), the RCMP issued another press release, which read in part:

> The RCMP respects the Indigenous rights and titles in BC and across Canada. It was inappropriate for the RCMP to make any reference to the materials provided to the court during the injunction application process. Our role is to enforce the injunction and not to interfere with any ongoing discussion between our Indigenous communities and any other level of government. (RCMP 2019b)

There is a deep irony at work here. The *Behn* precedent insulated Coastal GasLink's injunction application from the impact of the exponentially more

significant precedent in *Delgamuukw* and the collateral attack doctrine would have excluded defenses based on Aboriginal title during a contempt trial. In the meantime, the RCMP invoke *Delgamuukw* and the law on Aboriginal title (or at least the gas company's interpretation of it), as justification for the use of force and incursion on unceded Wet'suwet'en territory.

I say "would have" because after the province took over prosecution of the contempt charges arising out of the raid on the Gidimt'en Access Point, Crown prosecutor Trevor Shaw "told the Supreme Court of British Columbia in Prince George that after a "detailed review of the evidence" there wasn't sufficient evidence for convictions on criminal contempt charges" (Trumpener 2019). A lawyer for Coastal GasLink then stated the company would follow the Crown's lead and would not proceed with civil contempt proceedings. The judge acquiesced to this joint state-corporate prosecution decision, stating that "There is high public interest, but it is not appropriate to proceed. . . . I accept that Coastal GasLink does not wish to proceed" (Trumpener 2019). In the aftermath of the raid and the withdrawal of contempt charges, the Unist'ot'en camp continued its challenge to the issuance of interlocutory injunction, arguing in court that Wet'suwet'en law must be upheld on unceded Wet'suwet'en lands (Unist'ot'en Camp 2019). More recently, the Gidimt'en clan sued Coast GasLink for damages in relation to the destruction of property during the Access Point raid in January, stating that the "spiritual and emotional traumas these companies have inflicted on the Wet'suwet'en are tremendous and grave. These acts of violence must not go unpunished or unrecognized in the courts" (Barker 2019).

Such challenges to the "new normal" of injunctions and contempt by Indigenous land defenders and allied movements ought to be understood as praxis-based resistance to settler-colonial legality. After the 2014 Trans Mountain pipeline injunction was issued, activists known as caretakers chained themselves to the doors of the Vancouver courthouse "to draw attention to the role of the courts in ongoing colonial occupation of Indigenous territory on Burnaby Mountain and across the country" (Burnaby Mountain Updates 2014). Following an all too rare instance of a declined injunction application, Alliance Against Displacement organizer Maria Wallstam argued that successful challenges to injunctions by grassroots movements turn "slightly against the general and fundamental colonial rule of Canadian law that private property is more important than people's lives" (Wallstam 2017). By revealing the foundational role of law in mediating between extractive industry and the settler colonial state, such resistance also shows the beginning of a way out of BC's injunction habit.

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