ORIGINAL RESEARCH ARTICLE

"The Legal Billy Club": First Nations, Injunctions, and the Public Interest

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Abstract: This article centers on the profound discrepancy between efforts by First Nations to obtain injunctions against industry and the state versus the far more successful record of corporations and governments seeking to obtain injunctions against First Nations. We examine how the common law test for injunctions in struggles over lands and resources leads to these results. We begin by tracking the history of injunctions in the Aboriginal law context, especially the development of s 35(1) jurisprudence, which ironically deprived First Nations of access to injunctions, despite an earlier period of successful defence of Indigenous land rights using this legal tool. We then focus on the doctrinal and political function of the "public interest" consideration in injunction cases, positioning this concept within a broader political economy framework. Finally, we turn to the origins of the injunction as an equitable remedy and argue that the current imbalance in injunction success rates ought to be understood through a re-examination of equity within a broader historical trajectory of settler-colonial legality. We conclude that the heavy lifting done by notions of 'public interest' both relies on and obscures the circumvention and exclusion of Aboriginal treaty and constitutional rights from the law of injunctions and constitutes a de facto resolution of Aboriginal land rights in Canada. Finally, we ask what place, if any, exists in injunction jurisprudence for Indigenous law and governance.

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> "At the end of our acts of defiance, we are often met with the business end of the police truncheon. But the process of attacking us usually begins weeks and even months earlier when the state takes in hand its legal billy club: the court injunction."
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> - Arthur Manuel, *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy*.[1]

Introduction

This article begins with a simple question: what accounts for the profound discrepancy between the efforts by First Nations to obtain injunctions against corporations and governments versus the efforts by corporations and governments to obtain injunctions against First Nations? In 2019, a national study of over 100 injunctions was led by the Yellowhead Institute at Toronto Metropolitan University (Yellowhead) in Toronto.[2] It found that from the years 1973-2019, 76 per cent of injunctions filed against First Nations by corporations were granted, while First Nations were successful against corporations only 19 per cent of the time. This research was updated by Yellowhead in 2020 and the gap had widened in that single year.[3] The percentage of injunctions successfully sought by corporations against First Nations climbed from 76 per cent to 81 per cent. The study also examined rates of government-filed injunctions against First Nations. In 2020, governments were successful

1. Arthur Manuel with Grand Chief Ronald Derrickson, *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy* (Toronto: James Lorimer & Company, 2017) at 215.
2. Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper* (October 2019), online (pdf): <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf> at 29-30 [*Land Back*].
3. Yellowhead Institute, "A review of over 100 injunction cases involving First Nations across Canada found that:" (August 2020), online (pdf): <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/injunction-stat-land-back.pdf>.

at obtaining orders 90 per cent of the time. Just one year earlier, that figure had been 86 per cent. Meanwhile, by 2020 First Nations were only successful at obtaining injunctions against governments 18 per cent of the time. In this article, we ask: what is it about the common law test for injunctions that leads to these results and, given this evidence, what makes injunctions such an effective tool in the hands of industry and the state against First Nations?

Our research here builds on the original Yellowhead research and dataset, which we led and contributed to,[4] by recoding the cases initially examined and refining the methodology to focus specifically on the grounds of adjudication in each case. Central to our methodology is an examination of the application of the tripartite test set out by the Supreme Court of Canada (SCC) in *RJR-MacDonald Inc v Canada (Attorney General)*[5] to injunction[6] cases involving First Nations. Scholars have noted the significant and disproportionate protections the *RJR-MacDonald* test provides to businesses and property owners over First Nation "protestors" and labour "picketers".[7] But the implications of these protections as they pertain to First Nation assertions of jurisdiction require further examination. De facto resolutions of First Nation land rights are currently being mediated through a discretionary, equitable remedy that is insulated from the reach of Aboriginal rights and title entitlements.

This article undertakes a close reading of the way the courts interpret the *RJR-MacDonald* factors of "irreparable harm" and "balance of convenience" in injunction cases involving First Nations—most of which have unfolded in contestations over land, water, and resources—to reveal the ways colonization has been organized around a false distinction between public and private interests. We suggest that to understand what accounts for corporate success in the courts against First Nations when seeking to develop and pursue extraction on Indigenous territories, we must understand how

4. Shiri Pasternak led the research on injunctions published in the Land Back report, *supra* note 2, and Irina Ceric contributed to the research design and final peer-review of the findings. The research team that compiled and analyzed the first dataset included Mark Kruse and Carrie Robinson, with technical support from Azada Rahi. Data visualization was done by Yumi Numata. This research was supported by SSHRC Partnership Development Grant #890-2015-0020.

5. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 at 334 [*RJR-MacDonald*].

6. Injunctions are an equitable remedy (see Part III); most often a court orders "a party to proceedings to refrain from doing specified acts": AWR Carrothers, "The Labour Injunction in Canada" (1958) 13:1 Relations industrielles/Industrial Relations 2. Most injunction cases are heard in provincial Superior Courts due to their "inherent" jurisdiction to control their own procedures, dating back to English antiquity and enshrined in the *British North American Act*, 1867: Jeffrey Berryman, *The Law of Equitable Remedies*, 1st ed (Toronto: Irwin Law, 2000) at 15-16 [*Equitable Remedies*]. Injunctions may also be issued by the Federal Court of Canada: *Federal Courts Rules*, SOR/98-106, r 373.

7. See Bora Laskin, "The Labour Injunction in Canada: A Caveat" (1937) 15:4 Can Bar Rev 270; Naiomi Metallic, *Injunctions against Pickets and Protests in the 21st Century: It's Time to Stop Applying the Three-Part RJR-MacDonald Test* (LLM Thesis, York University, Osgoode Hall Law School, 2015) [unpublished].

"public interest" arguments that are critical to applying the injunction test are weighed towards a specific understanding of the "status quo" in Canada that is rooted in a political economy of resource extraction. We argue that to understand the judicial reasoning that supports the "maintenance of the status quo" that is so critical to the "balance of convenience" test, we must revisit the equitable roots of the injunction remedy that lie at the heart of Canadian property law—the juridical underpinning of settler-colonialism.

The methodology for this injunction research originally involved searches within two legal databases for all injunction cases involving First Nations in Canada. We did not code cases where injunctions involved community members obtaining injunctions against other community members, and we focused our research on First Nations rather than all Indigenous people, therefore excluding cases involving Inuit and Métis peoples. We returned to Yellowhead's original dataset for this research, but we narrowed our analysis to focus on the role of "public interest" arguments in applications for injunctions under the *RJR-MacDonald* test.[8] Each case was coded for the following criteria: the parties involved (i.e., corporations vs First Nations, or First Nations vs corporations), whether a blockade was involved, the type of injunction at play, the trigger for the conflict, the legal issues raised, and the key arguments made by the parties with respect to the tripartite injunction test (i.e., serious issue to be tried, irreparable harm, and balance of convenience). In total, we coded 70 cases, more than a quarter (19 decisions) of which contained detailed considerations of the "public interest." By highlighting specific cases from this dataset to show this and other tendencies we found on a national scale, we hope that this research marks a focal point in a study of injunctions and First Nations, rather than being interpreted as the authoritative end of this inquiry.

Our article is organized as follows: in Part I, we track the history of injunctions in the Aboriginal law context, paying particular attention to how the development of s 35(1) jurisprudence, which interpreted Aboriginal constitutional rights enshrined in the 1982 *Constitution Act*,[9] ironically deprived First Nations of access to injunctions, despite a prior period of successful defence of Indigenous land rights using this legal tool. In Part II, we focus on the doctrinal and political function of the "public interest" consideration in injunction cases, positioning this concept within a broader political economy framework. In Part III, we turn to the origins of the injunction as an equitable remedy and argue that understanding its discretionary application requires understanding equity's role within a broader historical trajectory of settler-colonial property relations. We conclude that the injunction playing field is inherently uneven because the common law test currently leaves no room for assertions of Indigenous law or governance. This imbalance is now baked into *RJR-MacDonald* and a juridical shift (as opposed to a political or policy fix) requires a different legal framework.

8. Requests for stays of proceedings under the *RJR-MacDonald* test were excluded from this dataset.

9. *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

I. The Strange Power of Uncertainty and the Impact of s 35(1) on Injunctions

In the early 2000s, John Hunter analyzed the trajectory in the use of injunctions by First Nations in British Columbia (BC).[10] Interlocutory injunctions had been "the primary remedy in Aboriginal rights litigation" in the province between 1985 and 1990, and Hunter demonstrated how they were obtained or fought by First Nations relatively successfully to defend their lands, as courts found against private interests in their favour.[11] He argued, however, that when the SCC issued its landmark ruling in *R v Sparrow*,[12] things began to shift.

Sparrow was the first SCC case to interpret s 35(1) of the new *Constitution Act*, which "recognized and affirmed" Indigenous peoples' "aboriginal and treaty rights."[13] *Sparrow* and the cases that followed began to lay out the tests that define the scope and meaning of Aboriginal rights. Hunter argued that it was precisely the evolution of this new constitutional landscape that led judges to shift their understanding of what constituted a "balance of convenience" away from First Nations and in favour of companies, arresting the short winning streak Indigenous claimants had enjoyed in the late 1980s. How is it possible that when it came to injunctions, an ostensible expansion of Aboriginal rights jurisprudence swayed courts *against* First Nations?

The answer to this question lies in the specific test judges must apply to determine whether to grant injunctive relief. The prevailing test for nearly a century was laid out by William Williamson Kerr in 1888,[14] establishing that injunctions ought to be granted where a prima facie case suggested a strong possibility of success at trial. The "strong possibility" threshold for granting injunctive relief was modified by the House of Lords in *American Cyanamid Co* in 1974, which decided that courts should only engage in a limited analysis of merits since the strength of a claim could not be determined at the stage of interlocutory relief.[15] A three-pronged test developed, where after the lower threshold of whether the case constituted *a serious issue to be tried* was reached, two additional tests followed: whether the matter will cause "irreparable harm" to the party seeking relief; and whether an injunction is the most equitable way to protect the rights of the party, pending trial,

10. John Hunter, "Advancing Aboriginal Title Claims After Delgamuukw – The Role of the Injunction" in *Litigating Aboriginal Title* (Vancouver: Continuing Legal Education Society of British Columbia, 2000). In 2009, Hunter updated his article, but the core arguments remain unchanged: see John Hunter, "Aboriginal Rights Litigation" in Derek A Brindle & Joy Tataryn, *Injunctions: British Columbia Law and Practice*, 2d ed (Vancouver: Continuing Legal Education Society of British Columbia, 2009) 1.3-1.3.24.
11. See *MacMillan Bloedel Ltd v Mullin* (1985), 61 BCLR 145, 1985 CanLII 154 (BCCA) [*MacMillan*]; *Pasco v Canadian National Railway Company* (1985), 69 BCLR 76, 1985 CanLII 320 (BCSC); *Hunt v Halcan Log Services Ltd* (1986), 15 BCLR (2d) 165, 34 DLR (4th) 504.
12. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].
13. *Constitution Act, 1982*, *supra* note 9.
14. William Williamson Kerr, *A Treatise on the Law and Practice of Injunctions*, 3d ed (Philadelphia: Blackstone, 1889) at 13, cited in Jean-Philippe Groleau, "Interlocutory Injunctions: Revisiting the Three-Pronged Test" (2008) 53:2 McGill LJ 272 at 272-73.
15. *American Cyanamid Co (No 1) v Ethicon Ltd*, [1975] AC 396 (HL(Eng)), [1975] 1 All ER 504 [*Cyanamid*].

without unfairly disadvantaging another's rights (i.e., the "balance of convenience" test). Throughout the 1980s, judges in Canada relied on cases like *Yule*,[16] *Wale*,[17] and *Cyanamid* when exercising their discretion at each stage of the tripartite test.

With the incorporation of Aboriginal rights in the constitution, the declining success of First Nations in obtaining or fighting injunctions appears to be a contradictory outcome at a key moment of recognition. At first glance, this recognition should have strengthened Aboriginal claims of "irreparable harm," as such harms could now constitute a breach of constitutional rights. But Hunter argued that these new constitutional protections greatly complicated—and therefore lengthened—the duration of time necessary to determine the merits of a case, giving priority to other elements of the injunction test. First Nations were asserting rights and title to land in ways that disrupted, for example, provincial regulatory regimes; a growing jurisprudence established tests to challenge the application of provincial jurisdiction to First Nations.[18] But how would these Aboriginal rights tests weigh within the tripartite test?

First, the lengthening of trials specifically increased the *inconvenience* to business operations, therefore favouring their interests in the "balance of convenience" test.[19] For a time, the uncertainty of title and rights claims had constituted sufficient cause to delay the interests of private companies; post-*Sparrow*, the uncertainty had a legal framework for determination that was lengthy, complicated, and lay outside the jurisdiction of the court hearing the injunction application. Compounding the issue of the *time* it would take to adjudicate the merits of injunction cases was the gradual emptying out of the s 35(1) "box" of rights, once expected to secure Aboriginal rights to land, water, and resources. The s 35(1) case law demonstrated that there were pathways around these rights and that state legislation could override Aboriginal claims.[20] The uncertainty that once favoured First Nations asserting constitutional rights in injunction cases[21] was now taken up by courts that pointed to the ambivalence of rights that were yet to be proven in costly title and rights litigation.

16. *Yule Inc v Atlantic Pizza Delight Franchise (1968) Ltd* (1977), 80 DLR (3d) 725 (ONSC), 1977 CanLII 1198 (ONSC).

17. *British Columbia (Attorney General) v Wale* (1986), 9 BCLR (2d) 333 (BCCA), 1986 CanLII 171 (BCCA).

18. On Aboriginal rights, see e.g. *Sparrow, supra* note 12, and on Aboriginal title, *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw* (SCC)].

19. The traditional injunction test in Canada relies on a redefinition of *Cyanamid, supra* note 15, as we will see. The SCC adopted *Cyanamid* and the three-pronged test in *RJR-MacDonald* and *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321 [*Metropolitan Stores*].

20. See Hunter, "Advancing Aboriginal Title Claims After Delgamuukw", *supra* note 10. See also Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23:1 Windsor YB Access Just 17; Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003) (an anthology debating the nature of s 35 rights).

21. See e.g. *MacMillan*, *supra* note 11.

A 1995 Gitskan injunction case—technically, a leave to appeal their denial of ongoing injunctive relief—is emblematic of this transition period. The landmark *Delgamuukw v British Columbia*[22] case brought by the Wet'suwet'en and Gitskan Nations that first tested s 35(1) rights on Aboriginal title was a factor in the judge's decision *against* two Gitskan houses[23]. The houses sought relief against Skeena Cellulose to restrain bridge construction that the company required for logging access.[24] Proudfoot JA agreed with a lower court decision to discharge an injunction granted in 1988 to the Houses of Gwoimt and Tsabux. She held that the injunction had been founded on outstanding questions of Aboriginal title, but that the legal terrain had changed after the 1993 BC Court of Appeal decision in *Delgamuukw*[25] that found that no ownership or jurisdiction rights had been established by the Gitskan. A few years later, in 1997, the SCC held that the Wet'suwet'en and Gitskan[26] Nations might in fact hold Aboriginal title to their territory, defined for the first time as an underlying, collective, and *sui generis* proprietary interest. The SCC instructed the nations to return to court to assert this title over specific tracts of land.[27] But while the Gitskan were undertaking this monumental, lengthy title case, lower court decisions had cost them interim protections, raising serious questions about the implications of injunctions on First Nations' constitutional rights.

One solution to this problem of reconciling rights and title cases with injunctions came in the form of another s 35(1) precedent conceived to protect Aboriginal rights even in the pre-proof stage of assertion: the Crown's duty to consult and accommodate. In the post-*Sparrow* case of *Haida Nation*, the SCC advised that First Nations should rely on their s 35(1) protected rights to consultation, rather than pursuing injunctions, because the duty to consult would better safeguard their interests.[28] Reasoning the need for this legal shift, the Court laid out four limitations of injunctions: first, they may not capture the full range of government obligations; second, the duty to consult necessarily entails balancing interests and thus could go further towards reconciliation; third, the Court cited Hunter's argument that the balance of convenience test favours industry and jobs, prejudicing the courts against First Nations before the merits can be determined; and fourth, stopgap measures like injunctions should not be used for complex matters, which must be given adequate time in courts to resolve.[29]

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22. *Delgamuukw* (SCC), *supra* note 18.
23. As Indigenous legal scholar Val Napoleon writes, "The basic conceptual political, social, economic, and legal unit in Gitksan society is the House (*wilp*)": *Ayook: Gitskan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) at 4 [unpublished].
24. *Houses of Gwoimt & Tsabux v Skeena Cellulose Ltd* (1995), 17 BCLR (3d) 389 (BCCA), 1995 CanLII 1496 (BCCA) [*Houses of Gwoimt & Tsabux*].
25. *Delgamuukw v British Columbia*, 104 DLR (4th) 470 (BCCA), 1993 CanLII 4516 (BCCA) [*Delgamuukw* (BCCA)].
26. *Houses of Gwoimt & Tsabux, supra* note 24 at paras 5-6. *Delgamuukw* (BCCA), *supra* note 25, was brought by the hereditary governments of the Wet'suwet'en and Gitskan Nations and sought a similar declaration covering some of the lands subject to the injunction case. The BC Court of Appeal found that the Gitskan held "unextinguished, non-exclusive aboriginal rights" (at para 263).
27. *Delgamuukw* (SCC), *supra* note 18.
28. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 14.
29. *Ibid.*

Since *Haida Nation* came down, however, it has not reduced the number of injunctions involving First Nations, nor protected them any better in proceedings. It may be the case that First Nations have had more success pursuing judicial reviews of regulatory decisions or lawsuits for failures of the Crown to engage in meaningful consultation. Although these legal avenues are beyond the scope of this article, such a comparison would undoubtedly shed light on this important question. Here, however, we seek to uncover whether *Haida Nation* and the s 35(1) protected rights to consultation created more opportunities for First Nations to assert and protect their rights in injunction cases. In particular, did the courts consider breaches of the Crown's duty to consult an "irreparable harm"?

If anything, we could conclude that failures on the part of governments to comply with the duty to consult have not been seen by the courts to constitute "irreparable harm". Irreparable harm is at the core of injunctive relief since it is precisely what entitles litigants to "equity's extraordinary and discretionary relief".[30] The plaintiff must show immediate harm that cannot await resolution at trial or be addressed any other way, especially through damages. For example, a 2008 Federal Court of Appeal decision in *Canada v Musqueam First Nation* held that the government's failure to consult did not give rise to "a veto" on the basis of disputed territory alone, despite the fact that lands in the Musqueam First Nations' traditional territory were being alienated by the Crown to third parties.[31] In other words, the potential loss of lands was not considered an irreparable harm, the justice reasoned, unless it was coupled with "possible degradation" or a specific use claim to the territory. The prerequisite for injunctive relief was only damage in a narrow sense, not the historical, cumulative state dispossession that the Musqueam sought to prevent.[32] This reasoning and the resultant outcome is disappointing, since injunctions could potentially provide a strong interim measure to prevent damage as more broadly construed, while other rights litigation moves through the courts. However, a long line of injunction cases rejects this logic.

The duty to consult was also undermined in *Behn v Moulton Contracting Ltd*[33] in 2013, when members of the Fort Nelson First Nation were chided for blockading their lands threatened by logging. Writing for a unanimous SCC, LeBel J concluded that "[t]o allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into

30. Jeff Berryman, "The Centrality of Irreparable Harm in Interlocutory Injunctions" (2015) 27 IPJ 299 at 302.

31. *Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at para 4, leave to appeal to SCC refused: *Musqueam Indian Band v Minister of Public Works and Government Services and Squamish Nation AND BETWEEN Squamish Nation v Minister of Public Works and Government Services*, 2008 CanLII 63487 (SCC). See also *Siska Indian Band v British Columbia (Minister of Forests)* (1998), 62 BCLR (3d) 133, 1998 CanLII 3904 (BCSC).

32. Recent precedent on the cumulative impact of violations of Aboriginal and treaty rights may impact such analyses in the future: see e.g. *Yahey v British Columbia*, 2021 BCSC 1287.

33. *Behn v Moulton Contracting Ltd*, 2013 SCC 26 [Behn].

disrepute."[34] In one of the few injunction cases ever brought to the SCC, the decision on the duty to consult set an unfortunate precedent that the applicants—as individuals, rather than as the Band—did not have standing to assert these rights, despite s 35(1) jurisprudence that has been successfully brought to protect individuals within communities.[35] Moreover, the Behn family's resort to blockades was rendered unlawful despite the uncertainty over proper title to the land in question.

Behn has proven extraordinarily influential. Indeed, in *Enbridge Pipelines Inc v Williams*, a 2017 case involving representatives of the Haudenosaunee Development Institute, Broad J cited *Behn* and decided 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 on discretionary grounds." [36] The injunction was granted to Enbridge partially on the basis of the defendant's resort to blockades, and the matter of treaty rights was deferred to proceedings in other courts.[37]

In *Williams*, the court went to great lengths to distinguish an earlier Ontario decision calling for judges to prioritize the duty to consult. In *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*,[38] the Ontario Court of Appeal had made every effort to encourage consultation when Aboriginal treaty rights to hunt were impacted. As Macpherson JA instructed, citing *Haida* directly: "The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process".[39] Relying on *Behn* (and a key 2014 decision from the Newfoundland and Labrador Appeal Court[40]), Broad J instead framed the Haudenosaunee defendants' invocation of the duty to consult in *Williams* as the imposition of a "precondition involving the exhaustion of efforts to consult", dismissing their attempt to require the Crown to consult with respect to treaty rights as an illegitimate resort to self-help.[41]

34. *Ibid* at para 42.

35. Kent McNeil, "Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority" (2021) 57:1 Osgoode Hall LJ 127.

36. *Enbridge Pipelines Inc v Williams*, 2017 ONSC 1642 at para 33 [*Williams*].

37. See also *John Voortman & Associates Limited v Haudenosaunee Confederacy Chiefs Council*, [2009] 3 CNLR 117 (ONSC), 2009 CanLII 14797, where the Ontario Superior Court granted a property owner an interlocutory injunction to restrain interference by the Haudenosaunee Confederacy on the grounds that their title claim was weak and therefore the duty to consult was not violated.

38. *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 at paras 45-46.

39. *Ibid* at para 48.

40. *Nalcor Energy v Nunatukavut Community Council Inc*, 2012 NLTD(G) 149 at paras 2-5. After "several hours" of consultation, the judge cited the importance of keeping workers safe by granting an injunction against Indigenous blockaders contesting the construction of the Muskrat Falls dam.

41. *Williams, supra* note 36 at paras 34, 37.

These cases demonstrate the failure of injunctive relief for First Nations when s 35(1) consultation rights are brought to bear. On the one hand, in *Haida Nation*, the SCC tried to steer land claims out of the injunction arena, wisely counselling on its inherent limitations and the dangers of bias embedded in the tripartite test. But this warning backfired when—out of necessity—First Nations sought urgent relief or were faced with plaintiffs seeking to remove them from their lands. Judges can then interpret *Haida Nation* to reason that First Nation cases should be heard in different proceedings, as litigation for rights and title, or else attempt to adjudicate their rights and title on the merits based on scant evidence. The paradox that results is that the denial of injunctive relief to First Nations and the success of corporations and governments seeking injunctive relief against them practically constitutes a de facto resolution of disputed land claims. Put simply, the s 35(1) duty to consult, alongside the long delays and evidentiary hurdles standing in the way of establishing Aboriginal rights and title more generally, as demonstrated by *Sparrow* and *Delgamuukw*, has proven to mostly work against First Nations seeking injunctive relief.[42]

II. The Public Interest as Colonial Status Quo

Section 35(1) rights do not fit easily into the tripartite injunction test because they require lengthy and careful litigation or negotiation. Yet, the use of injunctions has by no means been discontinued on this basis. Of the 70 cases we coded, 42 (or 60 per cent) referred to Aboriginal rights, treaties, and/or title in motions brought by First Nations or as defences against injunctions. Almost a third of these cases address the legal question of consultation. Many of these legal arguments are countered in the courts by public interest-based counter-arguments and reasoning.

The explicit consideration of public interest arguments, in fact, emerged concurrently with the emergence of s 35(1) case law discussed above, after the SCC made two critical decisions that emphasized the importance of public interest when balancing "convenience" in interlocutory injunctions. While *Metropolitan Stores*[43] and *RJR-MacDonald*[44] did not involve Indigenous people, these *Charter* cases became central to the shift away from injunctive relief for First Nations. Their importance was due to the presumption baked into the "public interest" that an equitable balance can exist between protecting the interests of distinct groups in society and the "concerns of society generally."[45]

For First Nations already struggling to assert their inherent jurisdiction against the non-justiciable nature of Crown sovereignty, the paramountcy of the public interest further prejudices courts hearing injunction applications against them. In *Metropolitan Stores*, cited in *RJR-MacDonald*, the SCC made

42. See Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79:1 Can Bar Rev 252 at 275 (arguing that the duty to consult should outweigh the availability of injunctions against First Nations).

43. *Metropolitan Stores*, *supra* note 19.

44. *RJR-MacDonald, supra* note 5.

45. *Ibid* at 344.

foundational comments defining the public interest, stating that "in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies, and which must be 'given the weight it should carry'."[46] As the court decided:

> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest... [E]ither the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[47]

The public interest is further closely tied to the expectation that injunctions maintain or preserve the status quo.[48] The status quo is considered critical to guiding judges' decisions on what constitutes the public interest.

For Indigenous claims litigation, however, the "status quo" or the "existing legal regime or the state of affairs on the ground" may include active mining or logging,[49] preserving at minimum a circumstance of disputed land, and at most, maintaining a destructive or violent occupation.[50] As detailed in this Part, the uneven pattern in injunction cases also persists through the courts' interpretation of this "status quo" imperative. An interpretation that favours statutory regimes and private capital contradicts SCC decisions on the interplay of the duty to consult and the role of regulatory agencies and tribunals, which call for recognizing that the "duty to consult, being a constitutional imperative, gives rise to a *special public interest* that supersedes other concerns typically considered by tribunals tasked with assessing the public interest."[51] Thus, the post-*Sparrow* shift away from success for First Nations obtaining injunctions is not only due to the s 35(1) jurisprudence and a diversion towards constitutional litigation. It is also due to a public interest defined by market rationale and the demand for Indigenous lands.

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46. *Metropolitan Stores, supra* note 19 at 149.
47. *RJR-MacDonald, supra* note 5 at 344.
48. Hunter, "Advancing Aboriginal Title Claims After Delgamuukw", *supra* note 10 at 1.3.04. See also *Cyanamid, supra* note 15 and *Pacific Northwest Enterprises Inc v Ian Downs & Associates Ltd* (1982), 42 BCLR 126 (BCCA), 1982 CanLII 519 (BCCA).
49. See e.g. *McLeod Lake Indian Band Chief v BC* (1983), 33 BCLR (2d) 378 (BCSC), 1988 CanLII 3107 (BCSC).
50. Hunter, "Advancing Aboriginal Title Claims After Delgamuukw," *supra* note 10 at 1.3.04. As one reviewer noted, "public interest" as colonial status quo also connects to other universal doctrines that have been legally challenged, such as "best interests of the child" in *Racine v Woods*, [1983] 2 SCR 173, 1 DLR (4th) 193. For an excellent discussion of the racism underpinning this construction of the "public interest," see Raven Sinclair, "The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias" (2016) 11:2 First Peoples Child & Family Rev 8.
51. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 40, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70 [emphasis added].

Reconciling the public interest of Canada's resource economy with Indigenous rights lies at the heart of these cases. Less examined, though, is the way the courts manage, and often shield, private interests from exposure to counter-legal claims. For example, Hunter demonstrates that early injunctions involving First Nations were open to considering the interests of First Nations in the land, reflecting a time of relative calm within the cycles of capitalist crisis. As a case in point, the Ahousat and Clayoquot arguments for title to Meares Island led the judge to reject the public interest argument made by the forestry company to protect private investment.[52] Though he admitted that the case was a "frontline" precedent for Nations across the province disrupting extraction on their land by asserting title, the fear expressed by the province and companies was not deemed a sufficient public interest argument, for this uncertainty would be up to each court in every circumstance to consider. But critically, the judge also did not find the importance of logging for the company to be a matter of "irreparable harm," since "the timber will still be there" if MacMillan Bloedel were found to hold the right at trial, whereas "[t]he position of the Indians is quite different", since logging may extinguish their food sources and ways of life.[53]

By 1989, Esson JA challenged this position in *Westar Timber Ltd v Ryan et al.*[54] This case involved the Gitksan Nation's conflict with a forestry company that sought to log and expand operations into a region over which the Nation was asserting title as part of the *Delgamuukw*[55] case. The judge quoted Macfarlane JA's dissenting reasons from *MacMillan Bloedel* at length, emphasizing the heading "Provincial concern about sovereignty over resources", where Macfarlane JA wrote that Meares Island was a unique case because it was a small, isolated area.[56] However, "[i]f an injunction were being sought with respect to the whole area the economic consequences of granting an injunction would probably weigh heavily against making the order."[57] Esson JA picked up this line of the thinking, and citing the importance of "public interest" in *Metropolitan Stores*, found that "the court should not grant an injunction if the economic consequences of doing so would have a serious impact upon the economic health of the province, the region or the logging company."[58] Thus, the public interest argument here smothers the possibility of challenging provincial regulation that may constitute irreparable harm to Indigenous rights. As Esson JA argued:

> ...injunctions restraining the exercise of rights granted under the Forest Act could *sterilize the working of that statutory scheme* just as effectively as injunctions restraining the granting of licenses and other rights, that being so, the public interest must be considered in applications of this kind.[59]

52. *MacMillan, supra* note 11 at 20.
53. *Ibid*.
54. *Westar Timber Ltd v Gitksan Wet'suwet'en Tribal Council* (1989), 37 BCLR (2d) 352 (BC CA), 60 DLR (4th) 453 at para 54 [*Westar*].
55. *Delgamuukw* (SCC), *supra* note 18.
56. *Westar, supra* note 54 at para 52.
57. *Ibid* at para 54.
58. *Ibid* at para 55.
59. *Ibid* at para 47.

The statutory scheme itself is framed here as a matter of public interest. But who does it protect? When it is enacted to defend the interests of non-Indigenous industry and workers against First Nation assertions of rights, the public interest here reveals the contrived division between public power and the economy. In other words, the "public" sphere of interest is the hidden background condition for the private accumulation of capital. Statutory power here "enforces its constitutive norms" through legal frameworks.[60] When the impact of First Nation challenges to provincial regulation leads to financial loss and harm to non-Indigenous workers, the impact of "public interest" arguments doubles: it can be used to defend state regulatory powers, but also the state's role in protecting the certainty of investment and employment in regional non-Indigenous economies.

Another example of how the public interest argument works by presuming this division is when it was invoked to dismiss a Gitskan logging injunction in 1990. The judge considered a disruption to non-Indigenous logging by First Nations asserting rights, stating that, "[t]he 'ripple down' effect of the consequences will be immeasurable. It is simply not possible to measure the damages of failed businesses, closed mills and people migrating from the area."[61] Here, the court views the public interest as a means to protect private capital, since the economic livelihood of non-Aboriginal citizens will be impacted. The court does not recognize a public interest role in protecting Indigenous livelihood.

This interpretation of the conjoined meanings of status quo and public interest can be found as far back as our research extends, to 1973—the earliest record we have of an injunction involving First Nations—and it is closely tied to resource extraction and development. Though the language of "public interest" was not yet been codified in law, the idea was already evident. The court told the James Bay Cree at the time:

> It is important to note at the start that hydroelectricity is the only primary energy resource possessed by the province of Quebec. With the petroleum crisis which exists actually in the world, *this resource has become of a capital importance to ensure the economic future and the well-being of the citizens.*[62]

The economic well-being and future of the Cree, Innu, and Inuit Nations are not included in this consideration of the project, set to enter a catastrophic phase of hydrological transformation to their territory with the largest dam project in North America.[63] This definition of the "interest" of

60. Nancy Fraser, "Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism" (2014) 86 New Left Rev 55 at 64.

61. *Wiigyet v District Manager* (1990), 51 BCLR (2d) 73 (BCSC), 1990 CanLII 2314 (BCSC) at 16, cited in Hunter, "Advancing Aboriginal Title Claims After Delgamuukw," *supra* note 10 at 1.3.15.

62. *Simard-Beaudry Inc v Kanatewat* (1974), 5 CELN 2 (QCCA), 1974 CarswellQue 245 at 7 [emphasis added].

63. See Sean McCutcheon, *Electric Rivers: The Story of the James Bay Project* (Montreal: Black Rose Books, 1991); Zebedee Nungak, *Wrestling with Colonialism on Steroids: Quebec Inuit Fight for Their Homeland* (Montreal: Véhicule Press, 2017).

"the Quebec population" represents not only a majoritarian stance regarding the principle,[64] but also an explicitly colonial one, since none of these lands had ever been subject to treaty or surrendered. The Quebec public is prioritized as the beneficiary of extraction, while the interests of Indigenous Nations must be sacrificed.

The natural resource economy is of central importance to Canada's political economy and therefore to colonization. Its idiosyncrasies have also determined "public interest" arguments in relation to First Nation rights. The backdrop to many of the BC cases that Hunter studies, for example, demonstrate the boom-and-bust cycle of a resource sector deeply impacted by global forces.[65] Thus, the precarity of the global commodity market is critical to the injunction story too. Following high prices and production in the late 1970s, a devastating recession in BC in the early 1980s was only temporarily corrected with a sharp boom in the late 1980s, followed by another deep recession in the late 1990s.[66] Rather than adapt technologically to yo-yoing demand, rapacious harvesting devastated the province's interior, triggering environmental and Indigenous movements for protection through a spate of occupations, blockades, and of course, injunctions.[67] The global price fluctuations for timber put private interests on a razor's edge of financial survival, sharpening corporate and state arguments of "irreparable harm" when production was disrupted. Meanwhile, the province had to balance private interests with increasingly powerful movements demanding to protect these lands.

In other words, capitalism in Canada has two crises: first, its internal contradictions and boom and bust cycles of production, coupled with the natural limits of supply; and second, insecure land tenure for investment in resources on lands where Indigenous peoples challenge the Crown's claim to underlying title and rights. In injunction cases, the courts only tend to deal with the former crisis because it fits a temporal and racial understanding of economic duress. The failures of the courts to recognize the razor's edge of Indigenous survival after a century or more of apocalyptic changes wrought by colonization (e.g., fisheries re-routed and dammed, areas stripped bare of trees and life, animals harvested to near extinction) indicates that these harms are not legible as "economic" factors in these decisions. We cannot be too fancy about the reasoning here: this is settler-colonialism in action, in the form of willful denial.

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64. For interesting discussions of a similar "cutting out" of certain publics in "public interest" discussions regarding minority rights and national security in Canada, see (respectively): Colin Feasby, "*Charter* Injunctions, Public Interest Presumption, and the Tyranny of the Majority" (2020) 29:1 Const Forum Const 20; Yavar Hameed, "Unmasking the Public Interest in Discretionary National Security Decisions in Canada" (2013) 92:1 Can Bar Rev 31; Gary Kinsman, Dieter K Buse & Mercedes Steedman, eds, *Whose National Security? Canadian State Surveillance and the Creation of Enemies* (Toronto: Between the Lines, 2000).

65. Roger Hayter, "'The War in the Woods': Post-Fordist Restructuring, Globalization, and the Contested Remapping of British Columbia's Forest Economy" (2003) 93:3 Ann Am Assoc Geogr 706.

66. *Ibid* at 714.

67. Nicholas Blomley, "'Shut the Province Down': First Nations Blockades in British Columbia, 1984-1995" (1996) 111 BC Studies 5.

We can see this dynamic play out through a 1996 injunction case in Manitoba where, despite concerns regarding logging traplines, Mathias Colomb First Nation lost their bid for an injunction because, according to the court, "[i]f Repap is hindered in its activities, the consequences will be the forced closure of its plant in the Pas, Manitoba, with the consequent loss of jobs for employees and loss of revenues for Repap."[68] These financial losses were deemed "unrecoverable", as opposed to the First Nation's land claims, which Repap successfully argued were merely "speculative".[69] These lands being logged were precisely where Mathias Colomb was negotiating an extension of their reserve boundaries to compensate for "lost lands" during the negotiation of Treaty 6.[70] While land restitution to the First Nation would provide valuable opportunities to the community, formerly and wrongfully denied by Canadian state policy, these financial losses were not deemed unrecoverable by the court.

Time and time again, this colonial dynamic plays out in injunction proceedings in the public interest reasoning behind determining "irreparable harm". In a logging dispute that dragged on for many years, the Okanagan First Nation consistently lost injunction cases, despite their assertions of Aboriginal title to the land. For instance, when a motion was served against the Okanagan to stop logging without provincial authorization, the province sought a work order to preserve the status quo, stating: "when a public authority is prevented from exercising its statutory powers, the public interest suffers irreparable harm."[71] A few years earlier, the First Nation had been unable to convince the judge that the Pine Marten and their traplines would suffer from clear-cut logging on their territory. The court found the harm to be worse to Riverside and Weyerhauser contractors, and to logging company employees who would suffer substantial losses, "which would be difficult, although not impossible to calculate."[72] Another logging case in BC involved the Nlha7kapmx Nation, specifically the Siska Indian Band. Here, the courts decided that since the mill is a "sunset operation"—a business that might close without access to a specific stand of trees—the injunction should be granted in their favour. In contrast, the spiritual, cultural, and economic sustenance of the community of 250 people who depended on the land was not deemed to be at immediate risk.[73]

Likewise, the Klabona Keepers of the Tahltan Nation attempted to stop a mine on their territory to protect the salmon runs that their nation and downstream nations have depended on for centuries for sustenance and kinship. Yet, this assertion of harm did not count as dearly as "the emotional and psychological effects of long-term unemployment," which are harms "that cannot be compensated

68. *Repap Manitoba Inc v Mathias Colomb Indian Band*, [1996] 110 Man R (2d), 1996 Can LII 18341 (MBCA) at para 13.

69. *Ibid* at para 11.

70. Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 173-207.

71. *British Columbia* (*Minister of Forests*) *v Okanagan Indian Band*, [1999] BCJ No 2545, 37 CPC 4th 224 at para 9.

72. *Derickson v R*, 1996 CanLII 2440 (BCSC) at para 33.

73. *Siska Indian Band v British Columbia* (*Minister of Forests*), 1999 CanLII 2736 (BCSC) at para 8 (the court also decided that the Band delayed too long to have their motion for an injunction considered).

through damages."[74] Salmon are a keystone species that maintain the functional integrity of riparian systems and many at risk species depend on the salmons' aquatic and terrestrial ecology through the province; it is difficult to imagine a greater impact to the region or to the people who have lived in reciprocal relation with the species for hundreds of generations.[75] Punnett J of the BC Supreme Court nonetheless stated that,

> In this case there is a public 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. Accordingly, it would run contrary to the public interest to allow the defendants to persist in their blockade of the plaintiff.[76]

Ten years earlier, the Lax Kw'Alaams Indian Band of the Tsimshian Nation heard the same message when they sought an order prohibiting the harvesting of culturally modified trees that have been integral to the culture for hundreds of years. They were told the economic health of the region was paramount: "An injunction here would create uncertainty, not only for West Fraser but also for the logging contractor who has been engaged to perform this work, the employees hired for the work, and their families."

Occasionally, courts will recognize that the impact of resource-based economies on First Nations' rights requires a more nuanced treatment of the public interest. In a 2011 case involving dueling applications for injunctions by Taseko Mines Ltd. and members of the Tsilhqot'in Nation, the BC Supreme Court held that it is "very much in the public interest to ensure that... reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation."[78] This process "is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation"—one that would be at risk should the First Nation's injunction application be denied and thus "weighs heavily in the balance of convenience."[79] Yet even in this decision, where the public interest in reconciliation played a key role in denying the mining company an injunction, a brief but unlawful interference in Taseko's operation via a blockade by members of the Tsilhqot'in Nation that appeared to the judge to "be more moral than physical" led the court to award Taseko partial costs.[80]

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74. *Red Chris Development Co v Quock*, 2014 BCSC 2399 at para 68 [*Red Chris*].
75. KD Hyatt & L Godbout, "A Review of Salmon as Keystone Species and Their Utility as Critical Indicators of Regional Biodiversity and Ecosystem Integrity" in Laura M Darling, ed, *At Risk: Proceedings of a Conference on the Biology and Management of Species and Habitats at Risk, February 15-19, 1999*, vol 2 (Kamloops: BC Ministry of Environment, Lands and Parks, Victoria, BC and University College of the Cariboo, 2000).
76. *Red Chris*, *supra* note 74 at para 77.
77. *Lax Kw'alaams Indian Band v British Columbia* (*Minister of Forests*), 2004 BCCA 306 at para 23.
78. *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675 at para 60.
79. *Ibid*.
80. *Ibid* at para 10.

First Nation blockades similarly shaped the 2019 *Coastal GasLink Pipeline Ltd v Huson* decision that led to the Royal Canadian Mounted Police (RCMP) raid on Wet'suwet'en territory in early 2020 and catalyzed the #ShutDownCanada solidarity movement.[81] Church J found that "interference by the defendants with valid and subsisting rights to construct a project that has been found to be in the public interest" was a form of irreparable harm that would be suffered by the plaintiff pipeline company.[82] This finding also determined the court's resolution of the public interest claims made by both parties. The Indigenous defendants argued that an interlocutory injunction would generally harm the governance of Dark House and the Wet'suwet'en legal order.[83] Coastal GasLink (CGL) submitted that the public interest should be understood more broadly because the pipeline project would bring substantial benefits to Indigenous people, local communities, the province, and the Canadian economy.[84] They argued that $20 billion could be lost if the pipeline could not be built.[85] Church J cited these factors favourably in her decision.

Another element of the public interest further tipped the balance in favour of the corporate injunction claimants in *Huson*: the idea that the practice of Indigenous law is a "self-help" remedy. In a variation on the project-centered irreparable harm analysis, Church J held that there is "a public interest in upholding the rule of law and restraining illegal behaviour and protecting the right of the public, including the plaintiff, to access Crown roads."[86] This conclusion rests on a long line of cases, particularly the SCC's 2013 decision in *Behn*, rejecting so-called self-help remedies such as blockades, occupations, and other land-based resistance strategies.[87]

As discussed in Part I, *Behn* was not an injunction case but rather addressed the ability of Indigenous defendants in a tort action to assert treaty rights and the duty to consult in their defence after being sued by a logging company for blocking access to the company's work sites. In *Huson*, CGL relied on *Behn* to suggest that it was the Wet'suwet'en "defendants who have moved to *alter the status quo* in this case by engaging in self-help remedies rather than challenging the validity of the permits and authorizations through legal means."[88] The "remedies" in question were a healing centre, on which construction began in 2010, cabins and other living quarters, as well as gates intended to control access to the Unist'ot'en Camp, a small village, all of which are located on Wet'suwet'en territories on or near the pipeline route. At the interlocutory injunction hearing, CGL's counsel, Kevin O'Callaghan, asserted that, "A blockade can never be seen to be the status quo."[89] The

81. *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 [*Huson*].

82. *Ibid* at para 197.

83. *Ibid* at para 216.

84. *Ibid* at para 217.

85. *Ibid* at para 204.

86. *Ibid* at para 220.

87. *Behn*, *supra* note 33.

88. *Huson*, *supra* note 81 at para 213 [emphasis added].

89. *Ibid* (Court Transcript at 10).

court agreed, reducing long-standing assertions of jurisdiction made material via occupation and land-based practices to a mere blockade and concluding that "[u]se of self-help remedies is contrary to the rule of law and is an abuse of process."[90]

But which rule of law? As the defendants' legal counsel, Michael Ross, argued on their behalf,

> It is their primary defense, the defendants say, that Coastal GasLink was attempting to enter Dark House territory in violation of Wet'suwet'en law and authority and within their efforts to prevent – that is the defendants' efforts to prevent – this violation of Wet'suwet'en law and authority, they were at all times acting in accord with Wet'suwet'en law with proper authority.[91]

While the segments of the *RJR-MacDonald* test often overlap, the invocation of "self-help" allows the judicial treatment of the public interest to reinforce—or even replicate—the "maintenance of the status quo" factor also considered under the heading of the balance of convenience. "Self-help" then is a practice that necessarily violates the status quo. *Behn*, in other words, allows factors like Indigenous legal orders to serve a similar function to the roles played by time and uncertainty in the aftermath of *Sparrow*, insulating injunctions from the reach of s 35(1).

The cases canvassed above shed light on this doctrinal ordering of interests, in which the broad concerns and interests of Canadian society generally—or at least the alleged concerns—will almost invariably trump the more particular public interest of First Nations. This hierarchy is especially evident in cases where the "public interest" has been opposed by First Nations and has led to the assertion of Aboriginal or treaty rights in opposition to the maintenance of the status quo. In the case of *Huson*, and so many others we examined, the public interest refers to the completion or continued operation of an approved or licensed project—never to the inception or maintenance of the Indigenous legal order or governance system.

III. Origin of an Injunction: Equity, Property, and Settler-Colonial Legality

That the "public interest" functions as a fixed nexus of exclusion within injunction law points to a more foundational problem: along with other elements of the balance of convenience test, public interest operates the way it does due at least in part to the inherently discretionary character of equitable remedies. Much as s 35(1) rights were pushed outside of the scope of the tripartite test, and the guiding principle of "public interest" preserved a colonial dynamic rooted in a resource economy, the discretionary basis of equitable remedies also carries an opportunity for bias and discrimination against First Nations that is buried in the "silent compulsion" of land struggle in Canada.

It may seem contradictory to attribute the cause of a persistent pattern of judicial reasoning to the notion of discretion, but locating the equitable roots of injunctions within a broader settler-colonial framework suggests that this discretion is distinctly and historically bounded. The power

90. *Ibid* at para 220.

91. *Ibid* (Court Transcript at 27).

to grant an injunction derives from an old and subsumed system of English law called the Court of Equity. Although injunctions eventually came under the jurisdiction of the combined courts of law and equity,[92] the origin of injunctions can inform us about the meaning of its remedies. Since the Court of Equity could only grant specific relief where damages (i.e., awards of money) were deemed insufficient, injunctive relief required "irreparable harm"—of a kind which could *not* be compensated monetarily—to be granted.[93] Irreparable harm, then, had jurisdictional importance for which court would hear the case and, therefore, what remedies would be available.

The Court of Equity itself emerged from the dissatisfaction of English people with the rigidity of the common law system. This led to many complaints to the King, who delegated these matters to the Chancellor to resolve through a new legal venue.[94] Since Chancellors tended to draw from ecclesiastic classes, they resolved matters in the new courts of equity largely by drawing on canon law principles of good conscience.[95] No less discretionary than the common law, but less bound to strict rules, procedures, and established legal precedents, injunctions were included among the equitable remedies the court provided. Eventually, this looser system of law could not withstand the pressure exerted by commercial markets and land privatization for the more procedural and substantive rules of doctrines in the common law.

As a result, the significance of the injunction as an equitable remedy must be understood in relation to the common law. Remedies have "distinct structure, justifications, and goals",[96] which are not integrated in a hierarchical way into the common law.[97] There is much debate in Canada on where and how these discretionary lines are drawn. As Jeffrey Berryman explains:

92. The Judicature Acts of 1873-75 fused these legal systems and courts, and in 1854 the *Common Law Procedure Act, 1854, 17-18 Vict, c 125*, ss 79 and 82 empowered common law courts to award injunctions: Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1983). Today, most provinces in Canada have a statute carrying forward the fusion of law and equity from old Judicature Acts, granting courts authority to award interlocutory injunctive relief wherever it is "just and convenient": Berryman, *Equitable Remedies*, supra note 6 at 15. Sharpe clarifies that this justification was augmented by the fusion of legal systems and must be qualified by a substantive right at stake (at 1.1140). See e.g. *Courts of Justice Act*, RSO 1990, c C.43, s 101(1): "In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."

93. David A Crerar, "'The Death of the Irreparable Injury Rule' in Canada" (1998) 36:4 Alta L Rev 957.

94. Berryman, *Equitable Remedies*, *supra* note 6 at 2.

95. Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2:1 CJCCL 261; PV Baker & PSJ Langan, *Snell's Principles of Equity*, 28th ed (London: Sweet and Maxwell, 1982) at 8-9.

96. Berryman, *Equitable Remedies*, *supra* note 6 at 9.

97. *Ibid* at 10.

> It is up to the defendant to refute the plaintiff's remedy of choice. But for judges, who traditionally conceive of their role as the top of an adjudicative apex, it is difficult to escape from the position that the "discretion", in that equitable remedies are said to be discretionary, is for the judge alone to exercise.[98]

Complicating this issue, though, is that these lines are not entirely clear, especially in Canada. Equitable remedies shape substantive rights and vice versa. We can see quite clearly, for example, in the case of injunctions and First Nations, how equitable remedies are shaping Indigenous peoples' substantive rights.

The ambiguity of the relationship between these remedies and the common law is complicated by the colonial relationship between Canadian courts and Indigenous peoples. Much of this ambiguity can be found in property law, which the courts ultimately seek to protect when they are tasked with maintaining the status quo in injunction proceedings. Brenna Bhandar's exploration of racial regimes of ownership and, more specifically, her examination of the "development of the specific legal forms of private property relations"[99] in settler-colonial sites points to a framework for understanding how our modern concept of "public interest" has evolved out of this process of development. As Bhandar writes, this property law system emerged from "political ideologies, economic rationales, and colonial imaginaries that gave life to juridical forms of property and a concept of human subjectivity that are embedded in a racial order."[100] She examines, for example, the titling registration regimes of the 19th century in the British colonies that relied on a new racial science to deny Indigenous peoples' own tenure system through hierarchies of racial entitlement. Drawing on the work of geographer Nicholas Blomley, she also theorizes the process of racial property-making as "enactments" that must be repeated regularly and reproduced through legal techniques of denial.[101] What does it mean, then, to reconsider equitable remedies as part of these "colonial modes of appropriation" that constitute the public interest?

The public interest protected by injunctions is indelibly shaped by private property interests that underpin statutory schemes and common law constructs. Here, we need to dig a bit deeper into the relationship between colonialism, capitalism, and property law in Canada. In his examination of settler colonialism in British settlements, Robert Nichols' work in *Theft is Property!* offers a critical reformulation of Karl Marx's important concept of "dispossession" or "expropriation" to the process of capital accumulation. Like many others, Nichols rethinks Marx's theorization of a stadial view of violent dispossession as an essential condition for the next stage of development, a "silent

98. *Ibid*.

99. Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 7.

100. *Ibid* at 22.

101. *Ibid* at 184, citing Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (London: Routledge, 2003) at 114.

compulsion of economic relations."[102] Rather, Nichols writes that "[t]here was no historical transition from extra-economic violence to silent compulsion, only a geographical displacement of the former to the imperial periphery."[103] Nichols' reformulation avoids the common move that often follows this point, which is to prolong Marx's theory of early "primitive accumulation" into the present in order to account for an ongoing, violent removal of Indigenous peoples from their lands. Instead, he rethinks the category of "dispossession" itself to produce an important insight into property relations in the settler colony. Ongoing dispossession is not only required to transform nature into commodities, but is part of the silent compulsion of capitalism where land is both "a conceptual and legal category that serves to relate humans to 'nature' and to each other in a particular, proprietary manner."[104] It is intrinsic to the culture of settler-colonialism.

Nichols traces the emergence of what he calls a "hybrid private/public form" of juridical dispossession during the settlement of Canada and other settler-colonial states in ways that are helpful in working to connect the contemporary legal tool of injunctions and the concept of "public interest" to more foundational property relations.[105] Dispossession, Nichols argues, "did not proceed through macro assertions of sovereignty but through microlevel practices that worked to dismantle one infrastructure of life and replace it with another."[106] We can apply Nichols' observation to Canada, where the transformation of land into property proceeded through mechanisms like the *Dominion Lands Act* of 1872,[107] which also privatized the theft of territory from Indigenous peoples. This federal legislation facilitated massive land redistribution of Indigenous lands to the Hudson's Bay Company (HBC), Canadian Pacific Railway, and other "colonization companies."[108] Prior to this redistribution, "Rupert's Land" was acquired through a "Deed of Surrender" in 1869 between Canada and the HBC to the lands of the Anishinaabe, Cree, Ojicree, Inuit, Innu, Dene, Gwich'in, Métis, and more, who had lived on and governed these lands for thousands of years.[109] These "Company lands" sold to Canada were then privatized again through the distribution of acreage to private companies and to European settlers.

102. Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Durham: Duke University Press, 2020) at 64.

103. *Ibid* at 65.

104. *Ibid* at 83.

105. *Ibid* at 45.

106. *Ibid* at 45.

107. *Ibid* at 44-45.

108. Peggy Martin-McGuire, *First Nation Land Surrenders on the Prairies, 1896-1911* (Ottawa: Indian Claims Commission, 1998) at 37; see also Yellowhead Institute, "Corporate Colonialism" (2021), online (pdf): <cashback.yellowheadinstitute.org/wp-content/uploads/2021/05/Corporate-Colonialism-Factsheet-Cash-Back.pdf>.

109. See e.g. Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: Native Law Centre, University of Saskatchewan, 1982).

It is this hybrid public/private form of property that we see protected in injunction cases. The discretion of the equitable remedy, coupled with the racial subjectivity embedded in the colonial property right—designed to usurp Indigenous territorial authority—naturalizes a violent process of dispossession. The implementation of the injunction on Wet'suwet'en territory, for example, was secured through the provincial authorization of permits, licenses and right of ways to the pipeline company, CGL, despite BC's legal uncertainty of the Crown's underlying title to the land.[110] The *Delgamuukw* decision led to over a decade of failed negotiations over the territory at the modern treaty table, so the province reverted to a position of denial rather than accommodation of Aboriginal title. With state regulatory approvals, the company was able to obtain an injunction, which was accompanied by an enforcement order so that public police forces could use their powers to remove Indigenous peoples from their lands. Extra-legal "exclusion zones" were created that blocked the Wet'suwet'en from accessing their territory, ever expanding the discretionary powers of injunctive relief into new domains of dispossession.[111]

Writing on the reconciliation of private property rights and Aboriginal title in the courts, Inupiat/Inuvialuit legal scholar Gordon Christie points out: "There is no such thing as a mechanical process that pushes out beyond current case law in such a way as to not implicate the invocation (however hidden and subtle it may be) of values and norms."[112] He suggests that the principles of reconciliation will be determined by forces of power that "infect" the courts, like the presumption that Canadian courts may decide the extent of power invested in First Nations' governance and law or that courts possess an "all-encompassing and overpowering set of predeterminations."[113] Pessimistically, he predicts that "[t]he most likely extrapolation, carrying with it as it will a larger background of presumptions and hidden values and principles, follows a trajectory furthering goals and objects of colonial law and policy."[114] Anishinaabe legal scholar John Borrows has also addressed the uneasy reaction of the courts to pitting third party interests directly against Aboriginal title. Yet, he is clear that the usual bias must be mitigated:

> Constitutionalized Aboriginal title rights should obviously trump non-constitutionalized property interests. As I have argued, to hold otherwise would privilege non-Aboriginal interests over rights constitutionally protected within the country's highest law. This would be discriminatory.[115]

110. The RCMP, in turn, relied on Coastal GasLink's claims with respect to the absence of legally established Aboriginal title: see Irina Ceric, "Beyond Contempt: Injunctions, Land Defence, and the Criminalization of Indigenous Resistance" (2020) 119:2 South Atl Q 353 at 366.

111. British Columbia Civil Liberties Association, "Policy Complaint Concerning RCMP Checkpoint on Morice West Forest Service Road" (29 January 2020), online (pdf): <bccla.org/wp-content/uploads/2020/01/RCMP-Complaint-Public.pdf>.

112. Gordon Christie, "Aboriginal Title and Private Property" in Maria A Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book, 2009) 177 at 180.

113. *Ibid* at 196.

114. *Ibid* at 181.

115. John Borrows, "Aboriginal Title and Private Property" (2015) 71 Sup Ct L Rev (2d) 91 at 117.

The governments cannot hide behind the courts here. Patricia Owens writes that there is really no such thing as public or private violence: "There is only violence that is made 'public' and violence that is made 'private.'"[116] Here, she is referring to the dynamics of international war, but this sentiment can readily be applied to Canada. Injunctions involving First Nations are often fought on the terrain of competing and contested sovereignties and counter-dispossession struggles by Indigenous peoples to maintain territorial authority over their lands. The veil of Crown protection for private property interests over Indigenous rights and title must be brought to account.

Conclusion: Disarming the Legal Billy Club

Two related conclusions emerge from the analysis set out above. First, at least part of the answer to the question of why the *RJR-MacDonald* test delivers such imbalanced results in conflicts over resource extraction and Indigenous rights in the present day lies in the past, and is illuminated through a re-examination of equity through the lens of settler-colonial legality. The same historical lens reminds us that the present-day political economy of injunctions cannot be divorced from the resource-based economy that continues to rest on the dispossession of Indigenous lands and jurisdiction.

Second, we show that the heavy lifting done by notions of "public interest" both relies on and obscures the circumvention—if not outright exclusion—of Aboriginal treaty and constitutional rights from the common law's calculus. Although beyond the scope of this article, the enforcement stage of injunctions, marked by broad police discretion and the further blurring of public and private, similarly relies on notions of "public interest" focused squarely on the administration of justice and the reputation and authority of the superior courts.[117] Both of these themes point to the need to limit the wallop of the interlocutory injunction in the short term while aiming for a more foundational reconfiguration in the long term. Accordingly, we conclude by asking what, if any, place exists in injunction law and practice for Indigenous law and governance.

Our research makes it clear that injunctions are a symptom of upstream failure to address the exercise of Indigenous rights properly, lawfully, and politically in Canada. The focus on "self-help" remedies in *Behn*, discussed in Parts I and II, has proliferated in the case law as a response to the fact that injunctions have become the default response to attempts by First Nations to enact and administer Aboriginal rights, attempts that often—in 41 per cent of coded cases—involve blockades or other on-the-ground assertions of jurisdiction. The "*Behn* effect", which presumptively delegitimizes such extralegal tactics even in the absence of viable alternatives, is exacerbated by a jurisprudential framework that doles out interim and interlocutory injunctions[118] with a tacit understanding that

116. Patricia Owens, "Distinctions, Distinctions: 'Public' and 'Private' Force" (2008) 84:5 Int Aff 977 at 979.

117. See e.g. *Canadian National Railway Co v Jane Doe*, 2021 BCSC 2469 at para 62.

118. Only 9 per cent of the applications we coded sought permanent injunctions. Following the conclusion of our research, in December 2022, an Ontario court issued an additional significant ruling, granting a permanent injunction in relation to the 1492 Land Back Lane reclamation on Haudenosaunee territory: *Foxgate Developments Inc v Jane Doe*, 2022 ONSC 7035 (appeal pending).

the matter will not proceed to trial—the injunction is the point. Underlying this pattern is one fundamental factor—the denial by the Crown and industry of Indigenous rights—a factor that cannot be overcome given the direction embedded into the injunction as an equitable remedy.

Understood this way, injunctions serve as an admission of the Crown title fiction at the heart of private property relations. A recent decision of the BC Supreme Court, *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*,[119] suggests that this fiction is slowly being unearthed. In a discussion of the *Delgamuukw* decision, Kent J notes the SCC's holding that "Aboriginal title 'crystallized' at the same time sovereignty was asserted, hence presumably permitting the layering/burdening of radical title", but goes on to write that, "the logic of this is perplexing. Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the de facto seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada."[120]

Two "harsh realities" stand in the way of undoing Crown sovereignty, however: its "undeniable" existence and "certain" continuation and the doctrine of precedent.[121] Taken together, the reconciliation of sovereignty and the pre-existence of Indigenous societies will "not likely entail wholesale evisceration of common-law concepts"—including those making up the law of injunctions. Nonetheless, we argue that a reckoning lies in store for *RJR-MacDonald* and *Behn*: one that builds on the promise of *Haida Nation* but exceeds it, shifting the juridical basis by which Canadian states and industry can intervene in struggles over lands, resources, and rights.

One such route would be subjecting the *RJR-MacDonald* framework to the standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*),[122] especially in BC, which is both the epicentre of injunctions involving First Nations and the first province to enact a statute incorporating *UNDRIP* into domestic law. The *Declaration on the Rights of Indigenous Peoples Act* (*DRIPA*) requires that the government of BC "take all measures necessary to ensure the laws of British Columbia are consistent with [*DRIPA*]".[123] Given that *UNDRIP* requires states to obtain the free, prior, and informed consent of Indigenous peoples "prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources",[124] *DRIPA* can and should be used to examine every facet of the legal framework of injunctions: the common law,[125] rules of civil

119. *Thomas v Rio Tinto Alcan Inc*, 2022 BCSC 15.

120. *Ibid* at para 198.

121. *Ibid* at paras 201-204.

122. *United Nations Declaration on the Rights of Indigenous Peoples*, being Schedule, Annex to *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, art 32(2) [*UNDRIP*].

123. *Declaration on the Rights of Indigenous Peoples Act*, *supra* note 122, s 3. See also *Canadian National Railway Co v Jane Doe*, supra note 117 at para 212.

124. *UNDRIP*, *supra* note 122.

125. Darcy Lindberg argues that "fulsome adoption of the commitments in *UNDRIP* would address the challenges involving the use of Indigenous legal orders within common law problems": "*UNDRIP* and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55:1 UBC L Rev 51 at 56.

procedure, legislation such as BC's anti-SLAPP statute,[126] and Crown and police policies. While other provinces have not yet passed *DRIPA*-like statutes, similar incremental fixes are available, and to some degree inevitable, given the resurgence of Indigenous legal orders and the persistence of movements calling for a fundamental reordering of Crown-First Nations relations. Injunctions currently stand as an impediment to getting #landback, but the ground has shifted before, and it will again.

126. The province's anti-SLAPP [Strategic Lawsuits Against Public Participation] legislation allows applications for injunctions to proceed while a motion to dismiss the underlying lawsuit as a SLAPP is pending: *Protection of Public Participation Act*, SBC 2019, c 3, s 5(2). Similarly, BC's "Directives on Civil Litigation involving Indigenous Peoples" (22 April 2022), online: Province of British Columbia <news.gov.bc.ca/files/CivilLitigationDirectives.pdf>, issued pursuant to *DRIPA* in 2022, do not include any mention of injunctions.