OUR LAND, OUR WAY: THE RULE OF LAW, INJUNCTIONS, AND INDIGENOUS SELF-GOVERNANCE

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Introduction

European settlement swept across Canada, ignoring Indigenous peoples' existing laws and institutions. Today, two parallel systems of law exist: settler legal systems, which assert Crown sovereignty to all of Canada, and Indigenous legal systems, which assert sovereignty over their resources and peoples. Although dormant, due to policies such as section 91(24) of the *Constitution Act*[1] and the *Indian Act*,[2] Indigenous legal traditions persist today and are developing into a third order of government in Canadian federalism. Yet, the differing legal systems have not reconciled. One area where this tension arises is during resource development and extraction. How these projects proceed and are managed are frequently contested, which often leads to injunctions.

Indigenous communities sometimes erect blockades as a form of protest. Under Canadian laws, blockades as a form of protest are seen as civil disobedience. Although Canadians have a right to peacefully assemble, the siting of disruption is key to gain legal tolerance. Civil disobedience seeks to create change by illegal means or interference with the lawful interests of other citizens. In the context of Indigenous protestors and resource development, the peaceful assembly interferes with a developer's economic interests. As such, blockades are a form of civil disobedience, not lawfully protected peaceful assembly. The current judicial sentiment is that allowing Indigenous peoples to erect blockades, but stopping others, would create two different applications of the Canadian rule of law.

In this context, injunctions are frequently implemented to stop communities from erecting blockades used to "defend disputed land from development by private

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[1] *Constitution Act, 1982*, s 91(24), being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (section 91(24) allows the Canadian government to assert power over "Indians, and Lands reserved for the Indians").

[2] *Indian Act*, RSC, 1985, c I-5.

third parties."[3] In 1982, section 35 of the *Constitution*[4] entrenched the protection of existing Aboriginal and Treaty rights in Canadian law. Since then, Indigenous people have used injunctions to protect their ancestral lands. However, there is a growing trend of the courts' reluctance to grant injunctions to Indigenous people[5] and an increased frequency of companies obtaining injunctions against Indigenous people.[6] Rather than undermining the rule of law, Indigenous peoples' efforts to prevent unwanted development on their lands should be viewed as an expression of self-governance.

Colonialism is apparent in legislated actions, such as the imposition of band councils or residential schools, but it is also demonstrated through the Canadian common law and court actions that dispossess Indigenous people.[7] John Borrows posits that the Canadian common law favours non-Aboriginal legal sources over Indigenous sources. He says the

> overreliance on non-Aboriginal legal sources has resulted in very little protection for Indigenous peoples. Aboriginal land rights were obstructed, treaty rights repressed, and governmental rights constricted. This judicial discourse narrowed First Nations' social, economic, and political power.[8]

Building on this reasoning, this paper addresses favouritism in the injunction process. The rule of law has been discussed in the context of post-injunction sentencing and contempt of court power. However, few papers analyze the injunction process, the rule of law and the effect on Indigenous self-governance.

This paper argues that the trend of granting injunctions to corporations prevents Indigenous people from protecting and preserving their lands and goes against the rule of law as it inhibits the Indigenous communities' ability to self-govern. This will be accomplished by assessing the Canadian versus the Indigenous rule of law, evaluating the "balance of convenience" step in the test for granting an injunction, and viewing protesting as a method of enforcing Indigenous laws.

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[3] Ryan Newell, "Only One Law: Indigenous Land Disputes and the Contested Nature of the Rule of Law" (2012) 11:1 Indigenous LJ 41.

[4] *Constitution Act*, *supra* note 1, s 35.

[5] See Yellowhead Institute, "Land Back" (October 2019) at 10, online (pdf): <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf> [perma.cc/H5L2-X5PE]; Kate Gunn, "Injunctions as a Tool of Colonialism" (30 July 2020), online (blog): *First Peoples Law* <www.firstpeopleslaw.com/public-education/blog/injunctions-as-a-tool-of-colonialism> [perma.cc/NW8A-4KDQ]

[6] *Ibid.*

[7] Newell, *supra* note 3 at 43-44.

[8] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 8.

I. Background

A) Indigenous Peoples' Unique Relationship to Land

> *Water is a sacred thing. This is reflected in many traditional beliefs, values and practices.* — Ann Wilson, Anishnaabe Elder, Rainy River First Nation

Understanding the interconnectedness between land and Indigenous language, culture, laws, medicine, and food sources is imperative to understanding the impacts of granting injunctions against Indigenous peoples in Canada. When the sources of connection are affected by resource development, it is detrimental to an Indigenous community. According to the Royal Commission on Aboriginal Peoples, land is fundamental to Indigenous identity, and is reflected in the language, culture and spiritual values of all Indigenous peoples.[9] For example, the Gitksan tribe told a story of a thunderous noise coming from the mountain beside the lake interrupting party festivities; it was a grizzly bear coming down the side of the mountain. The warriors tried to confront the animal, but it crossed the lake and trampled them to death.[10] The elders used the story to warn young people to take just enough food to eat and leave the rest for others; if they took more, a tragedy like the grizzly bear attack will happen.[11] If development destroys the mountain, the story dies, and with it a piece of culture. Stories used to relay societal practices are told across Indigenous cultures.

In addition to providing sustenance, land is the basis for Indigenous creation stories that connect Indigenous people to the Creator, Mother Earth, as well as support Indigenous laws. A healthy environment is intrinsic to Indigenous peoples' governance systems: the land, plants, animals, and people all have spirit and must be shown respect. This respect forms the basis of Indigenous laws.[12] The Seven Generation Principle is an important aspect of governance within Indigenous law, dictating that it is their responsibility to preserve and better the land for the next seven generations.[13] The unique connection between Indigenous peoples and the land is woven into essentially every aspect of their lives, and, as such, when the land is impacted through resource extraction Indigenous lives are impacted in multiple ways.

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[9] Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, (Report), vol 1 (Ottawa: Supply and Services Canada, October 1996).

[10] Jean Leclair, "Of Grizzlies and Landslides: the use of archaeological and anthropological evidence in Canadian aboriginal rights cases" (2005) 4 Public Archaeology 109 at 113.

[11] *Ibid*.

[12] The Spirit in the Land: The Opening Statement of the Gitksan and Wefsuwefen Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987, by Gisday Wa and Delgam Uukw. Gabriola, B.C.: Reflections, 1990 at 1.

[13] Beverly Jacobs, "Environmental Racism on Indigenous Lands and Territories" (2010) Can Political Science Assoc at 1 [Jacobs].

B) Sources of Indigenous Laws

Prior to the European invasion, Indigenous people lived in distinct, sustained, and identifiable communities for generations. This is evidence of effective governing systems.[14] Indigenous communities are numerous and extremely diverse across Canada. Amongst differing communities, there are differing laws. For some Indigenous communities, the natural world—land, plants, animals, seasons, and cycles of nature—was a "central tenet of their lives and worldviews since the dawn of time."[15] This understanding is sophisticated and comprehensive wherein the natural world is seen as one interconnected entity. Traditional concepts of respect and sharing "that form the foundation of the Aboriginal way of life,"[16] create the Seven Sacred Teachings. These teachings are built around the seven natural laws, which are embodied by an animal:

> Love – Eagle
> Respect – Buffalo
> Courage – Bear
> Honesty – Bigfoot
> Wisdom – Beaver
> Humility – Wolf
> Truth – Turtle[17]

These seven laws explain that "the animal world taught man how to live close to the earth."[18] Therefore, some Indigenous laws arise from animals and animal spirits.

To provide a specific example, Wet'suet'en governance reflects both human relations and relations of humans to the land, animals, and the spirit world. Antonia Mills, a professor of First Nations studies at the University of Northern British Columbia, wrote,

> [t]he expression the Witsuwit'en use most commonly for law is *yinkadinii' ha ba aten* ('the ways of the people on the surface of the earth') … The principles of Witsuwit'en law define both how the people own and use the surface of the earth when they are dispersed on the territories and how they

[14] Stephen Cornell, "Wolves Have a Constitution: Continuities in Indigenous Self-Government" (2015) 6:1 Intl Indigenous Policy J Article 8 at 4.

[15] Bob Joseph, "What is the relationship between Indigenous Peoples and Animals" (4 April 2016), online (blog): *Working Effectively With Indigenous* Peoples <www.ictinc.ca/blog/what-is-the-relationship-between-indigenous-peoples-and-animals#> [perma.cc/D7W4-5QWM].

[16] *Ibid*.

[17] *Ibid*.

[18] "Seven Sacred Teachings", online: *Empowering the Spirit* <https://empoweringthespirit.ca/cultures-of-belonging/seven-grandfathers-teachings/> [perma.cc/X57J-BS8P].

> govern themselves and settle disputes when they are gathered together in the feast.[19]

These principles govern the Wet'suwet'en and shape their personal behaviours. Indigenous nations in Canada's Pacific Northwest depend on sets of Indigenously generated rules that govern territory, exchange, and the behaviour of leaders.[20] Additionally, across Canada, Beverly Jacobs describes Haudenosaunee religion, education, and ceremonies, as "intertwined, intermingled, and holistic"[21] with Haudenosaunee law. As such, even if a nation's laws are not connected to the land, other aspects are, and if that practice is harmed by land destruction, their laws are harmed as a spill-over effect.

Intercommunity treaties reflected lawful interactions between signatories and rules that would govern both societies and their governments.[22] Europeans recognized Indigenous communities as their own nations when they entered into intergovernmental treaty relationships "first symbolized by the *Gus Wen Tah* or Two-Row Wampum."[23] Treaties require the signatories to "acknowledge their shared humanity and to act upon a set of constitutional values reflecting the unity of interests generated by their agreement."[24] Whether a treaty was signed between Indigenous communities or between an Indigenous community and a European, the treaty acknowledges shared constitutional values. These shared constitutional values are evidence of two systems of government. Despite evidence of Indigenous systems of governance such as trade, warfare, treaty signing, and other activities, early colonizers often concluded that no such systems existed.[25] Although this conclusion is now understood to be wrong, reconciling Indigenous legal systems with Canadian legal systems continues to be a problem.

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[19] Antonia Mills, *Eagle Down is our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UNB Press, 1994) at 141.

[20] Cornell, *supra* note 14 at 10.

[21] Beverly Jacobs "John Borrows Canada's Indigenous Constitution. Toronto: University of Toronto Press, 2010 – Drawing Out Law. A Spirit's Guide. Toronto: University of Toronto Press, 2010" (2014) 29:3 CJLS 420.

[22] For example, the Dish with One Spoon Wampum, made in 1701 between the Haudenosaunee Confederacy and the Anishinaabe Three Fires Confederacy, represents a peaceful resource sharing agreement: "Two Row and Dish With One Spoon Wampum Covenants, online (pdf): *Future Cities Canada* <futurecitiescanada.ca/portal/wp-content/uploads/sites/2/2022/02/fcc-civic-indigenous-tool3-teaching-twodishonespoon.pdf> at 3 [perma.cc/73V8-U889].

[23] Newell, *supra* note 3 at 49.

[24] Robert A Williams Jr, *Linking arms together: American Indian treaty visions of law and peace, 1600-1800* (New York: Oxford University Press, 1997) at 99.

[25] Cornell, *supra* note 14 at 4.

In *Canada's Indigenous Constitution*,[26] John Borrows purports that Canada should be a multi-jurisdictional country embracing the common law, civil law, and Indigenous legal traditions. He argues that Indigenous legal traditions are not stuck in the past, rather they have "modern relevance" that "can be developed through contemporary practices."[27] This three-pronged legal system should not have any hierarchy. Between the many Indigenous nations in Canada, there exists a diverse set of legal traditions, but five sources are commonplace: sacred law (creation stories, treaty relationships), natural law (relationships with the natural world), deliberate law (talking circles, feasts, council meetings, and debates), positivistic laws (proclamations, rules, regulations, codes, teachings, Wampum readings), and customary law (marriages, family relationships, recent land claim agreements).[28] Understanding these sources is imperative to understanding the Indigenous rule of law because general consensus to accept the rule of law is needed. Although diverse, these common sources create a base of general consensus to support an Indigenous rule of law that can be applied across Canada.

II. The Rule of Law

The concept of the rule of law has existed for millennia. Historically, Aristotle (c. 350 BC) purported generally applicable rules and John Locke emphasized well-known, established laws.[29] These interpretations desire laws that are generally applicable and known to all. Formatting laws this way creates a system where everyone knows how they should behave, and everyone behaves in accordance with the same rules. Pre-1836, the rule of law in Canada was based on freedom and respecting the conditions of freedom.[30] This is because the agreements entered into by colonizers and Indigenous people created laws for the purpose of maintaining two separate nations. However, it has evolved to exclude Indigenous people, as one rule of law eclipsed the other.

Post-1836, rather than supporting freedom, settlers used the law to disenfranchise Indigenous people. When the rule of law was grounded in the legitimacy of the Wampum and treaties, it was in its purest form.[31] Consequently, a reversion of the rule of law is "the best if not the only instrument for the Crown to maintain a democratic and honourable relationship with First Nations."[32] The differing

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[26] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, "Indigenous Constitution"].

[27] *Ibid* at 10.

[28] *Ibid* at 23–58.

[29] "The Rule of Law" (22 June 2016), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/rule-of-law/#HistRuleLaw> [perma.cc/T9K7-H5C9].

[30] Bruce Morito, "The Rule of Law and Aboriginal Rights: The Case of the Chippewas and Nawash" (1999) 19:2 Can J Native Studies 263 at 276.

[31] *Ibid*.

[32] *Ibid* at 277.

interpretations of Indigenous and Canadian rules of law must be understood before their potential recovery is discussed.

A) The Indigenous Rule of Law

Constitutionalism is "the idea that the process of governing is itself *governed* by a set of known, foundational laws or rules."[33] Although laws differ, constitutionalism occurs within Indigenous legal traditions thereby creating a set of laws and rules that apply uniformly across Indigenous communities in Canada. Laws and rules have power because a "community hath agreed to be governed"[34] by them. For example, the Iroquois Confederacy was an alliance of five nations living around the eastern Great Lakes. This alliance was formulated on an "elaborate, multi-level political system that operated according to guidelines given in the Great Law of Peace" and recorded in wampum belts.[35] These guidelines had power, allotting authority to specific people and procedures for decision-making.[36]

The Haudenosaunee (signatories of the Iroquois Confederacy) argued that the Great Law of Peace permitted their use of direct action against Henco Industries Ltd.[37] The Great Law of Peace required them to stop industrial encroachment on the Douglas Creek Estates, which they were trying to preserve for future generations.[38] The Haudenosaunee Confederacy Council maintains that protestor actions were grounded in their own laws. The Council described the legal foundations as follows:

> The Haudenosaunee, and its governing authority, have inherited the rights to land from time immemorial. Land is a birthright, essential to the expression of our culture. With these land rights come specific responsibilities that have been defined by our law, from our Creation Story, the Original Instructions, the Kaianeren:kowa (Great Law of Peace) and Kariwiio (Good Message) .... [A]ccording to our law, the land is not private property that can be owned by any individual. In our worldview, land is a collective right. It is held in common, for the benefit of all. The land is actually a sacred trust, placed in our care, for the sake of the coming generations. We must protect the land. We must draw strength and healing from the land. If an individual, family or clan has the exclusive right to use and occupy land, they also have a stewardship responsibility to respect and join in the community's right to protect the land from abuse. We have a

[33] Cornell, *supra* note 14 at 2.

[34] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithica, New York: Cornell University Press, 1947) at 5, quoting Lord Bolingbroke.

[35] Cornell, *supra* note 14 at 6.

[36] *Ibid*.

[37] Newell, *supra* note 3 at 60–61.

[38] *Ibid*.

> duty to utilize the land in certain ways that advance our Original Instructions. All must take responsibility for the health of our Mother.[39]

The land gives rise to a community right. Beverly Jacobs, a Haudenosaunee law professor, said the "Indigenous rule of law, [is] our relationship to mother earth. We're talking about our ceremonies. We're talking about our governance systems. We're talking about our respect of mother earth and natural law – and it's a whole different worldview about our understanding of our relationship."[40] The Indigenous rule of law is grounded in the land, which creates a duty to protect the land. This duty is what supports the Haudenosaunee's direct actions.

The Ardoch Algonquin First Nation (AAFN) lists "the protection of the environment both locally and globally in keeping with the sacred responsibility to the earth"[41] as a guiding principle. They emphasize that "Algonquin people should regard the land as a living creature and should interfere as little as possible with its expressions."[42] Mr. Lovelace, a member of the AAFN, purported that Ontario laws conflicted with Algonquin law by allowing development prohibited under Algonquin law and criminalizing Algonquin protestors.[43] The Canadian legal system failed to deliver justice that included priorities articulated in Algonquin laws.[44] Thus, the AAFN protestors lost faith in the Canadian legal system.

Although these are just two specific examples of Indigenous legal orders, the idea of land giving rise to a legal duty of protection is widely applicable. Coupled with the five sources of Indigenous laws, this notion forms an Indigenous constitution. Since all Indigenous people comply with this constitution, it gives rise to a set of foundational laws or rules. These laws support an Indigenous rule of law that is separate and distinct from the Canadian rule of law.

B) The Canadian Rule of Law

In Canada, we are constitutionally bound by the rule of law.[45] The concept of the Canadian rule of law is stated in *Roncarelli v Duplessis* as a "fundamental postulate

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[39] "Land Rights Statement", online: *Protect The Tract* <www.protectthetract.com/land-rights-statement> [perma.cc/9KEH-7FF7].

[40] Patricia Hughes, "Two Tales About the Rule of Law", *Slaw* (25 February 2020), online: <www.slaw.ca/2020/02/25/two-tales-about-the-rule-of-law/> [perma.cc/B9XY-UVKW].

[41] Ardoch Algonquin First Nation, "Guiding Principles of the Ardoch Algonquin First Nation" cited in Newell, *supra* note 3 at 61.

[42] Ardoch Algonquin First Nation, "Principles of Development" cited in *Newell*, *supra* note 3 at 61.

[43] Newell, *supra* note 3 at 61–62.

[44] *Ibid* at 62.

[45] *Canadian Charter of Rights and Freedoms* at preamble, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...").

of our constitutional structure".[46] This version requires that power is applied uniformly, not arbitrarily. In *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, the motion judge, Justice Cunningham said,

> Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly, it is a dilemma of his own making.
>
> His apparent frustration with the Ontario government is no excuse for breaking the law. There can only be one law, and that is the law of Canada, expressed through this court.[47]

In this passage, Cunningham J suggests that there is a singular rule of law in Canada. This is not the case.

Injunctions offer a unique opportunity to look at the dispute between Canadian laws and the Indigenous legal perspectives. The crux of the issue is the previously irreconcilable rule of law debate. Although sentiments similar to Justice Cunningham's are still prevalent in Canada, under Canada's commitment to Truth and Reconciliation, section 35 promises can be upheld by reconciling the two rules of law that exist in Canada. The Aboriginal right to self-governance is constitutionally protected.[48] This right can be realized through adopting the Indigenous rule of law.

In *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council*,[49] Justice Marshall discussed the rule of law in the context of injunctions. He stated,

> This case deals with an issue that is arguably the pre-eminent condition of freedom and peace in a democratic society. It is upheld wherever in the world there is liberty. The Rule of Law is a principle not well known to people, but this case shows its importance, not just to the communities involved here but also the rule of law should be appreciated by all Canadians. The rule of law for our purposes can be simply stated. It is the rule that every citizen from the prime minister to the poorest of our people is equally subject to and must obey the law. It is a rule of general application. Whenever it is broken -- even in a small way, we say there is injustice. We see the unfairness. It is a rule that is woven into every part of our social contract to live peacefully together. Even a small tear in the cloth of our justice system spoils the whole fabric of society.[50]

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[46] *Roncarelli v Duplessis*, [1959] SCR 121 at 142 16 DLR (2d) 689.

[47] *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, 2008 ONCA 534 at para 40 [*Frontenac Ventures*].

[48] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[49] *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council* (2006), 82 OR (3d) 347, 2006 CanLII 63728 (ON SC).

[50] *Ibid* at paras 2–5.

Marshall J is clearly discussing the Canadian rule of law. It is unjust to continue thinking of the rule of law as solely a component of the Canadian legal system. In situations dealing with Indigenous people, dual conceptions of the rule of law are possible.

In *Manitoba (A. G.) v Metropolitan Stores Ltd*[51] and *RJR-MacDonald Inc v Canada (Attorney General)*[52] the Supreme Court of Canada created the three-part test for granting an injunction. At the first stage, the application judge determines whether the applicant has a "serious question to be tried", ensuring that the application is neither frivolous nor vexatious.[53] At the second stage, the applicant must show the court that they will suffer irreparable harm if an injunction is refused.[54] Finally, an assessment of the balance of convenience to identify which party would suffer greater harm from the granting or refusal of the injunction.[55]

Self-help remedies are direct actions wherein protestors form blockades or occupy a disputed parcel of land after an injunction is granted. The Canadian rule of law bans such remedies since they are an abuse of process.[56] Court power "began as a natural vehicle for assuring the efficiency and dignity of, and respect for the governing sovereign",[57] however, it is now simply respect for the court and its procedures. Such respect is "essential to the administration of justice",[58] and ensures a consistent judicial process. Within the injunction test, the Canadian rule of law maintains a monopoly on the interpretation of "self-help remedies." Canadian courts continue to discount arguments that the Indigenous rule of law supports self-help remedies,[59] resulting in segregated views of the rule of law.

The rule of law is multi-dimensional. As Laskin JA states in the *Henco* appeal, it includes "respect for minority rights" and "reconciliation of Aboriginal and non-Aboriginal interests through negotiations."[60] When negotiations fall apart, Indigenous people often feel direct action, such as erecting blockades, is necessary to

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[51] *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321 [*Manitoba*].

[52] *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*].

[53] *Manitoba*, *supra* note 51 at 127–28.

[54] *Ibid* at 128–29.

[55] *Ibid* at 129.

[56] See *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 42 [*Behn*].

[57] Ronald L Goldfarb, *The Contempt of Power* (New York: Columbia University Press, 1963) at 9–10.

[58] Newell, *supra* note 3 at 46.

[59] See e.g. *Behn*, *supra* note 56; *British Columbia and Power Authority v Boon*, 2016 BCSC 355 (which saw self-help remedies as an abuse of process); *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 [*Coastal GasLink*] (Justice Church did not accept the defendant's argument that Wet'suwet'en law and authority allows blockades until specific authorization is given by Chief Knedebeas).

[60] *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, 277 DLR (4th) 274, 2006 CanLII41649 (ON CA) at para 142 [*Henco*].

protect their lands.[61] If these actions are litigated, the court typically favours private corporations' economic interests over Indigenous interests. However, reconciliation of the two rules of law could import the multi-dimensional approach into negotiations.

Legal pluralism is the "simultaneous existence within a single legal order of different rules."[62] In Canada, colonial laws and traditional Indigenous laws can function together in the context of the rule of law and land protection. The rule of law can form the basis for democratic cross-cultural agreements because it creates principles of honour and integrity for those in power that can apply externally between cultures.[63] The similarities between the rules of law—a repulsion from arbitrary rule and the use of rules to uphold cultural, community, and other conditions of freedom (e.g. honour)—create the ability for a simultaneous existence.

III. The Balance of Convenience Step in the Injuction Test

Blockades are often used when private parties and Indigenous communities have a dispute.[64] Courts order interlocutory injunctions to force a party to do something or refrain from doing something before the matter can be brought to trial. Injunctions should only be granted when every effort to reconcile, negotiate, accommodate, and consult is exhausted.[65] The underlying motivation is to ensure an "effective relief can be rendered at the final trial."[66] The objective is to prevent harms from occurring before the case is heard, potentially too late to stop damage.[67] As stated above, to obtain an injunction, an applicant must prove three conditions: (1) there is a serious issue to be tried; (2) there would be irreparable harm caused if an injunction was not issued; and (3) the balance of convenience favours the granting of an injunction.[68]

The third step is where courts have run awry. The Canadian judicial system favours business interests over those of Indigenous people in the "balance of convenience" step in the injunction test. In *Haida Nation v British Columbia (Minister of Forests)* the Supreme Court of Canada acknowledged that

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[61] Newell, *supra* note 3 at 44.

[62] Andre-Jean Arnaud, "Legal Pluralism and the Building of Europe" cited in Borrows, "Indigenous Constitution", *supra* note 26 at 8.

[63] Morito, *supra* note 30 at 278.

[64] Examples of other blockades include the 1974 Ojibwa occupation of Anishinabe Park in Kenora, the 1990 Mohawk occupation in Oka, and the 2001 Secwepemc blockade of Sun Peak ski resort's road.

[65] *Frontenac Ventures*, supra note 47 at para 46.

[66] Jeffery Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law, 2000) at 14.

[67] *Platinex Inc v Kitchenumaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181, [2007] OJ No. 1841 at para 156 [*Plantinex*].

[68] *Manitoba*, *supra* note 51 at 127–29.

> 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.[69]

In her *Land Back* report, Dr Shiri Pasternak reviewed more than 100 Canadian injunction cases. She found that 76% of injunctions filed by corporations were granted whereas 82% of injunctions filed against corporations were denied.[70] This injunctive trend is evidence of what the Supreme Court of Canada acknowledged in *Haida Nation*. If balancing is not done appropriately, it suppresses Indigenous interests and goes against the rule of law because adjudication is not done impartially. Contrasting examples of Indigenous blockades and their resulting injunctions highlight the courts' differing applications of the injunction test.

A) Injunctions for Indigenous Communities

In *Canadian Forest Products Inc v Sam*, Justice Dillon suggested that when private parties seek injunctions that could negatively impact Indigenous communities, "a careful and sensitive balancing of many important interests should occur and terms carefully considered."[71] Initially, Canadian Forest Products Inc. ("Canfor") sought injunctive relief against Wet'suwet'en blockaders who protested logging on lands they asserted Aboriginal title over. The Wet'suwet'en nation countersued for an injunction preventing logging activity. The British Columbia Supreme Court (BCSC) granted the Wet'suwet'en their injunction because the logging would cause irreparable harm.[72]

Canfor submitted that the Wet'suwet'en blockaders "deliberately used unlawful means."[73] Canfor claimed the blockade created irreparable harm because it interfered with their ongoing business.[74] However, in *Zeo-Tech Enviro Corp v Maynard*, the BCSC confirmed that mere interference is insufficient—the loss must cause a business closure or loss of a market position.[75] To protect Wet'suwet'en cultural ties, Canfor said they would preserve culturally modified trees and the trapline trail.[76] However, the area in question is the last untouched piece of forest in the Kelah's (a Wet'suwet'en house) traditional territory. Preserving two culturally significant

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[69] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 23 at para 14.

[70] Yellowhead Institute, *supra* note 5 at 10.

[71] *Canadian Forest Products Inc v Sam*, 2011 BCSC 676 at para 75 [*Canfor*].

[72] *Ibid* at paras 129, 137.

[73] *Ibid* at para 101.

[74] *Ibid* at para 119.

[75] *Zeo-Tech Enviro Corp v Maynard*, 2005 BCCA 392 at para 43. For an example of closure/market loss, see *Tlowitisis-Mumtagila Band v MacMillan Bloedel Ltd*, [1991] 4 WWR 83, 53 BCLR (2d) 69 (BC CA) (many jobs would be lost, and no alternative logging sites were available).

[76] *Canfor*, supra note 71 at 124.

things out of an entire sacred area equates to sifting an archaeological site for artefacts then destroying the rest. Without the land, the area loses its cultural significance.

Preserving pristine areas for traditional Indigenous uses frequently clashes with economic interests related to resource development. In *MacMillan Bloedel Ltd v Mullin*, the British Columbia Court of Appeal recognized the unique nature of land in relation to traditional culture as an irreplaceable resource,[77] quoting Justice Muirhead in *Foster v Mountford and Rigby Ltd* (1976), where the court said, "monetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure."[78] In Wet'suwet'en culture, feasts are central to society and government.[79] They are used to demonstrate who will succeed to chiefdom and confirm relationships of people with their territory.[80] Moreover, various Wet'suwet'en houses and clans interact at an official level at the feasts.[81] As such, feasts enable and uphold Wet'suwet'en law. Damage to Kelah's, a Wet'suwet'en chief, traditional territory would inhibit Wet'suwet'en governance. Wet'suwet'en hereditary chiefs have jurisdiction over Wet'suwet'en territories, so if chiefs cannot be appointed, governance will fall apart. Since this was the last pristine area in Kelah's territory, the BCSC held that the requisite cultural depth was met. This is because the disputed area is the sole remaining location where Kelah could host a feast.[82] As such, an injunction was granted to Kelah.

In *Platinex v Kitchenuhmaykoosib Inninuwug First Nation (KI)*, the court granted an injunction to the KI.[83] Justice Smith decided the KI would suffer irreparable harm if Platinex's mining plans proceeded. This decision created the potential for using the rule of law to protect Aboriginal rights at the "balance of convenience step."[84] This is because Justice Smith placed weight on consultation, negotiation, accommodation, and reconciliation of Aboriginal rights. Injunctions are an equitable remedy, which, according to the Supreme Court of Canada, should account for the "social fabric" if it is to produce just results.[85] When looking at granting an injunction against a project that might have an adverse impact upon asserted Aboriginal rights, a careful and sensitive balancing of many important interests should occur, and terms

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[77] *MacMillan Bloedel Ltd v Mullin*, [1985] 3 WWR 557, 61 BCLR 145 (BC CA) at 21 [*Mullin*].

[78] *Foster v Mountford and Rigby Ltd (1976)*, 14 ALR 71 at 586.

[79] *Canfor*, supra note 71 at para 16 citing *Delgamuukw v British Columbia*, [1993] 5 WWR 97, 104 DLR (4th) 470 (BC CA) at 608.

[80] *Ibid*.

[81] *Ibid.*

[82] *Canfor*, supra note 71 at paras 18–20.

[83] *Plantinex*, *supra* note 67 at para 115.

[84] Newell, *supra* note 3 at 65.

[85] Graham Mayeda, "Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings and Coasts Awards on Environmental Protestors and First Nations" (2009) 6:2 J Sustainable Development L & Policy 143 at 154.

should be carefully considered.[86] This "social fabric" accounting imports a careful and sensitive approach to the Indigenous perspective at the third step.

Irreparable harm refers to "the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[87] A harm that cannot be quantified in monetary terms is the permanent loss of natural resources. It must be clear and not speculative,[88] and it must arise between the date of the grievance and the trial.[89] Additionally, the injury must be material, and parties could not be placed in the position in which they formerly stood if the activity progressed.[90] Irreparable harm influences the third balancing step.[91] As such, considerations of the nature of harm, and an unquantifiable, clear, material loss should influence the court at the balance of convenience stage.

Harm to the land is, in actuality, harm to Indigenous self-governance. Such harm cannot be cured by any amount of money. For example, when the Grassy Narrows' water became contaminated with mercury, the Nation's lawyer, John Olthuis, stated, "they realize that no amount of money can possibly compensate for the horror that they have gone through."[92] Anthropologist Anastasia M Shkilnyk who spent six months on the reserve agrees with this assessment, writing, "it is also probable that no amount of money will solve the problems of the Grassy Narrows people."[93] These observations demonstrate the unquantifiable nature of harm to a communities' land. Based on the Indigenous rule of law, such harm is extremely clear. Since it is unquantifiable, Indigenous applicants cannot be placed in the position they formerly stood if development continues without proper consultation and accommodation.

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[86] *Frontenac Ventures*, supra note 47 at para 43.

[87] *RJR-MacDonald*, supra note 52 at 341.

[88] *RJ Sharpe, Injunctions and Specific Performance* (Aurora, Ontario: Canada Law Book, 1992) at 2–26.

[89] See e.g. *Lake Petitocodiac Preservation Association Inc v Canada (Minister of the Environment)* (1998), 81 ACWS (3d) 88, 1998 CanLII 8003 (FC) at para 23.

[90] *Mullin*, supra note 77 at para 19–20.

[91] *BC (AG) v Wale* (1986), [1987] WWR 331, 9 BCLR (2d) 333 (BC CA), aff'd [1991] 1 SCR 62, [1991] 2 WWR 568. This case applied a two-step injunction test wherein the second and third steps were combined. This test has been applied elsewhere in Canada. Although the three-step test prevails and is the correct test, courts have held that between the two and three step tests there is no practical difference. As such, the second and third steps influence each other.

[92] "Compensation and "shame" for Grassy Narrows" (1985) at 00h:01m:25s, online (video): *CBC Archives* <https://www.cbc.ca/player/play/1747665575> [perma.cc/WL3M-MZGY].

[93] Anastasia M Shkilnyk, *A Poison Stronger Than Love: The Destruction of an Ojibwa Community* (New Haven, New York: Yale University Press, 1985) at 240.

The honour of the Crown requires that "it act as a committed participant in the undoubtedly complex process of consultation and reconciliation."[94] In *Frontenac Ventures*, the Ontario Court of Appeal endorsed the multidimensional approach to the rule of law taken in *Henco*.[95] In *Henco*, Laskin JA concluded that injunctive relief was not appropriate for private parties based on the rule of law because it involves respecting the rights of minorities and reconciling Aboriginal and non-Aboriginal interests.[96] In *Re: Resolution to amend the Constitution*, the Supreme Court of Canada used similar language, calling the rule of law "highly textured."[97] This approach ameliorates Indigenous interests in the third step. Accounting for the "social fabric" would entail considering the unique Indigenous perspective on the environment during the third step. Since the environment is inextricably linked to the Indigenous constitution that gives rise to the Indigenous rule of law, these systems of government should be included during the balance of convenience step.

The Supreme Court of Canada created "a clear line of Supreme Court jurisprudence, from Sparrow to Mikisew" that when constitutionally protected Aboriginal rights are asserted, injunctions sought by private parties should only be granted as the last possible resort.[98] However, an issue arising out of the case law is that injunctions are granted for Indigenous applicants mostly when the territory claimed is small or it is the only remaining area in their traditional lands. It is unfair to put such a dire threshold on Indigenous applicants.

B) Injunctions for Private Parties

Some commercial litigators have opined that the "criminal justice system will generally not intervene to prohibit civil disobedience" and therefore "an injunction has emerged as the only practical remedy available to project proponents who may be impacted by civil disobedience."[99] This conclusion is opposed to that of Laskin JA in *Henco*, but it is supported by recent jurisprudence and the injunctive trend. The judiciary widely accepts using civil injunctions as redress for parties impacted by civil disobedience.[100] Previously, courts favoured negotiation, reconciliation, and other solutions. For example, in *Platinex* Justice Smith ordered two rounds of negotiation before ultimately implementing a consultation protocol.[101]

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[94] *Frontenac Ventures*, supra note 47 at para 45.

[95] *Ibid* at paras 45–48.

[96] *Henco*, supra note 60 at 140–42.

[97] *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 at 805.

[98] *Frontenac Ventures*, supra note 47 at para 46.

[99] Rick Williams et al, "The New Normal? Natural Resource Development, Civil Disobedience, and Injunctive relief" (2017) 55:2 Alb L Rev 285 at 286.

[100] *Ibid* at 293.

[101] *Platinex, supra* note 67.

During the injunction test, irreparable harm carries weight at the balance of convenience step. Courts routinely find that proof of ongoing interference with a business is sufficient to establish irreparable harm. In *Hudson Bay Mining & Smelting Co v Dumas*, the Manitoba Court of Appeal said "[i]t is well settled that a finding of a complete blockade of a lawful business strongly suggests irreparable harm for the purposes of an injunction."[102] Such blockades are presumed to be against the public interest because they exemplify public disobedience. Therefore, they import the presumption that a court will grant an injunction as a method of compelling compliance with the law.

The balance of convenience analysis requires that an injunction is just or convenient. However, "[t]he elements usually considered include: examination of the status quo; the strength of the plaintiff's case; the relative magnitude of the harm; and whether the public interest is engaged."[103] The status quo used to be maintaining the land in its natural state, but now the status quo is accepting that project delays amount to a collateral attack on the permits and authorizations for the development activity.[104]

While Indigenous blockaders normally argue that protecting the environment is in the public interest, courts have viewed the fact that a government authority permitted a project as an indication that it is in the public interest to allow construction.[105] Although, in *Taseko Mines Ltd v Phillips* Justice Grauer said,

> The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished.[106]

Justice Grauer further stated that "it is also 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 … [which] weighs heavily in the balance of convenience."[107] However, this reasoning is often rebutted in the context of injunctions because injunctive relief proceedings are not the appropriate arena to evaluate whether the government's level of consultation was sufficient.[108] Boiling public interest down to consultation is not an appropriate evaluation of public interest.

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[102] *Hudson Bay Mining & Smelting Co v Dumas*, 2014 MBCA 6 at para 86.

[103] *British Columbia Hydro and Power Authority v Boon*, 2016 BCSC 355 at para 69.

[104] Williams et al, *supra* note 99 at 299. See also *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133.

[105] Williams et al, *supra* note 99 at 299.

[106] *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675 at para 66.

[107] *Ibid* at para 59–60.

[108] Williams et al, *supra* note 99 at 301.

Public interest encompasses much more than consultation. While there is not a separate test or unique preconditions for granting an injunction to applicants raising Aboriginal or treaty rights, there are aspects of development that impact Indigenous applicants in distinct ways. Courts pigeonhole Indigenous applicants in the balance of convenience stage when assessing what is in the public interest. In *Behn v Moultan Contracting Ltd*, the Supreme Court of Canada declared that

> To 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 disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. **The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights** and of the duty to consult as a defence.[109]

While *Behn* is not an injunction case, it addressed the ability of Indigenous defendants to assert treaty rights as a defence in civil suits. Disallowing a defence of a breach of treaty rights effectively excludes the unique Indigenous perspective from carrying any weight during the balancing process. In this sense, the court is favouring private parties in the third step.

In *Coastal GasLink Ltd v Hudson*, the court granted an injunction to Coastal GasLink Ltd. against Wet'suwet'en hereditary leaders and land defenders. [110] The defendants, members of the Dark House of the Wet'suwet'en, argued that Wet'suwet'en laws supported their actions. Their responsibility to the land, which is deep-seated in their laws, does create a right to protect the land under the Indigenous rule of law. However, the BCSC, in line with *Behn*, concluded that the blockade undermined the Canadian rule of law amounting to "a repudiation of the mutual obligation of Aboriginal groups and the Crown to consult in good faith."[111] *Coastal GasLink Ltd* and an earlier case, *Red Chris Development Company Ltd v Quock*,[112] both held that the Indigenous defendants could not use their laws as a defence. Part of the reasoning for these decisions was the fact that Indigenous laws are communally held, and individuals do not have standing to assert collective rights on behalf of an Indigenous community.[113]

Within the five sources of law discussed by John Borrows, there are both communal and individual rights.[114] Consequently, by lumping all Indigenous laws into

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[109] *Behn*, *supra* note 56 at para 42 [emphasis added].

[110] *Coastal GasLink*, *supra* note 59.

[111] *Ibid* at para 157.

[112] *Red Chris Company Ltd v Quock*, 2014 BCSC 2399.

[113] *Ibid* at para 39; *Coastal GasLink*, *supra* note 59 at para 159.

[114] Borrows, "Indigenous Constitution", *supra* note 26.

a singular understanding, rather than a nuanced interpretation that allows for a holistic view of Indigenous laws, courts weaken an Indigenous defendants' position. A singular understanding, where Indigenous laws are viewed as only giving rise to collective rights, means that Indigenous people cannot use treaty rights, including governance, as a defence. In turn, this strengthens the applicant's position, which is a component in the balance of convenience step.

Disallowing this defence perpetuates judicial favouritism of private parties at the balance of convenience step in the injunction test. This injunctive trend thus inhibits Indigenous people from practicing their inherent right of self-governance that arises, in part, from the land. Part of reconciliation is ensuring this right is recognized in Canada. Reconciliation is in the public interest; therefore, Indigenous self-governance is within the purview of public interest.

Private parties using injunctions against peaceful protestors converts the conflict into one between the courts and the protestors, which could bring the administration of justice into disrepute.[115] Kent Roach purports that "Aboriginal rights cannot be truly justiciable rights unless courts become comfortable with remedies for their violation."[116] One such remedy is negotiation.[117] The injunctive trend, as it stands now, circumvents negotiations. In this sense, it prevents Indigenous people from protecting and preserving their lands. As argued above, damage to Indigenous lands contravenes the Indigenous rule of laws. Negotiation is flexible and is well-suited for recognizing both Indigenous and Canadian rules of law. If the Indigenous rule of law comprised a third pillar in Canadian federalism, it would be in the public interest to protect the land, and thus the third step in the injunction test would be recalibrated.

C) Institutional Trust and Injunctions

In *MacMillan Bloedel Ltd v Simpson*, the British Columbia Court of Appeal held that necessity is not a defence for contempt since it can never "operate to avoid a peril that is lawfully authorized by the law."[118] This decision was affirmed by the Supreme Court of Canada. An argument could be made that, in granting an injunction, the court impairs Indigenous self-governance by allowing activities that harm traditional lands, which form the foundation of Indigenous laws. Following this reasoning, necessity may be a defence to direct actions. Moreover, the Canadian government supports implementing the TRC's Calls to Action,[119] one of which focuses on Indigenous self-

[115] Mayeda, *supra* note 85 at 158.

[116] Kent Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21:3 Man LJ 498.

[117] *Ibid*.

[118] *MacMillan Bloedel Ltd v Simpson* (1994), 90 BCLR (2d) 24, 89 CCC (3d) 217 (CA) at para 46, aff'd [1995] 4 SCR 725.

[119] For example, between 2007 and 2015 the Government of Canada provided about $72 million to support the TRC's work: "Truth and Reconciliation Commission of Canada" (last modified 19 September 2022),

governance. Specifically, TRC Call to Action 45.iv asks the federal government to "reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions."[120] This support needs to translate into the legal system since "the legitimacy of Indigenous governance solutions depends substantially on "a process of Indigenous choice"."[121] The injunctive trend prevents Indigenous choice by bullying protestors into silence. A solution for long-standing and difficult socioeconomic problems, such as resource development, is including Indigenous people and their governing systems in the process. This solution avoids top-down policy solutions, thereby increasing negotiation and cooperation.

Social and political institutions function more effectively when people trust each other. Trust facilitates cooperation, which increases growth in societies by creating efficient economic activities.[122] Many Indigenous people distrust both the Canadian legal system and governmental institutions.[123] Both Indigenous and Canadian rules of law protect the basic values of their respective societies and they share values that shape governance. To reconcile these rules of law, the original sentiment contained in the rule of law—freedom—must be recovered. This recovery is intimately tied to restoring trust relations. General trust exists between an individual and the population. Low levels of general trust "do not deliver enough positive outcomes to constituents—which then entrenches mistrust and institutional failure."[124] Failures in the Canadian resource context look like injunctions.

According to Francis Fukuyama, a political economist, trust "arises when a community shares a set of moral values in such a way as to create expectations of regular and honest behaviour."[125] The injunctive trend eroded Indigenous trust in the Canadian legal system. Trust is predictive of economic and social success, [126] and as such, rebuilding Indigenous governance systems is a potential solution. If Indigenous governance systems increase, and interact with Canadian governance, then trust can re-enter the relationship. Call to Action 46.ii calls for the "repudiation of concepts used

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online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525> [perma.cc/S3QX-ZPSN].

[120] Trust and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (2015) at 5, online (pdf): <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf> [perma.cc/H39G-S5WF].

[121] Cornell, *supra* note 14 at 13.

[122] William Nikolakis & Harry Nelson, "Trust, Institutions, and Indigenous self-governance: An exploratory study" (2018) 32 Wiley Governance 331.

[123] Royal Commission on Aboriginal Peoples, *supra* note 9 at Chapter 14.

[124] Nikolakis & Nelson, *supra* note 122 at 332.

[125] Francis Fukuyama, *Trust: The social virtues and creation of prosperity* (New York: Free Press, 1995) at 153.

[126] *Ibid*.

to justify European sovereignty over Indigenous lands and peoples…and the reformation of laws, governance structures, and policies within their respective institutions that continue to rely on such concepts."[127] The Canadian judiciary's favouritism of economic interests over Indigenous interests affects the "balance of convenience" step. In this way, Canadian courts rely on concepts that justify European sovereignty over Indigenous lands.

William Nikolakis and Harry Nelson, resource development professors at UBC, studied three First Nation communities who chose different pathways to rebuild their governing bodies. Their research explored whether trust created more robust institutions. During an interview in the study, an Indigenous elected councillor discussed the challenges of working under the *Indian Act*. They stated "[a] really big windstorm at our village blew all these trees down. We couldn't even move the trees until we got permission from the Minister in Ottawa."[128] Another councillor described the effect of outside control on political trust, saying "[p]eople that don't feel involved in the decisions of their government don't trust their government, no matter the quality of the decisions they make."[129] These testimonies demonstrate that trust in governance under the *Indian Act* is low. This relates to the injunctive trend because low institutional trust translates to low expectations of regular and honest behaviour between Indigenous people, the Canadian legal system, and government. Society cannot function properly without trust in law and governance.

Widely adopting Indigenous governance systems could have two impacts. First, it would improve the quality and effectiveness of resource development negotiations because Indigenous perspectives would be represented through government officials rather than through the consultation process. This form of negotiation could avoid the need for injunctions while simultaneously ameliorating Indigenous self-governance. Second, it would improve trust in the Canadian legal system because Indigenous laws would be promoted by Indigenous governance systems. Since the Supreme Court favours negotiation over litigation in the context of Aboriginal treaty and rights,[130] wide adoption would likely be supported.

In *R v Sparrow*, the Supreme Court of Canada stated that "the relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[131] Based on this relationship, adopting the Indigenous rule of law is legitimate and would facilitate the operation of Indigenous systems of governance in Canada. If Canadian and Indigenous laws ran in tandem, injunctions may not occur. At the very least, the injunctive trend would improve because the two

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[127] Truth and Reconciliation Commission of Canada, *supra* note 120 at 5.

[128] Nikolakis & Nelson, *supra* note 122 at 343.

[129] *Ibid*.

[130] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 19 at para 207 [*Delgamuukw*].

[131] *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 at 1108.

systems would work together on resource development occurring on traditional lands. This cooperation would increase trust, thereby increasing the effectiveness of both systems of governance. Increasing trustworthiness creates cross-cultural freedom thereby repairing the divergence of the rule of law.[132]

IV. Self-Governance, Protesting, and Promoting Indigneous Laws

A) Elected vs Hereditary Chiefs

The *Indian Act* is an ongoing act of colonialism. The Act created "status Indians"[133] who are members of a Band,[134] and prescribed Band Councils to govern these Bands on reserves.[135] John Borrows critiqued the *Indian Act*, writing

> The federal government benefits from legislating over Indians because it allows them to set the parameters of our lives. This frees them from the harder work of engaging real participation and consent. The *Indian Act* makes it easier to control us: where we live, how we choose leaders, how we live under those leaders, how we learn, how we trade, and what happens to our possessions and relations when we die.[136]

Band councils are particularly challenging as they tell Indigenous communities how to organize and exercise authority.[137] As a by-product of this imposition, many community members do not accept this governing structure as their own.[138] An elected chief and council comprise band councils, which typically have two-year terms. Council power is constrained by the federal government; therefore, they conform to Canada's legal system.[139]

Hereditary chiefs must manage and conserve the resources on their territory.[140] Hereditary chieftaincies are passed down intergenerationally and are

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[132] Morito, *supra* note 30 at 280-81.

[133] *Indian Act*, *supra* note 2, ss 5-6.

[134] *Ibid*, s 2(1).

[135] *Ibid*, s 74.

[136] John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act" (2008) at 5, online (pdf): *National Centre for Indigenous First Nations Governance* <https://fngovernance.org/wp-content/uploads/2020/05/john_borrows.pdf> [perma.cc/JM6B-DVY8].

[137] *Indian Act*, *supra* note 2, ss 74–83.

[138] Cornell, *supra* note 14 at 9.

[139] Nikolakis & Nelson, *supra* note 122 at 334.

[140] Mills, *supra* note 19 at 135.

rooted in traditional forms of Indigenous governance.[141] Although band chiefs are recognized by and accountable to the Canadian government, hereditary chiefs "inherit the title and responsibilities according to the history and cultural values of their community."[142] Consequently, hereditary chiefs have cultural authority that elected chiefs do not. Such authority allows hereditary chiefs to make decisions on behalf of their nations. Hereditary chiefs uphold a nation's traditional customs, legal systems, and cultural practices. Therefore, the Canadian government must recognize hereditary chiefs' inherent power for the Indigenous rule of law to be adopted in Canada.

Internal conflict often occurs in a nation between hereditary chiefs and band councils.[143] This tension grows because the written laws imposed by the *Indian Act* and traditional laws are often incongruous. Consequently, reform is happening, in many different forms and degrees. One example of reform is moderate institutional building, which maintains current elected governance with increased freedom. The *First Nations Land Management Act*[144] facilitates institutional reform, which provides greater management powers over on-reserve land use. A second example is a hybrid between elected and traditional governance wherein traditional practices are integrated into "Western" styled governance under the *Indian Act*. Adopting custom election codes that allow communities to have greater autonomy over their elections and the duration of political terms or creating permanent roles for hereditary leaders and elders.[145] A third example is intensive reforms, such as declaring title or negotiating self-governance agreements, discard elected Band Councils, leading to the establishment of Indigenous constitutions, legislatures, executives, and judiciaries that work in harmony with Canadian laws.[146]

Political trust is the trust people have in their governments. As discussed in the previous section, the injunctive trend decreases Indigenous trust in the Canadian legal system. Rectifying this mistrust will take time and solutions will differ across Indigenous nations and communities. The mode—moderate, hybrid, or intensive—of self-governance implementation is in part informed by the level of disenfranchisement in each community. One community member from Nikolakis and Nelson's study discussed the restrictive *Indian Act*. They said, "INAC [Indian and Northern Affairs

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[141] Bob Joseph, "Hereditary Chief definition and 5 FAQs" (1 March 2016), online (blog): *Indigenous Corporate Training Inc* <www.ictinc.ca/blog/hereditary-chief-definition-and-5-faqs> [perma.cc/LVL3-RLFP].

[142] *Ibid*.

[143] For example, the Coastal GasLink pipeline that passes through Wet'suwet'en territory. See The Canadian Press, "Wet'suwet'en hereditary chiefs rally in Vancouver against BC natural gas pipeline", *Vancouver Sun*, (15 August 2022), online: <https://vancouversun.com/news/local-news/wetsuweten-hereditary-chiefs-rally-in-vancouver-against-b-c-natural-gas-pipeline> [perma.cc/5FC6-5TYW] ("Wet'suwet'en hereditary chiefs have opposed the pipeline for years, while 20 elected First Nations band councils along the route have signed off on the project").

[144] *First Nations Land Management Act*, SC 1999, c 24.

[145] Nikolakis & Nelson, *supra* note 122 at 335.

[146] *Ibid* at 336.

Canada] and the *Indian Act* has done nothing for our native people. ... Our vision is that we are going to be a self-sustaining village of people."[147] However, to transition outside the *Indian Act* through treaty, their community would only get 5% of their land back.[148] As such, their vision departs from what is practical, which influences what method of reform is available to their community.

Another tension in selecting governance reform arises between elected councils and hereditary chiefs. In some communities, the distrust of their elected council is high and thus decreases trust in moderate or hybrid legal system reform. Different patterns of institution building have different outcomes. As such, different nations will have different systems. Any reform is better than maintaining the status quo since "rules that are freely chosen—even if borrowed—generally work better than rules that are imposed from outside. Constitutions gain strength through the free consent of the governed."[149] An Indigenous constitution, therefore, gains strength through any amount of governance system reform. This would increase trust within communities where the trustworthiness of current elect governance is an issue.

The issue for resource extraction is knowing who to consult and work with. This issue is apparent in both the Coastal GasLink and Trans Mountain pipeline projects wherein elected councils approved the project, but hereditary chiefs did not.[150] Rather than getting approval from both levels of government, the Canadian government and private developers circumvented the hereditary level of governance[151] which, as discussed above, is the national level of government in Indigenous nations. Hereditary chiefs maintain and uphold traditional laws. By ignoring their approval during consultation, the consultation was not done in good faith. Circumventing the Indigenous legal system in this way is a continuation of colonialism. When Coastal GasLink Ltd. obtained an injunction against Wet'suwet'en land defenders, the court denied the defence of improper consultation during injunction in addition to disallowing Wet'suwet'en laws.

B) Protesting

Following injunctions, land defenders have continued their presence at blockades.[152] Their ongoing presence indicates that, regardless of the injunctive trend and denial of

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[147] *Ibid* at 339.

[148] *Ibid* at 340.

[149] Cornell, *supra* note 14 at 12.

[150] The Canadian Press, *supra* note 143; Matt Simmons "The Complicated Truth About Pipelines Crossing Wet'suwet'en Territory", *The Narwal* (5 October 2022), online: <thenarwhal.ca/coastal-gaslink-map-wetsuweten> [perma.cc/74KF-V52].

[151] *Ibid*.

[152] In 2020, a year after the injunction, the Unist'ot'en Camp was still in place. See Leyland Cecco, "Canada: Wet'suwet'en Activists Vow to Continue Pipeline Fight After Arrests", *The Guardian* (10

their legal systems, the Wet'suwet'en are not giving up. Following the *Coastal GasLink Ltd* decision, Wet'suwet'en leaders and supporters took part in solidarity actions across Canada.[153] The Wet'suwet'en hereditary chiefs opposed the pipeline proposals.[154] Pursuant to *Delgamuukw*, the court recognized that Wet'suwet'en houses and clans uphold the authority of the hereditary system in traditional territories.[155] Each house group has a house chief and supporting chiefs who assist in decision making. Wet'suwet'en decision-making requires the collective house group, comprised of all the house chiefs, to discuss important matters and come to a consensus. These decisions are ratified in the feast hall.[156]

The Gidimt'en checkpoint was erected in Gidimt'en territory (a Wet'suwet'en house) after unanimous ratification by the house chiefs.[157] This checkpoint is evidence of Wet'suwet'en self-governance in action. As such, protesting injunctions is an example of implementing the Indigenous rule of law. These direct actions are informed by the general Indigenous rule of law that arises from the land and specific Wet'suwet'en laws. The court previously recognized the hereditary governance system in *Delgamuukw*, yet the court denied it as a defence during the *Coastal GasLink Ltd* injunction.[158] This further erodes trust between Indigenous nations and Canada which, as previously discussed, negatively impacts social and economic outcomes for everyone.

Canada might disagree that denying Wet'suwet'en hereditary chiefs' jurisdiction brings the Canadian judicial system into disrepute, because Coastal GasLink Ltd. received approval for the pipeline from the elected chiefs. Yet, the Wet'suwet'en hereditary chiefs argue that the elected chiefs only retain jurisdiction over their respective band's reserve.[159] In this sense, elected chiefs have local authority

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February 2020), online: <www.theguardian.com/world/2020/feb/10/canada-protest-indigenous-wetsuweten-pipeline> [perma.cc/FA7H-CP83].

[153] "The Wet'suwet'en Conflict Disrupting Canada's Rail System", *BBC News* (20 February 2020), online: <www.bbc.com/news/world-us-canada-51550821> [perma.cc/5SVW-WJ6F].

[154] The Canadian Press, *supra* note 143.

[155] *Delgamuukw*, *supra* note 130 at para 188.

[156] Mills, *supra* note 19 at 43.

[157] On December 16, 2018 the House Chiefs made the decision to support the checkpoint: Gidimt'en, Press Release, "Wet'suwet'en Hereditary Chiefs erect new checkpoint on Gidimt'en (Cas Yikh) Territory" (17 December 2018), online (pdf): <https://static1.squarespace.com/static/5c51ebf73e2d0957ca117eb5/t/61664eec879be543a232b02a/1634094829043/PR+DEC+17+2018.pdf> [perma.cc/6P48-TBD4].

[158] *Coastal GasLink*, *supra* note 59 at para 155 ("There is no evidence before me of any Wet'suwet'en law or legal tradition that would allow blockades of bridges and roads or permit violations of provincial forestry regulations or other legislation. There is also no evidence that blockades of this kind are a recognized mechanism of dealing with breaches of Wet'suwet'en law).

[159] *Ibid* at para 67. See also Bob Joseph, "Hereditary Chiefs vs. Elected Chiefs: What's the difference (and why it's important)" (17 May 2021), online (blog): <www.ictinc.ca/blog/the-difference-between-hereditary-chiefs-and-elected-chiefs> [perma.cc/6HDL-2H3T].

whereas hereditary chiefs have national and regional authority. Coastal GasLink Ltd.'s approval, and the Canadian government's free, prior, and informed consent from the consultation process, was not ratified at the national level of governance. Post-injunction protesting is evidence of the need to reconcile the Canadian government's recognition of hereditary and elected chief jurisdiction.

Another notable action is that of the Tiny House Warriors. The warriors assert Secwepemc law provides jurisdiction over land in the pipeline's path. However, the elected Chiefs state that they gave their nation's free, prior, and informed consent to build the pipeline.[160] Kanahus Mannuel, one of the Tiny House Warriors, rejects their authority because, in her opinion, their power is limited to their reserves, not the whole of the traditional territory.[161] The Tiny House Warriors are in a similar position to the Gidimt'en checkpoint.

If elected Chiefs are the point of consultation and hereditary chiefs are excluded, the duty to consult is not being done in good faith. Under Indigenous self-governance, hereditary chiefs have superior powers of jurisdiction. As such, post-injunction protesting is an assertion of specific Indigenous nation's laws and the general Indigenous rule of law.

C) Promoting Indigenous laws through self-governance and the rule of law

A promising example of rebuilding an Indigenous governance system is the Ktunaxa Nation in southeastern British Columbia. The Ktunaxa utilized the treaty process to reorganize its governing systems.[162] Four Ktunaxa bands, previously treated as separate communities by Canada, linked together, thereby reconstituting themselves. The new governing system allows the four bands to specify and divide authority between the Nation as a whole and its communities pursuant to their own ideas. This process sheds the fragmented administrative structure imposed by Canada, replacing it with the Ktunaxa vision. The Nation's elders "often refer to the past hundred and fifty or so years as a time when the Nation 'went to sleep' … The process of building a modern Ktunaxa government is likened to 'waking up'"[163] The Nation is free to pursue their own vision under their own laws, which empowers the Ktunaxa as a community. As a result, the ability to self-govern ameliorates self-determination.

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[160] "Chiefs Urge Tiny House Warriors to end pipeline protest camp in BC's central Interior", *CBC News* (2 July 2020), online: <www.cbc.ca/news/canada/british-columbia/tmx-pipeline-protest-tiny-house-loring-blue-river-1.5635691> [perma.cc/5HRK-BU8D].

[161] *Ibid*.

[162] See "Ktunaxa Nation Rights Recognition & Core Treaty Memorandum of Understanding" online (pdf): <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ktunaxa_rights_recognition__core_treaty_mou_-_dec_2018.pdf>.

[163] Cornell, *supra* note 14 at 11.

Conclusion

While negotiations and land claims often move slowly, private corporations stake resource development claims quickly. This disproportionate speed jeopardizes Indigenous peoples' relationship to the land. Such a relationship is essential for Indigenous laws and, therefore, Indigenous self-governance. If development continues to destroy land by bulldozing through Indigenous protestors, it will fundamentally harm Indigenous peoples' ability to self-govern. The Canadian legal system's injunctive solution is not functioning as it should and as a result, injunctions inherently harm Indigenous self-governance.

Under the Indigenous rule of law, Indigenous people are required to protect the land. Courts continually argue that self-help remedies are outside Indigenous legal traditions. However, if blockades were interpreted as an Indigenous person exercising the rights of the land under their rule of law rather than a person acting in civil disobedience, injunctions would be decided differently. This understanding strengthens defences against the "strength of the plaintiffs' case" during the balance of convenience step.

When a legal system does not function for all its members equally, distrust in the system grows. Moreover, Indigenous people have their own governance systems in which they trust. Despite colonialism's attempt to assimilate Indigenous people, both Canadian and Indigenous laws exist. These should be reconciled to include both system's interpretation of the rule of law. In the meantime, the rule of law should, at the least, become more nuanced and inclusive given the land's precious nature.