Expert Opinion

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Attention: Aliah El-Houni, Community Justice Collective, and Meaghan Daniel, Barrister and Solicitor

This opinion was requested by Aliah El-Houni, one of the lawyers for the defendant, Skyler Williams, in the case of *Foxgate Developments Inc. v. John Doe et al*. The purpose of this report is to provide my opinion on legal trends with regard to injunctions and First Nations people. I have structured the report in accordance with the questions I was instructed to answer.

Expert Qualifications

1. Please describe your education and your professional and academic credentials. Please also provide your current curriculum vitae.

I obtained a PhD from the University of Toronto in 2013 and then held a SSHRC Postdoctoral Fellowship at two institutions: Columbia University in 2013 and 2014, before moving to Osgoode Hall Law School at York University from 2014 to 2016. I began my career as an Assistant Professor at Trent University in 2016 at the School for the Study of Canada.

My contributions to legal and policy analysis within academia include a book, dozens of book chapters, and peer reviewed articles on the topic of Aboriginal land claims, Indigenous jurisdiction, and the criminalization of Indigenous land defence in Canada. My book on Algonquin opposition to the federal land claims process, *Grounded Authority: The Algonquins of Barriere Lake Against the State*, published in 2017 by the University of Minnesota Press, won the Canadian Studies Best Book award and the Western Political Science Association's Clay Morgan Award for best book in environmental theory, as well as receiving honourable mentions from the American Political Science Association and the Anthropology and Legal Association.

I also focus my efforts on public education, and have written opinion pieces for national Canadian newspapers, as well as providing interviews for print, radio, and television media.

Finally, I am the co-founder, and former Research Director of Yellowhead Institute (2018-2021), a First Nations-focused research centre in the Faculty of Arts at Toronto Metropolitan University, established in 2018. Yellowhead produces research and provides a platform for Indigenous analysts, leaders, and academics to contribute critical policy and legal analysis on matters impacting Indigenous governance across the country.

2. What is your current position?

I took up my current position as an Assistant Professor of Criminology at Toronto Metropolitan University in 2017.

3. Please describe your current and past research on criminalization of Indigenous peoples who assert jurisdiction to their lands and legal trends with regard to injunctive relief.

I have written a number of articles on areas concerning the criminalization of Indigenous peoples who assert jurisdiction to their lands. This scholarship includes:

- Pasternak, S., Ceric, I. (2022) (submitted) "'The Legal Billy Club': Injunctions, First Nations, and Economic Rights." *Indigenous Law Journal.*
- Pasternak, S. (2022) "'Why does a hat need so much land?'" In *Allotment Stories: Indigenous Responses to Settler Colonial Land Privatization*, eds. Daniel Heath Justice and Jean M. O'Brien. (Minneapolis: University of Minnesota Press).
- Pasternak, S. (2021) "Jurisdiction." In *Routledge Handbook of Law and Society*, eds. Eve Darian-Smith, Kamari Clarke, Prabha Kotiswaran and Mariana Valverde. (New York: Routledge Press).
- Pasternak, S., Schabus, N. (2019) "Privatizing Uncertainty and Socializing Risk: Indigenous Legal and Economic Leverage in the Federal Trans Mountain Buy-Out." *University of New Brunswick Law Journal* 70, 209-231.
- Pasternak, S., Mazer, K., Cochrane, D.T. (2019) "The Financing Problem of Colonialism: How Indigenous Jurisdiction is Valued in Pipeline Politics," In *#NoDAPL and Mni Wiconi: Reflections on Standing Rock*, eds. Jaskiran Dhillon and Nick Estes. (Minneapolis: University of Minnesota Press).
- Pasternak, S., Dafnos, T. (2018) "How does a settler state secure the circuitry of capitalism?" *Environment and Planning D: Society and Space* 36:4, 739–757.
- Pasternak, S. (2017) *Grounded Authority: The Algonquins of Barriere Lake Against the State.* (Minneapolis: University of Minnesota Press).
- Pasternak, S. (2017) "Blockade: A Meeting Place of Law." In *Whose Land is it Anyway? A Manual for Decolonization*, eds. Peter McFarlane and Nicole Schabus (Vancouver: Federation of Post-Secondary Educators of BC).
- Pasternak, S. (2016) "A Tale of Vision and Violence: The Algonquins of Barriere Lake, the Trilateral Agreement, and the Land Claims Policy." In *Aboriginal History: A Reader, 2nd Edition,* eds. Kristin Burnett and Geoff Read. (Oxford, UK: Oxford University Press).
- Pasternak, S. (2014) "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" *Special Issue: Law & Decolonization*, *Canadian Journal of Law and Society* 29:2, 145-161.
- Pasternak, S., Collis, S., Dafnos, T. (2013) "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims," *Canadian Journal of Law and Society* 28:1, 65-81.

I have also studied the relevant literature in the field, including the following materials:

- Irina Ceric, "Beyond Contempt: Injunctions, Land Defense and the Criminalization of Indigenous Resistance," *The South Atlantic Quarterly* 119:2, April 2020.
- John Hunter, "Advancing Aboriginal Title Claims After Delgamuukw – The Role of the Injunction" in *Litigating Aboriginal Title* (Vancouver: The Continuing Legal Education Society of British Columbia, 2000).

- Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto, Ontario: Canada Law Book Limited, 1983).
- Naiomi Metallic, Injunctions against Pickets and Protests in the 21st Century: It's Time to Stop Applying the Three-Part RJR-MacDonald Test, LLM Paper, (2015) [unpublished manuscript].

In 2019, I led the first comprehensive national study on injunctions and First Nations in Canada. This study was published by the Yellowhead Institute in a report titled *Land Back: A Yellowhead Institute Red Paper*, released in October 2019.

Changing Use of Injunctions, Increased Reliance on Injunctions by Extractive and Development Corporations and the Legal Trends in the Case Law with regard to Injunctions and First Nations people

4. Please evaluate and provide your opinion as to the changing use of injunctions, and in particular, the increased reliance on injunctions by extractive industries or development corporations against First Nations people. Please also evaluate and provide your opinion as to the legal trends in the caselaw with regard to injunctive relief sought by and against First Nations people.

1. The *Land Back* study on injunctions discussed above encompassed the timespan between 1973 and 2019 and had a national scope. We examined caselaw from trial courts and appellate courts, provincial or territorial courts, and federal courts. A copy of the injunction study dated October 2019, is attached to this my report as Exhibit A at 29.

2. The empirical component of the study set out to examine:

    1) What has been the rate of injunctions granted or denied to First Nations when they file an action against corporations or governments?
    2) What has been the rate of injunctions granted or denied to corporations and governments when they file an action against First Nations?
    3) What are the triggers for injunctions involving First Nations, governments, and corporations?
    4) What type of injunctions were sought and obtained?

3. Three legal researchers coded each case according to a strict set of peer reviewed criteria and the coding dataset was verified for each case by an external legal advisor. In rare cases, First Nations were found to be 'indirect targets' and counted in the dataset (i.e., where First Nations have been heavily involved and targeted but not directly named in the injunction).

4. In September 2020, the Yellowhead Institute updated the data to incorporate new injunction cases between October 2019 and September 2020. A true copy of these updated figures, is attached to my report as Exhibit B**.**

Changing Use of Injunctions

5. The research described above was provoked by years of anecdotal evidence from First Nations who experienced failure in the courts when facing corporations in injunction

proceedings. This perception of inequity appeared to be validated by the court record. But it required empirical verification and analysis to eliminate the possibility of selection bias.

6. This research builds on the work of First Nations to bring this matter of justice to light regarding injunctions. For example, in 2002, several Indigenous groups brought the issue of injunctions to the attention of the United Nations Committee for the Elimination of Racial Discrimination. They filed an Urgent Action Early Warning submission, arguing that "interim relief measures, such as injunctions (which do not have to consider Aboriginal Title issues in depth), are used to stop Aboriginal people from exercising their Aboriginal Title and rights." A true copy of this submission is attached to my report as Exhibit C.

7. In reviewing the literature on the changing use of injunctions, I found the following:

a) The development of s. 35(1) jurisprudence, which interpreted Aboriginal constitutional rights enshrined in the 1982 *Constitution Act*, ironically deprived First Nations of access to injunctions, despite a prior period of successful defence of Indigenous land rights using this legal tool.

b) These new constitutional protections greatly complicated – and therefore lengthened – the duration of time necessary to determine the merits of a case invoking Aboriginal or treaty rights, giving priority to other elements of the injunction test. The lengthening of trials specifically increased the *inconvenience* to business operations, therefore favouring their interests in the "balance of convenience" test.

c) 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 Aboriginal rights, once expected to secure comprehensive rights to land, water, and resources. The s. 35(1) case law demonstrated that there were pathways around these rights and that federal and provincial legislation could infringe Aboriginal claims.

d) The uncertainty that once favoured First Nations asserting constitutional rights in injunction cases was now often interpreted by courts as an ambivalent set of rights. These rights, moreover, were often yet to be proven in title and rights litigation. However, title and rights litigation could take years and millions of dollars to settle, while injunctions were often sought (or defended) by First Nations to protect their rights in the interim.

e) One solution to this problem came in the form of another s. 35(1) right, meant to protect Aboriginal rights even in the pre-proof stage of the assertion of these rights: the Crown's duty to consult and accommodate. In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, the Supreme Court of Canada (SCC) advised that rights to consultation *rather than injunctions* should be pursued by First Nations because the duty to consult would better protect their interests (see para. 14).

f) Reasoning the need for this legal shift, the Court laid out four limitations to injunctions for asserting Aboriginal rights: 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 cites John Hunter's argument (2000) that the balance of convenience test favours industry and jobs, prejudicing the courts against First Nations before the merits can be determined; and fourth, stop gap measures like injunctions should not be used for complex matters, which must be given adequate time in courts to resolve.

g) Since *Haida Nation* came down, however, it has not reduced the number of injunctions involving First Nations, nor necessarily better protected them in proceedings. If anything, we could conclude that often failures on the part of governments to comply with the duty to consult have not been seen by the courts to constitute "irreparable harm" – a key injunction test.

h) The SCC tried to steer land claims out of the injunction arena in *Haida Nation*, wisely counselling on the inherent limitations and the dangers of bias embedded in the tripartite test. But this warning backfires when – of necessity – First Nations seek urgent relief or are faced with plaintiffs seeking to pursue unwanted development or extraction on their lands. Judges can then interpret *Haida Nation* to reason that First Nation cases should be heard in different proceedings, as claims for rights and title, and this weighs against them at trial.

i) Alternatively, judges may attempt to adjudicate First Nations' rights and title based on the merits of scant evidence, especially where temporary injunctions are granted without trial. This means, paradoxically, that the denial of injunctive relief to First Nations and the success of corporations and governments seeking injunctive relief against them, constitutes a *de facto* resolution of disputed land claims. Therefore, the *Haida Nation* s. 35(1) precedent has proven to work against First Nations seeking injunctive relief.

8. In the injunction cases we coded, 60 percent referred to Aboriginal rights, treaties, and/or title in First Nation motions or as defences against injunctions. Almost a third deal with the legal question of consultation.

9. The propositions in this report are born by the final tabulation of the empirical data found in the Yellowhead injunction study. Specifically, in examining every injunction brought by, or brought against First Nations people (including the small number of those cases where First Nations were 'indirect targets' as outlined in para 3 above), approximately 90 percent of the injunctions reviewed were interlocutory or interim injunctions, and nearly 100 percent of injunctions were triggered by development or extraction (defined and coded as conflict over permitting, licensing, mining, oil, gas, pipelines, fracking, forestry, fishing, roads, rail, bridges, development – urban, housing, recreational / tourism, and hydroelectric development). A true copy of this submission is attached to my report as Exhibit D.

Issues with the tripartite test in the *RJR MacDonald* precedent

10. *RJR MacDonald* set out a tripartite or "three-pronged" test for injunctions that first establishes whether there is a serious issue to be tried. Once this relatively low threshold is passed, the court must consider whether the matter will cause "irreparable harm" to the

party seeking relief, and whether it is the most equitable way to protect the rights of the party, pending trial, without unfairly disadvantaging another's rights (or the "balance of convenience" test).

11. Legal scholars have argued that the threshold of *serious issue to be tried* offers insufficient protection from those alleging harms beyond the strictly economic realm. For example, Listuguj Mi'gmaq scholar Naiomi Metallic argues that if a strong *prima facie case* was required in the first prong of the injunction test, irreparable harm and balance of convenience would be less relevant because constitutionally protected rights could be raised.

12. The exception to the first part of the *RJR-MacDonald* test, which states that "when the result of the interlocutory motion will in effect amount to a final determination of the action" a judge should undertake a "more extensive review of the merits of the case" while determining if there is a serious issue to be tried (pp. 338-39), is also rarely applied in injunction cases involving First Nations.

13. While *Metropolitan Stores* in 1987 and *RJR-MacDonald* in 1994 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 that in matters concerning "public interest" an equitable balance can exist between protecting the interests of distinct groups in society and "concerns of society generally."

14. For First Nations, already struggling to assert their inherent jurisdiction against the non-justiciable nature of Crown sovereignty, the paramountcy of the "public interest" consideration further prejudices the court against them. The public interest is tied to the expectation that injunctions must maintain or preserve the *status quo*. The "status quo" represents the "existing legal regime or the state of affairs on the ground" (Hunter 2000 at 1.3.04), which can include activities like logging or development. For Indigenous people, these activities - and their statutory protection - can preserve a circumstance of injustice and destructive occupation.

15. The "existing legal regime" refers to statutory processes that are themselves often subject to dispute by Indigenous peoples. It is the "status quo" of these legal frameworks that act as prejudices against First Nations in injunction proceedings with corporations and governments.

16. "Public interest" arguments are also used as an interpretive framework for the tripartite test. Challenging provincial regulation - even where it may violate Indigenous rights - has been considered by courts to go against the public interest because of the high financial cost to companies and local regional economies.

17. For example, in *Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council,* 1989 CanLII 2764 (BC CA), citing the importance of "public interest" in *Metropolitan Stores,* Esson J.A. writes 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" (para. 55). Thus, the public interest argument here suffocates the possibility of challenging provincial regulation that is alleged to violate the Gitksan Nation's rights.

18. In over 60 cases I analyzed for a recent article, the interpretive framework of the public interest is used without due consideration for the highly political process of provincial regulation and authorization, which is often treated as a neutral, irrefutable fact underlying the case. This is surprising, given how provincial authority has been successfully challenged in dozens of Aboriginal rights and title cases in ways that protect Indigenous jurisdiction in the face of Crown and third-party interests.

Impacts of the RJR MacDonald test on First Nations

19. Indigenous peoples have unique constitutional status within the Canadian state, and unique constitutional rights enshrined under s. 35. Non-Indigenous claimants do not have the same constitutional rights to underlying title, preserving cultural practice and livelihood, or rights of self-determination at play.

20. Thus, the *RJR* test has a disproportionate impact on Indigenous peoples by affecting Indigenous individuals in a qualitatively different way. Specifically, the test impacts the collectively held inherent title and rights of First Nations, as affirmed by *Delgamuukw* (1997) and *Tsilhqot'in Nation* (2014).

21. Injunction proceedings *de facto* decide matters of constitutional rights for Indigenous peoples, creating breaches of fiduciary obligation. But these *de facto* resolutions of Aboriginal rights also raise critical *access to justice* issues, concerning Indigenous peoples' ability to access funds to bring lengthy litigation against the Crown to adjudicate their rights and title.

22. New federal legislation also enshrines the United Nations Declaration on the Rights of Indigenous People (UNDRIP) – Bill C-15 (2021) An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples – and protects Indigenous peoples from this arbitrary use of law in *Article 10,* where it states: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

23. In addition to having a disproportionate impact on First Nations people, injunctions are granted at a disproportionate rate as against First Nations people versus corporations and governments. First Nations people disproportionately have their injunction applications (be they against private parties or the state) denied by the court. The final tabulation of the empirical data of our Yellowhead study found:

    1) When corporations sought injunctions against First Nations, their rate of success was 76 percent; when governments sought injunctions against First Nations, the rate of success was 82 percent.

2) When First Nations sought injunctions against corporations, the rate of denial was 81 percent; when First Nations sought injunctions against governments, the rate of denial was 82 percent.

24. When one takes the updated information into account, the success rate of corporate injunctions granted against First Nations grew by 14 percent (now 90 percent) and by 7 percent for successful government injunctions against First Nations (now 89 percent). Though this update included only one further year of data (new cases decided between October 2019 and September 2020), and therefore limited conclusions can be drawn, the data nevertheless shows an increase in the disproportionality statistics as outlined above.

25. The discrepancy of the injunction figures raised the question of what accounted for the significant gap in success rates between corporations, governments, and First Nations in obtaining injunctions. Therefore, the second component of this research involved legal analysis of the caselaw, and an analysis of the empirical findings. This work involved coding for the merits of the cases reviewed and triggers for these injunction proceedings. As outlined in para. 9, nearly 100 percent of injunctions were triggered by development or extraction.

26. I found overwhelming evidence that since the mid-to late 1980s, courts have found assertions of Aboriginal rights or Indigenous law and governance to have weak standing against the harm (deemed "irreparable") to resource and development economies. Disruption to the "status quo" of business, authorized by the province – even without the consent of impacted First Nations – has been rendered the greater inconvenience (on balance) than the constitutional and inherent rights of First Nation people. In other words, the bias against First Nations is baked into the test.

Do you have any relationship with a party to this litigation that might affect your duty to be objective and impartial?

No.

I am regularly asked to comment in the media about my own research or other research developments in Indigenous policy, and I have also published several Op-ed pieces in national media outlets in which I have expressed my opinion about a range of issues related to the criminalization of Indigenous land defence and policy questions. When asked, I have also agreed to add my signature to several open letters that have been published in an effort to communicate how policy could be changed to honour treaty relationships. In all cases, I have tried to ensure that the findings with regard to the research in question was accurately presented. None of these or other activities (as documented in my CV) affect my ability to act and present my opinion here in an objective and impartial manner, and I understand my duties to the court in this regard.