After the Injunction: The Role of the Courts in Policing First Nations Resistance in British Columbia

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Abstract

Indigenous land defenders challenging major projects on traditional territory remain an enduring feature of Canadian politics. These projects can be protected by court-issued injunctions that can authorize the state to dispel land defenders. Although there is a growing body of scholarship that shows how injunctions are typically granted in favour businesses and the state (Pasternak and Ceric, 2023), the sentencing of individuals who violate injunctions is underexplored. We analyze the sentencing decisions of First Nations individuals who violated injunctions protecting three major projects in B.C.: the Coastal GasLink pipeline, logging at the Fairy Creek watershed, and the Trans Mountain pipeline expansion. We find that in the total eight sentencing decisions across these projects, the court typically does not accept the defendants' arguments that commitment to Indigenous laws that protect traditional territory are relevant background factors that should mitigate against incarceration. Thus, *Gladue* principles are considered during sentencing, but our analysis suggests that *Gladue* does not live up to its promise of requiring courts to give weight to Indigenous laws, culture, and heritage.

Résumé

Les défenseur·es des territoires autochtones qui défient des projets de grande envergure sur les terres ancestrales sont toujours d'actualité en politique canadienne. Les projets que ces défenseur·es cherchent à stopper peuvent être protégés par des ordonnances d'injonction accordées par la Cour qui autorisent l'État à les disperser. Bien que des études savantes de plus en plus nombreuses montrent comment ces injonctions sont pratiquement toujours accordées en faveur des entreprises et de l'État (Pasternak et Ceric, 2023), il y a peu de recherche sur les sentences des personnes qui violent ces mesures injonctives. Nous analysons ainsi les jugements relatifs aux sentences de personnes des Premières Nations qui ont violé des injonctions protégeant trois projets d'envergure en Colombie-Britannique : le pipeline GasLink, l'exploitation forestière du bassin Fairy Creek et l'expansion du pipeline TransMountain. Nous constatons que, pour l'ensemble des huit décisions rendues dans le cadre de ces projets, les tribunaux n'acceptent généralement pas les arguments des avocats de la défense selon lesquels leur engagement envers les lois autochtones protégeant le territoire traditionnel constitue un facteur contextuel pertinent pouvant justifier une réduction de la peine d'incarcération. Donc, même si les principes énoncés dans l'arrêt Gladue sont pris en considération lors de la décision sur

sentence, notre analyse suggère que l'arrêt Gladue ne tient pas sa promesse d'exiger des tribunaux qu'ils reconnaissent et donnent du poids aux cultures, héritages et lois autochtones.

Introduction

The approval of major extractive projects remains controversial in Canada because it intersects with several politically contentious issues: Indigenous rights, environmental politics, and jurisdictional authority in a federal system to name a few. In the last few years, such major projects have faced staunch resistance from Indigenous peoples and nations who seek to resist against unilateral, colonial decisions taken by settler governments. Instances of visible Indigenous resistance against major projects include blockades, rallies, and demonstrations.

Due to the contentious nature of major projects being approved on Indigenous traditional territory, more scholarly attention is being directed to the ways in which proponents of the projects can successfully attain an injunction to remove demonstrators and land defenders from construction sites. The granting of an injunction and its initial enforcement are often the primary focus of researchers, media, and other community observers (for example, Mayeda, 2010; Hume and Walby, 2021; Pasternak and Ceric, 2023), and little attention is paid to what happens post-injunction, including the consequences for those who are punished for violating the injunction. In this paper, we investigate what happens after the injunction by asking the following questions: Do Court-issued injunctions significantly shape the sentencing decisions of those convicted of injunction-related offences? In particular, are First Nations individuals who defy the injunction protected by *Gladue* principles that compel sentencing judges to consider their Aboriginal heritage and circumstances? This paper analyzes the injunction(s), and related sentencing decisions across three different major resource projects in B.C. across five years (2018-2023): the Coastal GasLink pipeline, logging at the Fairy Creek watershed, and the Trans Mountain pipeline expansion. All three are major projects that drew widespread resistance among First Nations groups.

Our study finds that the courts in their decision-making over injunctions and sentencing do not generally accept arguments grounded in Indigenous law. At trial, First Nations individuals often argue that they are motivated to practice Indigenous law and responsibilities, however, the Court does not consistently accept this commitment as a mitigating factor to explain their interaction with the criminal justice system but instead view such commitments as a barrier to rehabilitation, making restorative justice measures inappropriate. In the Trans Mountain context, all seven sentencing decisions invoked a *Gladue* analysis, but commitment to Indigenous law was not treated as a relevant background factor that impacted an individual's moral blameworthiness. Only in one sentencing decision after the Fairy Creek protests did a judge use *Gladue* to recognize commitment to Indigenous law as a factor to reduce a sentence for mandated community service. Therefore, *Gladue* principles are considered during sentencing, but the Court rarely finds that rehabilitation is more important than supporting denunciation and deterrence. Our analysis of the sentencing decisions suggests that *Gladue* does not live up to its promise of requiring courts to appreciate Indigenous laws, culture, and heritage. Instead, in some cases we find that an

individual's adherence to Indigenous law is interpreted as an aggravating factor by courts in determining culpability and proportionality in sentencing.

Taken together, Indigenous law is unlikely to be supported by the judiciary at any phase of the legal process once major projects have been approved through regulatory review. Indeed, the injunction context directs the courts to protect major projects using the weight of criminal law, while leaving very little space for the expression of Indigenous laws. The country's commitment to reconciliation and the implementation of the United Declaration on the Rights of Indigenous Peoples (UNDRIP) at the very least calls into question the propensity of courts to deny Indigenous law as a relevant factor in a *Gladue* analysis before formal rights are negotiated and recognized between Indigenous groups and the state.

Indigenous Resistance and Injunctions in Canada

Indigenous resistance is regarded as necessary to assert and protect Indigenous self-determination and challenge ongoing settler-colonial dynamics and systems (Bargh, 2007; Stark et al., 2023). Resistance can take on many different forms but the acts that arguably attract the most attention from the state are non-routine, highly visible efforts that directly challenge a specific action taken by the state. In Canada, there is a long history of Indigenous nations using these direct acts of resistance to practice Indigenous legal orders, governance, and build organizational capacity to challenge unilateral state action affecting Indigenous livelihoods (Borrows, 2005; Simpson, 2021; Coulthard, 2014; Ladner and Simpson, 2010). One of the most significant examples include the Kanesatake Resistance in the summer of 1990, which was mobilized to prevent the Quebec government from disturbing sacred burial grounds, then prompting the state to use the police and eventually the Canadian armed forces to disperse the land defenders. Idle No More was a nationwide movement started by four First Nations women across Manitoba, Saskatchewan, Alberta in 2012 to both challenge the federal government's reforms to environmental regulation and demand respect for Indigenous rights more generally. In more recent years, this trend of ongoing Indigenous resistance has continued, as the most frequently reported acts of resistance are from Indigenous nations defending their traditional territory from major infrastructure or extractive projects (Do, 2023).

Although Indigenous resistance is commonplace in Canada, non-Indigenous actors generally react negatively towards Indigenous movements. When confronted with these acts, the state typically does not respond with policy or political changes that meet the demands of the resisting Indigenous parties (Morden, 2013). At most, the state may reverse course on a more specific or limited action, but are unlikely to meaningfully address the underlying concerns that triggered the act of resistance in the first place (Russell, 2010). The state's policy inaction is buttressed by negative media portrayals of Indigenous resistance. The mainstream media tends to portray Indigenous resistance as criminal behaviour perpetrated by radical leaders, which delegitimizes Indigenous movement's demands and challenges against the state (Corrigall-Brown and Wilkes, 2012; Hume and Walby, 2021; Perzyna and Bauder, 2023). Then, the state's police and security forces are mobilized to stifle Indigenous movements. Sociological and criminological

studies have identified the continuing connection between the original objectives of Canadian police forces, to support the dispossession of Indigenous peoples and the imposition of settler colonial law (Stark, 2016), and the actions of contemporary police forces (Chartrand, 2019; Crosby and Monghan, 2018). According to this scholarship, the police continue to suppress Indigenous resistance by treating their political demands as security threats, particularly when major extractive projects that are beneficial to settler society are contested by Indigenous groups (Crosby, 2021; Harb and Henne, 2019; Dafnos, 2013). Thus, despite the Canadian government's alleged embrace of reconciliation and a renewed relationship with Indigenous peoples, the police largely continue to act as an agent of settler-colonial values and interests (Van Rythoven, 2021). Inquiries and commissions demand reform within police forces, but it is acknowledged that change is slow coming due to internal institutional resistance and a lack of accountability (Hedican, 2008; 2012). Together, the state, the media, and the police are known to reject, contain, and delegitimate Indigenous resistance movements.

The role of the police and media in minimizing the transformative potential of Indigenous resistance is well-documented. What is less understood is the judiciary's role in confronting Indigenous movements. In the constitutional law context, judicial decisions are scrutinized for shaping the scope and nature of section 35, which is a provision that "recognizes and affirms" Aboriginal and treaty rights in Canada. In the criminal law context, the *Gladue* principles take up much scholarly attention given that the overincarceration of Indigenous peoples remains a glaring example of racial and colonial inequality (for example, Rudin, 2008; 2012; Briggs, 2020). In *R v. Gladue* (1999), the Supreme Court interpreted s.718.2(e)[1] of the *Criminal Code* to instruct judges that when sentencing Indigenous people, they must consider systemic and background factors, including experiences of colonialism, to impose incarceration as a last resort and to avoid further discrimination. *Gladue* also requires sentencing judges to consider sentencing procedures and sanctions that may be appropriate for the offender based on their culture, practices, and laws. These principles have extended to several aspects of the criminal justice process where an Indigenous person's liberty is at stake, including bail and parole. Despite its endorsement by the judiciary, *Gladue* has not decreased the rate of incarceration for Indigenous peoples, with some suggesting that *Gladue* is a form of paternalism that merely perpetuates settler authority (Briggs, 2020). Much of the scholarly discussion of *Gladue* is focused on its application in sentencing which considers individual culpability within the context of routine criminal law. It is less understood how the judiciary engages in questions about the unique circumstances and rights of Indigenous peoples in contexts where Indigenous movements challenge major projects through acts of resistance, which ultimately engage questions about sovereignty and the legitimacy of state authority.

There is a growing body of literature that investigates how the judiciary interprets Indigenous claims when resistance activities take place to challenge infrastructure or extractive projects. When Indigenous peoples mobilize to challenge major projects by physically blocking settler access to their traditional territory, the proponent of the project can seek an injunction from the judiciary. Injunctions are a type of court order that can compel a party to do or refrain from

[1] Section 718.2(e), "all available sanctions, other than imprisonment […] should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

doing specific acts. Injunctions are issued when irreparable harm will be caused if relief is not granted. In Canada, the SCC decision *RJR MacDonald Inc. v Canada (AG)* (1994) presents the framework by which courts can grant injunctive relief. This framework is a three-part test that involves the judge to consider the following: whether there is a serious question to be tried, meaning that the party seeking an injunction must show that there is a *prima facie* case of a rights violation; the party seeking the injunction must show that there will be irreparable harm if the injunction is not granted; and the party seeking relief must show that the harms they are likely to incur without an injunction is greater than the harms suffered by the other party if an injunction is granted. This final part of the test is known as the balance of convenience. Proponents' and governments' success in using injunctions to disperse Indigenous movements has increased over time (Pasternak and Ceric, 2023), which is an interesting development as it was Indigenous groups who used injunctions in the past to halt major projects on traditional territory (Gunn, 2020).

The way in which the judiciary assesses requests for injunctive relief favours proponents and the state. The extant literature shows that in the balance of convenience portion of the injunction test, the court does not accept Indigenous arguments justifying their resistance activities that are grounded in their obligation to uphold Indigenous laws and responsibilities to land (Newell, 2012; Dalton, 2022). Moreover, scholars have identified how the judiciary evaluates the "public interest" within the balance of convenience test to uncritically accept the economic benefits of resource extraction, which typically trumps the concerns of Indigenous parties and their rights (Pasternak and Ceric, 2023). When an injunction is granted, there are also issues with their enforcement that could disadvantage Indigenous peoples. There is usually a lack of specificity regarding who the injunction applies to, which may make it difficult for legal representatives and law enforcement to notify those whose rights are limited (Mayeda, 2010). Also, if Indigenous land defenders defy the injunction, it has been found that the court does not accept arguments based on Indigenous legal traditions as a defence (Newell, 2012). Nevertheless, this study of sentencing decisions should be reinvestigated given Canada's formal commitment to UNDRIP in 2017.

The literature's findings show that the judiciary's granting of injunctions for governments and proponents against Indigenous resistance movements has increased over time. What is less well understood is whether *Gladue* principles or section 35 influence the judiciary's sentencing decisions in cases involving injunction breaches. This paper seeks to address this empirical gap by considering whether the Court's decision to grant injunctions significantly shape sentencing decisions, and whether First Nations contemnors of the court are protected by *Gladue* principles.

Methodology

In order to explore the relationship between court-issued injunctions and sentencing decisions, three high-profile cases of resistance against resource extraction projects are chosen: the Trans Mountain pipeline expansion project, old-growth logging at the Fairy Creek watershed, and the Coastal GasLink natural gas pipeline. These projects were chosen because they represent some of the most reported instances of Indigenous resistance in recent years (Do, 2023). The resistance against old-growth logging at Fairy Creek was salient and featured First Nations participants but was more mixed in terms of organization between First Nations and non-Indigenous allies. This case was still chosen because of the court's involvement in issuing injunctions, and the subsequent

police enforcement of the injunction that garnered extensive attention due to 400 charges being laid and more than 1100 arrests.[2] All these cases also occurred in B.C., which is a unique jurisdiction in Canada because many First Nations in this province have not signed treaties with the Crown, thus making their section 35 rights more unspecified from the perspective of the state. Although the experience of First Nations in this province is thus unique compared to others with treaties, having all the cases from the same jurisdiction controls for the provincial court issuing the injunctions and sentencing those who defy the injunction. The three cases also unfolded in the last five years (2018-2023), including the initial granting of the injunction and any subsequent sentencing.[3] This period is thus a good indicator of how the provincial court currently understands the relationship between resource projects, Aboriginal rights, and criminal justice. Some sentencing processes are ongoing as First Nations land defenders continue to defy the injunction, such as the injunction protecting the Coastal GasLink pipeline.

The B.C. court decisions related to these projects were qualitatively assessed to uncover whether and how the courts considered section 35 rights or *Gladue* principles when issuing the injunction and any subsequent sentencing decisions. These decisions were identified through the CanLii legal database using a keyword search ("Indigenous," "Gladue" or "section 35"). One sentencing decision was released for the Fairy Creek logging case that invoked *Gladue* principles when sentencing a First Nations individual. Seven sentencing decisions from the Trans Mountain case were analyzed. With regards to the Coastal GasLink Pipeline case, only a judgment was issued regarding whether a Wet'suwet'en Chief was guilty of criminal contempt. Therefore, the court's engagement with Indigenous legal arguments can be assessed and is thus included in the analysis, but *Gladue* principles only apply to sentencing decisions. Other legal issues sometimes emerged after the initial injunction, like how the court's injunction orders were enforced by the police. Although interesting, only the sentencing decisions of First Nations individuals were assessed, with the exception just noted earlier. In particular, we scrutinized the court's application of *Gladue* principles to identify whether the courts treated contemnors of injunctions consistently or whether a consideration of background factors produced variable sentencing decisions. Relatedly, whether the sentencing court discusses section 35 rights, including the goals of reconciliation, is also noted as studies of the court's application of *Gladue* principles rarely engage with questions around claimed Aboriginal rights and the legal traditions that flow from rights-holding Indigenous nations.

Coastal GasLink Pipeline

The Coastal GasLink Pipeline is a 670-kilometer pipeline that aims to deliver natural gas from northeastern B.C. to a refinery facility in Kitimat (Coastal GasLink, 2023). This project was approved by provincial regulators and received an Environmental Assessment Certificate in 2014, despite certain First Nations rejecting the project's potential negative impacts to Aboriginal rights

[2] https://www.cbc.ca/radiointeractives/features/the-fallout-of-fairy-creek

[3] The BCSC's ruling regarding whether Chief Dsta'hyl, Wing Chief of the Likhts'amisyu Clan of the Wet'suwet'en Nation, is guilty of criminal contempt is included, even though it is released in early 2024. It is not a sentencing decision but is included because it is the only publicly available decision concerning the Wet'suwet'en resistance of the Coastal GasLink pipeline.

and traditional territory. In particular, eight of thirteen Wet'suwet'en hereditary chiefs representing different houses within the nation opposed the project, while the proponent only secured negotiated agreements from five of six elected band councils of the Wet'suwet'en First Nation. The elected band councils are First Nations governments whose governing authority is delegated from the federal *Indian Act*, first passed in 1876, and administer many services like health, education, and housing. In contrast, the hereditary leadership reflects the traditional Wet'suwet'en governing systems, and their role is to oversee the management of traditional lands, including areas where the pipeline would be built (Office of the Wet'suwet'en, n.d.). Four of the five clans are represented by the Office of the Wet'suwet'en during Crown-led consultation processes. The Big Frog Clan, which houses the Yex T'sa Wilk'us (Dark House), is not included in this broader institution. Each clan includes two or three houses that are represented by a hereditary chief.

Although the government is legally obligated to consult affected Indigenous groups when a major project may adversely affect claimed or recognized Aboriginal rights, the government is typically not required to obtain the consent of affected Indigenous groups.[4] Indeed, state actors are not obligated to follow Indigenous legal protocols or traditions. Instead, Indigenous groups can detail the scope of the anticipated negative effects on their rights and the government must move to reasonably address those concerns through accommodation measures like changing the project to mitigate negative impacts. The state's duty to consult has been heavily critiqued because key substantive issues over contested territory and sovereignties are not discussed; instead, it is assumed that the Crown has the authority to make decisions and receive engagement from affected Indigenous groups (Hamilton and Nichols, 2019; Do, 2020). Even though a project could affect territory where Indigenous groups could likely claim Aboriginal title, the state can rely on existing regulatory review to push a project forward and is not required to engage with the legal traditions or protocols of Indigenous nations.

Due to the flaws of the consultation process, some members of the Wet'suwet'en Nation rejected the project's approval. The resistance against the pipeline project reached new heights when Wet'suwet'en land defenders blocked access to the Morice Forest Service Road in 2018, an essential access point into Coastal GasLink's construction site. In December of 2018, the B.C. Supreme Court issued an interim injunction to dispel the blockades from the Morice Forest Service Road, but various camps continued being built. In early 2020, the Wet'suwet'en movement against the pipeline attracted other Indigenous solidarity movements and blockades across the country, grinding the country's national infrastructure to a halt (Do, 2023). At the time of writing, the B.C. Supreme Court has only made public one sentencing decision of a Chief who violated the court-imposed injunction. Indeed, the B.C. Prosecution Service announced it would not lay criminal charges against anyone arrested after the RCMP enforced the Court's injunction in early 2020; in response, the proponent also ended its civil contempt proceedings (Bellrichard, 2020). Nevertheless, this case drew national attention and spurred other Indigenous solidarity movements

[4] The SCC's 2014 *Tsilhqot'in Nation v. British Columbia* decision states that the Crown must obtain consent when infringing an Indigenous nation with Aboriginal title (para. 76). However, the Crown can still justifiably infringe title when consent is not obtained by discharging the duty to consult, showing that the Crown's actions reflect a compelling and substantial objective, and that those actions are consistent with the Crown's fiduciary obligation (para. 77).

to blockade key infrastructure, indicating its heightened importance to understand how the judiciary treats Aboriginal rights during the unfolding of high stakes events.

When the B.C. Supreme Court (BCSC) initially issued an interim injunction against the Wet'suwet'en land defenders, the Court, using the *RJR MacDonald Inc. v Canada (AG)* (1994) framework, found that the impact of an injunction on the land defenders would be minimal. The Court was convinced that the proponent's pre-construction work before the full hearing for an interlocutory injunction would only consist of "reconnaissance and survey activity, and activities that are consistent with forestry activities that are currently being undertaken in the area" (*Coastal GasLink Pipeline Ltd. v. Huson,* 2018, para. 33). Moreover, as long as the service road was not blocked, the camps could still be present (*ibid*). This finding corroborates the literature's stance that the courts uncritically accept the impact of monetary losses for the company should construction delays occur, but the continued infringement of Aboriginal rights is deemed as a minimal impairment, in this case because the construction activities have not yet intensified.

Shortly after the interim injunction was passed, new camps were established, mainly the Gidimt'en Access Point, to block settler access to the Morice Forest Service Road. The police intervened to enforce the interim injunction on January 7, 2019, and made arrests. Those who were arrested were released upon the condition that they comply with the interim injunction and their contempt proceedings were also vacated (*Coastal GasLink Pipeline Ltd. v. Huson*, 2019, para. 35). The Court heard each parties' applications in June regarding the proponent's application for an interlocutory injunction and set out its decision in December 2019.

In this 2019 decision, the Court directly dealt with the question of whether Indigenous law can be used as a defence against the proponent's application. The Court acknowledged that Indigenous laws may be "admissible as fact evidence of the Indigenous legal perspective," even before such laws are recognized as being part of Canadian common law (*ibid*, para. 129). However, the Court was not convinced that the injunction should be denied due to the conflict within the Wet'suwet'en Nation regarding the legality of the project, such as, "whether traditional hereditary governance protocols have or have not been followed, whether hereditary governance is appropriate for decision-making that impacts the entire Wet'suwet'en Nation and the emergence of other groups, such as the Unist'ot'en, which purports to be entitled to enforce Wet'suwet'en law on the authority of Chief Knedebeas and more recently the WMC [Wet'suwet'en Matrilineal Coalition]…" (*ibid*, para. 134). The Court understandably notes that a decision on the issuing of an injunction is not the appropriate venue to decide these questions on the scope and validity of Indigenous law in the context of project approval without a factual foundation.

That being said, the Court fixated on how the members of the Dark House Clan did not challenge the permits and authorizations before they were granted, thus interpreting the blockades as "self-help remedies" (*ibid*, paras. 152; 159). But the fact that the Office of the Wet'suwet'en, which represents several other clans, participated in the EA process, and asserted their rejection of the project is not considered in this decision. Instead, the issuing of the EA certificate is treated uncritically even though the other clan leaders did not support the project throughout the assessment. It is reasonable that the Court at this stage is not going to reopen the regulatory review process. However, the Court's interpretation of the Dark House clan as not acting in good faith is

overstated since it is doubtful that the Court would view the blockades by any other clan who participated in the EA process with more acceptance.

The Court then uses the internal disagreements over the desirability of the project as a way to further discredit the legal arguments posed by the Dark House Clan leaders while privileging the perspectives of Band Chiefs who support the project. In the balance of convenience step of the injunction test, the Court notes that "there are many in the community who support the Pipeline Project and are of the view that it will have substantial benefits to the Wet'suwet'en nation as a whole" (*ibid*, para. 218). The blockades being erected by members of the Dark House clan was interpreted as actions taken by an unrepresentative faction in the broader nation that cannot claim to assert collective Wet'suwet'en rights (Dalton, 2022), despite the Environmental Assessment Review showing many clans of the Wet'suwet'en Nation opposing the project. Internal disagreements within Indigenous communities between the Band Council and traditional leadership structures, another devastating effect from the ongoing legacy of colonial policies, stands as another barrier to asserting Indigenous laws and perspectives.

When the court issued both the interim injunction in late 2018 and the interlocutory injunction in 2019, they included an enforcement order (*Coastal GasLink Pipeline Ltd. v. Huson*, 2019, para. 232). The enforcement orders authorized the police to arrest anyone who violates the injunction and legitimated the continuing presence of police in the area (*ibid.,* para. 231). In January 2019, the RCMP first moved to enforce the interim injunction. At this early stage, the land defenders already expressed that the RCMP used excessive force, such as grabbing peaceful land defenders from the checkpoint gate and pinning them down using several officers for each person (CBC News, 2019). The RCMP deny that inappropriate force was used but acknowledged that fourteen people were arrested and processed (*ibid*).

Although the actions of the Wet'suwet'en Nation to blockade the Morice Forest Service Road was interpreted by the courts as an illegal act not grounded in Canadian nor Indigenous law, the nationwide solidarity movements after the RCMP's arguably heavy-handed enforcement of the injunction provoked the Canadian and provincial governments to negotiate land rights with Wet'suwet'en leadership. In the Memorandum of Understanding that was signed by the three governments on February 29, 2020, the settler governments acknowledged that "Wet'suwet'en rights and title are held by Wet'suwet'en Houses under their system of governance" (Government of Canada, 2020). The settler governments also committed to negotiate the implementation of rights and title over key areas like, "Nation reunification, revenue-sharing, compensation, land and resources, child and family wellness, water, fish, land-use planning and decision-making" as measures to rebuild the relationship between governments (Government of British Columbia, 2020). This historic agreement between the parties was only possible because of the immense pressure faced by settler governments to change their course of action lest economic and political turmoil continue from Indigenous solidarity movements. And yet, the MOU does not prevent the pipeline project from being built. In this case, political actors felt economic and political pressure to reexamine their relationship with the Wet'suwet'en Nation, while the B.C. Supreme Court held fast to the status quo of accepting the legality of resource projects with fraught approval processes.

In early 2024, the BCSC found Chief Dsta'hyl of the Likhts'amisyu Clan, which is a part of the Wet'suwet'en Nation, guilty of criminal contempt of court. The Court rejected the two main claims proffered by the defence: that the Chief did not have the intent to diminish the rule of law, and that the Chief should not be convicted of criminal contempt because he was acting pursuant to a coexisting Indigenous legal order (*Coastal GasLink Pipeline Ltd. v. Huson*, 2024, paras. 30; 44). The Court did not accept the first argument because the Chief publicly referred to the injunction as "invalid" and "bogus" (*ibid.,* para. 38). For the Court, "there is no gray area or room for debate" about the connection between acts that diminish the authority of the Court, such as violating a court-issued injunction, and eroding the rule of law (*ibid.,* para. 39). With regards to the second argument, the Court did not accept the novel defence and agreed with the Crown that such a claim amounted to a collateral attack on the injunction order (*ibid.,* para. 46). From the Court's perspective, the Wet'suwet'en trespass law is imprecise and would likely only hold if the Nation is able to claim Aboriginal title (*ibid.,* para. 57). Although a sentencing decision has not yet been released by the Court, this judgement illustrates that Indigenous legal orders are not treated as valid defences against charges of criminal contempt. As will be discussed later in this paper, Indigenous legal orders are inconsistently considered as a relevant background factor in a *Gladue* analysis.

The Court's reasoning clearly demonstrates that upholding Indigenous legal orders will not be a viable defence against a guilty charge of criminal contempt unless Aboriginal title has been formally recognized by the state. This is not surprising given that the Court must presume that its function and Canadian law are legitimate and thus must default to existing common law if Indigenous legal orders have not been specified or recognized. This case affirms how judicial venues in the context of challenging injunctions is not a fruitful avenue for facilitating dialogue about outstanding land rights. On July 2024, the BCSC sentenced Chief Dsta'hyl to sixty days of house arrest as part of a conditional sentence, with some accommodation for Chief Dsta'hyl to leave for daily therapeutic treatment of the Stage 4 lymphoma he was diagnosed with in 2023 (Hosgood, 2024). The Court has yet to publicly release the full sentencing decision, and thus it remains to be seen how the Court exactly applied *Gladue*. However, *The Tyee* reported that Judge Tammen was likely influenced by the letters of support from the community, even if Tammen found Chief Dsta'hyl to be guilty of criminal contempt, which may explain the conditional sentence (*ibid*).

The awkward position of the court to navigate outstanding questions of rights and title was not lost on the court in the next case, the Fairy Creek protests. In this case, the Court more squarely addressed and acknowledged the place of Indigenous laws, but this did not change the outcome of the decision to grant an injunction in favour of the proponent. However, commitment to Indigenous law shaped how the Court applied *Gladue* principles in its sentencing of a First Nations individual who violated the injunction.

Fairy Creek

Fairy Creek is a forested watershed that spans approximately 1189 hectares (Old Growth Forest Ecology, 2024). It is located in Pacheedaht First Nation territory, which is on the southwestern side of Vancouver Island in B.C. It is the last unlogged old growth forest on the Island outside of national parks and is considered environmentally significant because of its biodiversity and ability to store carbon (*ibid.*). A portion of the watershed is included in a Tree Farm License held by Teal Jones, a logging company. The tree license allows Teal Jones to harvest trees on Crown land, and these logging activities must also be consistent with the Province's Forest Stewardship Plan, which obligates Teal Jones to pursue environmental and cultural objectives (*Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021, para. 14). Indigenous nations must also be consulted when logging companies want to pursue logging plans that may negatively affect Aboriginal rights or rights claims, as per the Crown's duty to consult. This referral process is not as robust as a formal impact assessment but gives a chance for Indigenous nations to note archeological or significant sites that should be avoided (Smith and Bulkan, 2021). Consistent with duty to consult processes, Indigenous nations cannot stop logging activities as the final decision rests with the Crown.

The fact that Teal Jones can harvest within parts of this important watershed triggered the largest act of civil disobedience in Canadian history (Larsen, 2021). Although many grassroots actors were involved, the Rainforest Flying Squad is the primary activist movement that coordinated direct action, like blockades, to prevent Teal Jones from logging in the watershed. This group consists of Indigenous and non-Indigenous participants. Interestingly, the Pacheedaht First Nation were not opposed to the logging practices once it was confirmed no archaeological significant areas would be affected (*Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021, para. 21). The leaders of the Pacheedaht First Nation even eventually asked the protesters to leave and respect Pacheedaht decisions (CBC News, 2021). However, Pacheedaht Elder Bill Jones supported the protest activity (Oudshoorn, 2023).

The blockades against old forest logging began in August 2020 to prevent Teal Jones and their contractors from accessing logging sites. Protest activity did not abate even with the COVID-19 pandemic. Unsurprisingly, the company sought an injunction to disperse the protesters and eradicate the blockades. In April 2021, the B.C. Supreme Court granted this injunction. Similar to the Coastal GasLink case, in the balance of convenience test the Court focused on the fact that individuals within the broader Pacheedaht First Nation cannot claim to exercise the collective rights of that nation without explicit authorization (*Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021, para. 58). That being said, the Rainforest Flying Squad did not rely on Aboriginal rights to argue against the injunction. Due to the large number of people involved in the blockades, and the Court's framing of the protesters as militant, the Court issued an enforcement order alongside the injunction (*ibid.,* para 68-9). It is worth noting that in the aftermath of the high-profile conflict, the B.C. government agreed to defer the logging of old-growth forests until a forest management approach is implemented, as advocated by several First Nations including the Hereditary Chiefs of the Pacheedaht First Nations (Government of British Columbia, 2024). This deferral will continue into 2026 while long-term planning over forestry in the region continues.

Over 850 arrests were made, but there is only one record of a First Nations person's sentencing decision, Lexlixatkwa7 Nelson, because she sought a different sentence than what was

imposed on other protesters in similar circumstances: a $1500 fine or fifty hours of community work service. The decision, which took place on November 2022, is worth investigating because the Court employed *Gladue* principles to evaluate her claim for a sentence of twenty hours of community service work. Lexlixatkwa7 Nelson felt compelled by her commitment to Indigenous legal traditions to defy the injunction and was arrested on July 15, 2021. At the outset of the decision, the Court recognizes that, "the reception of English common law and the enactment of colonial statutes in British Columbia imposed a new and in important ways different legal order and did so with little or no regard for the vibrant, diverse, and complex Indigenous legal traditions that have been in place and evolving for millennia" (*Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022, para. 5). Although the judge does not challenge the validity of common law, the judge continues by stating that they are, "not oblivious to the irony – and perhaps hypocrisy is a better word – embedded in speeches about the importance of supporting the rule of law and respect for its institutions…[they are] aware that these speeches must rankle especially for those who resolve to live by Indigenous legal principles and are hard at work to preserve Indigenous law" (*ibid.*). There is some admission here that common law is not viewed as the rule of law by Indigenous peoples when it was the product of illegal colonial imposition, even if the Court is not open to ruling according to this recognition.

Nevertheless, the judge finds that Nelson's commitment to learning Ucwalmícwts, a Lil'wat language, and abiding by traditional laws are relevant to determining her moral culpability and thus her punishment for contempt (*ibid.,* para. 15). When applying the *Gladue* principles, the judge also noted that Nelson's family members suffered at Indian day schools and residential schools making her responsibility to practice Indigenous law a personal imperative that directly responds to colonial policies (*ibid.,* para. 11). As such, the judge reduced her sentence from fifty hours to thirty hours as a way to balance both the objectives of deterrence and being proportionate to the blameworthiness of the individual (*ibid.,* para. 15). The recognition of Nelson's practice of Ucwalmícwts demonstrates Briggs's (2020) argument that in considering *Gladue* factors courts should emphasize positive factors like commitment to traditional languages as these speak to cultural resilience, rather than focusing solely on negative background and systemic factors that lead to criminalization. Additionally, the Court's consideration of Nelson's language shows how courts can recognize Indigenous practices in sentencing, which helps to fulfill *Gladue's* stated goal of requiring courts to consider, "the types of sentencing procedures and sanction which may be appropriate […] for the offender because of his or her particular aboriginal heritage or connection,"[5] or what Denis-Boileau (2021) refers to as the second set of circumstances of *Gladue.* The second set of circumstances in *Gladue* analysis invites courts to consider customs, practices, and Indigenous law that are relevant for the person being sentenced in a common law court (Denis-Boileau, 2021, 540, 624). However, this balance and consideration of how upholding Indigenous law is a way to undo colonialism's harmful effects is not considered by the Court during sentencing in the Trans Mountain pipeline case. This is particularly striking considering that the sentencing period occurred around similar time periods, within the 2020s, and the violation of the injunction

[5] see *R v. Gladue*, 1999 at para 66.

involved participating in blockades to prevent the operations of a major extractive project. The Trans Mountain pipeline case is discussed below.

Trans Mountain Pipeline

The Trans Mountain Pipeline spans between two provinces, Alberta and B.C. and was first constructed in 1952, connecting the major cities of Edmonton, Alberta and Burnaby, B.C. In 2013, Kinder Morgan sought regulatory approval to twin the existing pipeline with another one that would carry diluted bitumen. Such a major expansion drew criticisms from environmental groups and First Nations, particularly those nations from B.C. along the pipeline route. This is because the project's construction would entail a seven-fold increase in tanker traffic within Burnaby's Westridge Marine Terminal, which is housed in narrow, busy waterways (Hunter and Prystupa, 2017). This challenging route increases the likelihood that a tanker spill into the water would occur (*ibid.*). Additionally, Kinder Morgan's tank farm, located near Burnaby's Mountain Conservation Area, would require additional construction to connect it to the expanded dock on the terminal. Apart from public backlash, the project was also mired in legal troubles, as the Federal Court of Appeal ruled in August 2018 that consultation with participating First Nations were found to be insufficient (*Tsleil-Waututh Nation v Canada (Attorney General of Canada)*, 2018). In that same year, the federal government maintained its commitment to the project as it purchased the pipeline from Kinder Morgan despite intense public protests and activism, the ballooning costs of the expansion, and the requirement to commit to additional consultation with affected First Nations (Harris, 2018). Despite a resounding rejection of the project from multiple groups, like municipalities, First Nations, and citizens, the project was approved in 2019 by the Government of Canada.

In the midst of the project's tumultuous approval process, grassroots and First Nations movements were regularly mobilizing to prevent the construction of the pipeline expansion project. Demonstrations varied from wide scale marches and rallies like the Walk for the Salish Sea that blocked crucial roads, where even federal politicians participated, to blockades like the Tiny House Warriors, led by the Secwepemc people, who strategically built homes to obstruct the pipeline route (Pawson, 2018; CBC News, 2018; Morin, 2017). The Trans Mountain Corporation was granted an indefinite injunction by the B.C. Supreme Court on March 2018, which was later amended in June 2018, to disperse protesters blocking access to construction sites that affect both the Westridge Marine Terminal and the Burnaby Terminal (*Trans Mountain Pipelines ULC v Mivasair*, 2018). Given the widespread disapproval of the project in B.C., it was expected that many would be arrested in defiance of the injunctions; indeed, around 170 arrests per week were conducted in April and steeper penalties for violating the injunction helped lower arrests overall by that summer (Pawson, 2018). For example, those arrested before April 16, 2018 and pleaded guilty by May 28, 2018 would receive a fine of $500 or 25 hours of community work service; in contrast, those arrested after August 2, 2018 and pleaded guilty would receive a sentence of 14 days imprisonment (*Trans Mountain Pipelines ULC v Mivasair*, 2018). Although the scale of the arrests was noted in the media, police and protester conduct were generally reported as being peaceful and cooperative particularly as the police were releasing protesters if they promised to

appear before court (CBC News, 2018b). However, during sentencing proceedings, the B.C. Supreme Court was not compelled to accept arguments about following Indigenous legal obligations as mitigating factors that change the moral culpability of those violating the injunction like the judge in the Fairy Creek case.

Three different First Nations individuals put forth that Indigenous laws should shape how the Court approached sentencing (*Trans Mountain Pipelines ULC v Mivasair*, 2020, para. 122) or that certain individuals who defied the injunction were exercising a "statutory duty, power, or authority" that exempted them from violating the junction if they were directed to participate by First Nations leaders (*Trans Mountain Pipelines ULC v Mivasair*, 2019, para. 40). These arguments were not found to be convincing by the Court, as the judge expected the articulation of specific Aboriginal laws that could be applied to the individual's conduct in the case (*Trans Mountain Pipelines ULC v Mivasair*, 2022, para. 75). Indeed, any defence that expressed how individuals were following Indigenous laws whose authority flows from unceded territory, and thus fulfilling *Gladue's* second set of circumstances, was completely rejected by the Court. The Court reiterated across many sentencing decisions that the Court has jurisdiction over the individuals to render a decision under Canadian law and the claim of being on unceded territory is not proven to the Court (*Trans Mountain Pipelines ULC v Mivasair*, 2022, para. 30; 2022b, para. 141; 2022c, para. 90). In one proceeding, Ms. Dick was called upon by the defence as an expert on Secwépemc laws; however, her testimony as an expert was rejected by the Court because she previously breached the injunction herself and expressed that the Court lacked jurisdictional authority over Indigenous peoples (*Trans Mountain Pipelines ULC v Mivasair*, 2023, para. 85). Therefore, her legal knowledge was discounted because of her commitment to practice those very legal obligations. Even when specific Indigenous laws are presented, the Court in this instance treated it as a threat to Canadian legal authority. The Court's conclusion that engaging with Indigenous laws somehow undermines Canadian law ignores the well-established practice of multiple legal traditions (common and civil law) coexisting within the Canadian legal system (Denis-Boileau, 2021).

In that same decision, the judge still admitted Ms. Dick's insights as part of the evidentiary record. However, the judge stated that they "[did] not see that this belief system is materially different than the beliefs or views of most other Canadians, including British Columbians, and those whose ancestors have been deeply connected to Canada and its lands and waters for many generations" (*ibid.,* para. 97).[6] Therefore, even though the source of Indigenous peoples' belief systems is different from Canadians, the judge did not view that First Nations individuals who defied the injunction were different than other protesters who also sought to protect the environment (*ibid.,* para. 101).[7] The judge only treated Indigenous law as another source of *personal* beliefs, but this does not give the First Nations individuals a right to "illegally" interfere with a major project (*ibid.,* para. 113). This interpretation of Indigenous legal traditions diminishes its centrality to Indigenous sovereign entities, particularly if it challenges the authority of Canadian law. Indeed, the Court also asserts how the views of First Nations people of the same nation, in

[6] see also *Trans Mountain Pipelines ULC v Mivasair*, 2023 BCSC 366 at para. 54.
[7] see also *Trans Mountain Pipelines ULC v Mivasair*, 2023 BCSC 791 at para. 69-70.

this case the Secwépemc people, were not united against the pipeline, indicating that there is a "diversity of views concerning environmental issues and specifically, the Trans Mountain pipeline project" (*ibid.,* para. 112). To the Court, Indigenous law is not authoritative over a people unless it can compel all individuals to obey it. Such a view ignores the effects of colonial policies that have broken Indigenous individual's attachment to their governance systems, and that the path of decolonization is a unique journey for each person and community. Importantly, this limited view of Indigenous law undermines the Supreme Court's direction in *Gladue* that when sentencing an Indigenous person, a judge must "craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective." (*R v. Gladue*, 1999 para. 74; see also Denis-Boileau, 2021; Briggs, 2020). In this case, a First Nations individual's decision to decolonize themselves is not considered by the judge if it challenges Canadian law and authority.

Rather than view the defence of practicing Indigenous law as a corrective to Canada's colonial legacy, the Court interpreted that the First Nations individuals claimed to be "entitled to disobey the Court's order because of their heritage and what they perceive as being their obligations to their own Indigenous rule of law" (*Trans Mountain Pipelines ULC v Mivasair*, 2020). And because the Court's primary objective is to "restore, maintain and preserve the rule of law … by punishing those people who would choose to threaten its existence," it is not surprising that defences relating to upholding Indigenous law were not accepted. Comments made by First Nations persons about rejecting the Court's authority due to their commitment to Indigenous laws were treated by the Court as contemptuous remarks that even worked against arguments for rehabilitative sentences. For example, defence for Mr. Gallagher and Mr. Bige, both First Nations men, sought a sentencing circle as part of their sentencing hearing. However, the Court viewed Mr. Gallagher's statements that rejected the court's authority as "combative and aggressive," thus demonstrating that he was going to use the sentencing circle process to "lecture the Court on how 'natural laws' dictate his actions," rather than "rehabilitate himself through the sentencing process toward becoming a law-abiding citizen of Canada" (*ibid.,* paras. 114-116). Such statements exemplify that the Court will not acknowledge commitment to Indigenous law as mitigating factors, and only remorse over breaking Canadian law will be accepted. Sentencing circles were intended to help Indigenize the criminal justice system, and yet this decision shows they will not be employed if Indigenous individuals challenge the authority of Canadian law.

The same outcome occurred during the sentencing of Mr. Sauls, also named Saw-ses, a Hereditary Chief of the Shuswap, who argued for a suspended sentence (*Trans Mountain Pipelines ULC v Mivasair*, 2023b, para. 47). Saw-ses similarly challenged the Court's jurisdiction and Canadian sovereignty, which led the Court to believe that rehabilitation "is questionable in Saw-ses' case" (*ibid.,* paras. 89-91; 95). After sentencing Saw-ses to twenty-eight days in jail, the judge also quipped that, "his leadership role would or should also include teaching others to be law-abiding citizens" (*ibid.,* para. 99). The Court is focused on protecting its own authority and even presents opinions in its official capacity that belittles the importance of protecting Indigenous laws and perspectives.

In the Trans Mountain context, sentencing decisions that involve First Nations individuals triggered a *Gladue* analysis, whereby the Court considers the person's heritage, background

factors, and lived experiences. However, the Court consistently finds that these factors do not shift the central focus of denunciation and deterrence in the sentencing process.[8] All but one sentencing decision related to the violation of the Trans Mountain injunction led to incarceration. Only one conditional sentence of forty-days was given to a First Nations individual, Ms. Pierre, due to her caretaking responsibilities as a single mother (*Trans Mountain Pipelines ULC v Mivasair*, 2023, para. 169). Even so, the sentence is quite restrictive as it requires her to stay home unless for emergencies and the permission of a conditional sentence supervisor (*ibid.,* para. 171). Due to the continued resistance against the pipeline by various activists, the Court's response was to render more punitive punishments to assert the authority of Canadian law. *Gladue* principles that are intended to contextualize and situate the various systemic factors that lead an Indigenous individual in contact with the criminal justice system are not outweighed by the interest of the state to maintain the primacy of injunctions that protect major projects. Furthermore, the *Gladue* analysis conducted in these decisions does not seem to give serious consideration to *Gladue's* other requirements of tailoring sentences to a person's Indigenous heritage and practices.

Discussion

Analyzing the sentencing decisions of First Nations individuals who defy court-ordered injunctions reveals an additional site of the state's coercive power. Other scholars have already identified that injunctions are used to protect the state's critical infrastructure even if it is on contested territory (Pasternak and Cerick, 2023). As a result, the decision to grant injunctions is not the site where the courts are willing to engage with arguments premised on Indigenous legal traditions. Although it may be understandable that a decision about injunctions will not produce a fact pattern that can allow the courts to open space for the expression of Indigenous law, it is problematic that the courts treat the contested project as legal due to it passing a state-based approval process.

All three projects displayed fraught approval processes. The Coastal GasLink pipeline and the Trans Mountain pipeline were approved despite being rejected by various Indigenous nations. Although the Pacheedaht First Nation initially distanced themselves from the protest activities, Elder Bill Jones from the Pacheedaht First Nation condemned Teal Jone's old growth logging in Fairy Creek. In 2021, the Pacheedaht, Ditidaht and Huu-ay-aht First Nations demanded the B.C. government to defer logging in the region and to enter into new agreements that respect their stewardship initiatives and governance over the territory (Government of British Columbia, 2021). Although the state was able to push contested projects through regulatory approval or referral processes, they are not perceived by all Indigenous groups as legitimate in the way the Court accepts the approval process. The fraught nature of these processes is neglected in the court's judgments, as illustrated in the Coastal GasLink pipeline injunction decision: the Dark House Clan's protests were treated as self-help remedies even though other members of the Wet'suwet'en clans expressed disapproval of the project during the consultation and regulatory process.

[8] For example, *Trans Mountain Pipelines ULC v Mivasair*, 2020 BCSC 1512; *Trans Mountain Pipelines ULC v Mivasair*, 2021 BCSC 369; *Trans Mountain Pipelines ULC v Mivasair*, 2021 BCSC 1127; *Trans Mountain Pipelines ULC v Mivasair*, 2022 BCSC 791; *Trans Mountain Pipelines ULC v Mivasair*, 2023 BCSC 410.

Moreover, within these approval processes, there is little opportunity to express Indigenous legal traditions and Indigenous perspectives are unlikely to inform the entirety of the assessment (Do, 2020). Injunctions may be the inappropriate time to express claims relating to Indigenous laws, and it is unlikely that an approved project can be renegotiated, but there is very little opportunity to express Indigenous law before projects are approved. It is unsurprising that Indigenous resistance against contested projects persist even with court-issued injunctions.

While *Gladue* principles can be considered at other stages of the criminal process, sentencing is the only stage where considering a person's Indigenous heritage in a remedial manner is statutorily required. Yet our analysis above demonstrates that when sentencing individuals who violate the court-issued injunction, *Gladue* principles do not consistently change the court's focus on deterrence and denunciation, nor does the *Gladue* analysis prompt courts to consider the role of Indigenous law and sentencing practices in a consistent manner. Although hundreds of people were arrested during the Fairy Creek and Trans Mountain protests, only a handful of people by comparison were charged and given a sentence. Those seven First Nations individuals who were sentenced for the Trans Mountain protests violated the injunction numerous times, making deterrence a significant objective from the court's perspective. That being said, all the protesters were nonviolent and did not have a criminal history. The recourse to incarceration rather than noncustodial sentences, including fines, community service, or community-based sanctions, is justified by courts as a means to reiterate that the lawfulness of the injunction which cannot be challenged by unrecognized Indigenous laws. Although territory and how it is used are highly contested, the injunction context diverts the courts' decision-making to focus on asserting the primacy of Canadian common law. The focus on a perceived need to prioritize the common law fails to acknowledge the well-established coexistence of multiple legal systems within the Canadian state (Denis-Boileau, 2021). A consequence of this approach is a lack of space for courts to consider section 35 rights. Section 35 rights are simply not in the picture until Indigenous legal orders are formally recognized by the state, which also entails a highly fraught and contested process.

Most concerning was the fact that the individuals' commitments to Indigenous laws worked against arguments for conditional sentences, as seen in the case of Mr. Gallagher. In Nelson's sentencing decision after the Fairy Creek protests where *Gladue* principles did mitigate against a tougher sentence, the judge recognized that adherence to Indigenous legal traditions reflects Nelson's commitment to address the devastating effects of colonial policies like residential schools. The judge's approach to sentencing Nelson helps to fulfill Brigg's (2020) call to apply *Gladue* as a means to consider Indigenous traditions and alternative sanctions, rather than primarily as a method to communicate social disadvantage that often provides a justification for incarceration. This connection between commitment to Indigenous legal traditions and *Gladue* was not made in any of the sentencing decisions after the Trans Mountain protests. Indeed, the sentencing judge in the Fairy Creek context remarked that they "cannot, with great respect, agree with Justice Fitzpatrick's essential reasoning" in the Trans Mountain cases, as they view Nelson's motivation to abide by their understanding of Indigenous law to be "a form of unique background" that significantly affects their moral culpability (*Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2022 para. 19). Our analysis suggests that the individual sentencing judge is relevant, as

each judge may approach the question of commitment to Indigenous law differently as a relevant background consideration. Additionally, while there are too few cases to make a conclusive statement, it appears the temperament of the Indigenous individuals may also matter. Not only did Justice Fitzpatrick in the Trans Mountain sentencing decisions state that commitment to Indigenous law did not affect their moral culpability, Mr. Gallagher specifically also was interpreted as being aggressive for his rejection of the court's authority, making a sentencing circle inappropriate (*Trans Mountain Pipelines ULC v Mivasair*, 2020, para. 114). If temperament towards the authority of Canadian courts and law shapes court's application of *Gladue*, this seriously calls into question the efficacy of judicial discretion in using *Gladue* to consider Indigenous law and sentencing practices with the goal of limiting incarceration, and furthermore, it points to the court's continuing focus on disciplining Indigenous individuals to adhere to Canadian law.

The sentences of Leyden, Gallagher, and Bige from the Trans Mountain injunction case have been appealed. A new trial was ordered for Leyden as it was found the trial judge erred in determining the *mens rea* for the offence, as Leyden's defence showed that he believed he had police permission to be at the injunction site (*Trans Mountain Pipelines ULC v Mivasair*, 2023, para. 94). The other appeals have yet to be heard, and the role of Indigenous law will undoubtedly be addressed in these cases.

It appears the courts are at a crossroads: *Gladue* is sufficiently flexible to consider commitment to Indigenous law as a unique background factor, as apparent in Nelson's sentencing decision, but the courts can also continue to prioritize deterrence in cases where injunctions are breached undermining *Gladue's* goal of decarceration. Considering that Indigenous legal traditions are excluded during project approval and decisions to grant injunctions, the courts can decide that those traditions can at least inform judges' application of *Gladue* principles in sentencing. The courts are understandably reluctant to recognize the content of Indigenous law in contexts where section 35 rights and title are not formally established, but Indigenous commitment to those laws can be given some expression in court's *Gladue* analysis. Just as the Crown cannot "run roughshod" over section 35 rights before they are formally recognized, reconciliation may demand that Indigenous individuals should not be criminally punished for adhering to laws that may in the future be a part of Canada's legally pluralistic system. In the present context, the second circumstances of *Gladue* requires courts to consider practices of Indigenous law and heritage as part of sentencing an Indigenous person in a manner that is individualized and proportionate, emphasizing that *Gladue* principles necessitate more than articulating social disadvantage and systemic discrimination.

Conclusion

This paper investigates the effects of judicial decisions that grant an injunction to protect contested resource projects, with a focus on how those who defy the injunction are sentenced by the court. To do this, the injunction and subsequent sentencing decisions involving three different major resource projects in B.C. across five years (2018-2023) are analyzed. Our findings corroborate the

existing literature that shows courts are unreceptive to arguments that are grounded in Indigenous law in the balance of convenience step of the injunction test. This rejection is often justified by the Court if the Indigenous nation rejecting the injunction contains members who support the resource project, as is evidenced in the Coastal GasLink injunction decision. Our study also uncovers how the court's sentencing process is guided by a concern to maintain the court's own legitimacy and authority to impose Canadian law onto Indigenous peoples, rather than supporting reconciliation through constitutional and criminal law instruments, like section 35 or *Gladue* principles. In this way, sentencing when injunctions are violated provides another example of how the carceral state is applied and sustained in the context of Indigenous peoples (Mussell, 2023).

This focus on maintaining judicial legitimacy and authority is echoed in the sentencing process of First Nations individuals who defied the injunctions. A rejection of court authority led the judge during the sentencing decisions over violations of the Trans Mountain injunction to reject rehabilitative options or lessening sentences. Even when a *Gladue* analysis is invoked, the Court focused on the goals of deterrence and denunciation to protect against repeat violations of the injunction. Indeed, as Briggs (2020) suggests, the *Gladue* framework reinforces settler-state authority, rather than providing access to non-carceral sanctions and Indigenous legal traditions. Although it may not be surprising that the judge rendered more punitive sentences for repeat violations of the injunction, it is striking that these decisions rejected the practice of Indigenous laws as a mitigating factor for the offence. This finding corroborates the few existing studies (Newall, 2012) that show reducing the overincarceration of Indigenous peoples is not weighted as importantly as maintaining the court's authority.

The three cases, Coastal GasLink, Fairy Creek, and the Trans Mountain pipeline expansion reveal that courts are an important actor in the contentious politics that arise when major projects affect Indigenous land rights. Although courts have had a privileged role in defining and shaping how Aboriginal rights are protected in the Canadian constitution, these cases demonstrate how the criminal law contexts leave little space for the realization of Indigenous laws by courts. Indigenous perspectives, particularly those grounded in their legal traditions are not expressed and engaged with during the approval process for major projects and extractive activities, as an argument against injunctions that protect contested projects, and as a mitigating factor during sentencing decisions. Although the three cases under examination all reflect contested major projects, once approval is given, courts staunchly defend the legality of the project through injunctions, and *Gladue* principles do not consistently shape a court's priority to avoid sentences of incarceration for Indigenous peoples. By analyzing these major projects from a broader time horizon, particularly during the sentencing process, criminal law is shown to contain Indigenous resistance even when section 35 rights may be at stake. Indigenous legal perspectives regarding contested territory are ultimately stifled by the criminal justice system and its adherents are even punished through incarceration. This result from recent cases is disconcerting, particularly as Indigenous resistance against major projects has not decreased over time (Do, 2023). Although the government's stance on these contested projects may shift after highly visible acts of resistance, such as the deferral of old growth logging at Fairy Creek, it is problematic that the participants of these movements may not be protected by *Gladue*. Future appeals from the Trans Mountain case

may reveal whether the B.C. courts intend to transform the application of *Gladue* in injunction cases.

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