POLICY BRIEF
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Injunctions by First Nations: Results of a National Study

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After pouring over more than 100 cases of injunctions filed by and against First Nations, we believe that this legal tool reinforces the impossible position of First Nation parties when they appear before Canadian courts.

ULTIMATELY, WHEN SEEKING INJUNCTIVE RELIEF, their jurisdiction cannot be seen as an inconvenience to extraction and development. First Nations are encouraged instead to commit to lengthy, costly litigation to expect any protection for their lands and waters. We have also seen deeply troubling signs of a lack of standing for Indigenous law in the courts.

This brief provides a summary of just a slim subset of data collected in the largest national research project that exists to date on the use of injunctive relief by and against First Nations in Canada.

To put it simply, injunctions are a legal tool to stop someone from doing something. They are requested as part of a broader court action. In this research, we wanted to understand the triggers and outcomes of this legal tool. It seemed as though First Nations were being removed from their lands and denied jurisdiction through this legal action, but little was known about how the tests for granting injunctions were being interpreted by the courts on a national scale. What we learned, in short, was that the judicial system has a serious problem reconciling Indigenous jurisdiction with resource extraction.

Methods

There is some existing research on injunctions, but none of it answered some basic questions that concerned communities:

- How effective is the injunction remedy for Indigenous people in Canada?
- What kinds of discretion do the courts exercise in granting injunctions for and against First Nations and what are the key elements to a successful application?
- How were Indigenous law and Aboriginal rights weighed in these decisions?

Searching each jurisdiction through online legal databases, our research team isolated over 100 cases involving First Nations. We also included several cases where First Nations were heavily involved and targeted but not directly named in the injunction, such as anti-logging protests at Clayoquot Sound or the province-wide TransMountain pipeline injunction.

While we excluded cases that involved First Nation injunctions against other First Nations, we included any First Nation individual(s), Band Councils, or grassroots groups who had standing in injunction orders against or by them in the court. Cases focusing on Inuit and Metis people were outside of the scope of this study but were collected for future use. Our cases fell between the years 1958-2019 and appear exhaustive for this period, though there is always the chance we missed a few.

Findings: The Merits of the Cases

Our research found that success rates of injunctions for First Nation people in Canada are very low. These numbers reflect an 18.5% success rate for First Nations seeking injunctions across Canada.

This raises questions as to the value of injunctions as a valid legal remedy for First Nations seeking to assert Aboriginal rights, title and treaty rights.

The case law summarized below demonstrates the ineffective use of injunction as a remedy for First Nations. And, may suggest that provincial and territorial regulation, and related environmental legislative frameworks, are left unchecked and under-challenged by the SCC legal precedent on injunctions vis-a-vis Aboriginal rights.

At the very most, it seems that the injunction remedy is sometimes used as a measure to achieve more comprehensive rights, title, and duty to consult compliance between First Nations, corporations and the government. However, the low success rate of the injunction remedy for First Nations calls into question fairness and equity in the use of this remedy within the Canadian legal system. In this brief, we will focus on blockades and Duty to Consult - two prevalent themes in the case law.

Blockades

Many of the cases we examined involved First Nation blockades. It is important to note here that the Supreme Court of Canada set a three-part test for granting interim and interlocutory injunctions in RJR-MacDonald Inc. v. Canada (Attorney General) [1995] 3 SCR 199 that is referenced repeatedly in the trials at provincial courts in this study. We wanted to understand how the tenets of this test were being defined and upheld across the country. The RJR-MacDonald test asks whether there is a serious issue to be tried, whether an irreparable harm has been suffered by the injunction seeker, and whether on a "balance of convenience" the harms are worthy of injunctive relief. If so, damages would also need to be determined.

Tresspass: During our research, we found as many as half of all injunction cases involved First Nations who had erected blockades. First Nation blockades are usually on "Crown land" leased out or permitted to companies for use. Therefore, the courts deemed the First Nation land defenders to be "trespassing," which is a tort and/or criminal offense [see: *Canadian National Railway v. Chippewa of Sarnia First Nation Band*, 2012 ONSC 7356, *Coastal Gaslink Pipeline Ltd. v Huson*, 2018 BCSC 2343, and *Marine Harvest Canada Inc v Morton*, 2017 BCSC 2383]. Here, the matter of how the court understands the underlying Aboriginal title, especially in cases on Crown Land, is material. First Nations are by and large not understood to have proprietary interest in the land, despite court rulings to the contrary (see *Delgamuukw v. British Columbia*, 1997, 3 S.C.R. 1010].

Geography: In the *Coastal GasLink Pipeline Ltd. v Huson*, 2018, case the court also determined that the remoteness of the bridge being blockaded favoured granting an injunction against the First Nation. [See as also *Husby Forest Products Ltd v Jane Doe,* 2018 BCSC 676 and *Marine Harvest Canada Inc v Morton*, 2017 BCSC 2383. Due to "remoteness" when the injunction was granted, it was also accompanied by an enforcement order, meaning that the land defenders could be forcibly removed. In the case of *Canadian National Railway v. Chippewa of Sarnia First Nation Band,* 2012, mentioned above, though, it was the frequency and density of disrupted circulation that turned the judge's favour towards the railroad company, prioritizing the transportation of goods over the assertions of Chippewa sovereignty [para 26 -31].

Indigenous Law: Lastly, First Nations have relied on their law and rights as a basis for erecting blockades without success. In *Marine Harvest Canada Inc v Morton*, 2017 BCSC 2383, the First Nations group occupied the Plaintiff, Marine Harvest Canada's aquaculture facilities. The Justice rejected the First Nations' claim that they were justified in their occupation as they have a sacred duty to protect the water (at paras 11-12, 70). In *Coastal Gaslink Pipeline Ltd v Huson*, 2018 BCSC 2343, the assertion that the blockades erected per Wet'suwet'en law was not compelling in dissuading the judge from granting an injunction against the First Nation (at para 28). Our preliminary assessment is that Indigenous law justifications are not persuasive in injunction cases.

Duty to Consult

Many cases involving blockades revolved around the "duty to consult." *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. clarifies this duty. Haida requires this duty where there is a potential violation of Aboriginal rights by governments, even in the pre-proof stage of formal litigation (para 32). In this respect, Haida protects Aboriginal rights, title and treaty rights.

On the other hand, from a review of injunction case law, it can be shown that the Haida framework has also not served First Nations when they try to bring injunctions in cases involving failures in consultation protocols. The case law suggests that the court is hesitant to issue an injunction to First Nations where duty to consult is the issue. In *Sapotaweyak Cree Nation v. Manitoba,* 2015 MBQB 35, the court also found that the duty to consult would be better considered under administrative law and not through an injunction (para.190). The court notes that "where a First Nation or Aboriginal community alleges a failure of the Crown to discharge its duty of consultation, the issue is normally determined pursuant to administrative law principles in the context of a judicial review" (para. 192).

It is more often the case that injunctions are used against First Nations to circumvent their ability to assert Aboriginal rights/title and treaty rights in relation to Crown and corporate development and projects.

There are also concerns regarding the Crown's "Delegation of Duty" being upheld by the regulatory process, such as administrative bodies/tribunals in the context of environmental law. For example, in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.,* [2016] 3 FCR 96, the National Energy Board (NEB) approved Enbridge's pipeline expansion without consultation with the First Nation. The Chippewas of the Thames case is an example of the Crown's duty to consult being implemented only at the lower end of the spectrum of the duty to consult framework referenced in Haida.

No Consent: Further, the courts found that the test in Haida requires only a "duty to consult not to agree" (para. 31). For example, in *Petahtegoose v. All Sustainable Forest Licence Holders, 2016 ONSC 2481,* the judge wrote that, "It is consultation not consent that is paramount."

Conclusion

This study suggests that the hesitancy of the courts to utilize injunctions as a remedy in the context of Aboriginal law results in disproportionately negative consequences for Indigenous people.

A review of the case law suggests that First Nations in injunction cases have a difficult time overcoming the 'irreparable harm' portion of the test given their pleadings are not based on property rights but on sacred duties to protect the land. For example, in *Munro v. British Columbia (Minister of Forests),* 1998, CanLII 3904, the First Nation argued that the cutting of trees could cause harm; so because the only harm was potential future harm and, the company immediate financial harm, the 'irreparable harm' portion of the RJR test was in favour of the company.

Some cases offer hope, though, for example, *R. v. Yellow Quill First Nation,* 1999 SKQB 82 states, "Irreparable harm is a reference to the nature of harm rather than its magnitude. It is harm that cannot be quantified in money" (at para 14).

If First Nations are to rely on injunctions to assert their inalienable Aboriginal rights and uphold the protection of proven Aboriginal rights, then work needs to be done to improve the use of remedies. Particularly, so that First Nations are allotted time to engage in a proper consultation process, while larger corporations rely on their permits and environmental assessment tribunals. The courts push First Nations away from using injunctive relief, arguing that they must prove their rights in court. But as an interim measure, they must grant First Nations the chance to buy time and raise money in the face of violation of their rights.