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Political Geography 84 (2021) 102298

Contents lists available at ScienceDirect

Political Geography

journal homepage: http://www.elsevier.com/locate/polgeo

# Climate injustice, criminalisation of land protection and anti-colonial solidarity: Courtroom ethnography in an age of fossil fuel violence

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ARTICLE INFO

*Keywords:*
Climate justice
Oil
Courtroom ethnography
Indigenous rights
Trans Mountain pipeline

ABSTRACT

As plans for expanding fossil fuel infrastructure continue to ramp up despite threats to the planet, how are geographers to address the criminalisation and prosecution of peaceful acts of defending earth, water and land? Reflecting on a courtroom ethnography and debates spanning legal geography, political ecology and social movements studies, this article explores embodied struggles around oil, 'justice' and geographies of caring – discussing how Indigenous youth, grandmothers in their eighties and others were convicted of 'criminal contempt' for being on a road near an oil pipeline expansion project. The project ("Trans Mountain Pipeline Expansion") was created to transport unprecedented levels of heavy oil (bitumen) across hundreds of kilometres of Indigenous peoples' territory that was never ceded to settler-colonial authorities in Canada. Focusing on a controversial injunction designed to protect oil industry expansion, the discussion explores the performativity of a judge's exercise of power, including in denying the necessity to act defence, side-lining Indigenous jurisdiction, and escalating prison sentences. Courtroom ethnography offers a unique vantage point for witnessing power at work and vast resources used by state actors to suppress issues fundamental to the United Nations Declaration on Rights of Indigenous Peoples and the Paris Climate Accord. It also provides a lens into the intersectional solidarity and ethics of care among those who dare to challenge colonialism and hyper-extractivism, inviting engagement with multiple meanings of '*irreparable harm*' at various scales. The article calls for more attention to power relations, values and affects shaping courtroom dynamics in an age in which fossil fuel interests, climate crisis and settler-colonial control over courts are entwined in evermore-complex violent entanglements.

## 1. Introduction

Courthouses can reflect, perpetuate and reproduce forms of colonialism in a myriad of ways. Some may be visible in the arrangement of courthouses themselves (Faria et al., 2019; Jeffrey, 2019), others through the relations, "performative use of categorisation" (Blomley, 2015) and "spatial tactics" (Sylvestre et al., 2020) in particular cases and decisions rendered. In Vancouver, Canada, there is a corridor in the British Columbia (BC) Supreme Court building where more than seventy portraits of white male judges appear on the wall, uninterrupted by female or non-white faces. Near the middle of the hall, a few women's faces eventually appear, reflecting some judiciary changes, before the remaining portraits show more white male judges. The building sits on the unceded territory of the Musqueam, Squamish and Tsleil-Waututh peoples. In the basement of the building, which was designed by a famous architect, a special room, built years ago for the Air India bombing terrorism case, has bullet-proof glass dividing the public gallery from the court. On August 15th, 2018, as part of a research programme on intergenerational environmental justice, I sat in this gallery with other courtroom observers as a seventeen-year old Indigenous boy was sentenced by a white male judge for violating an injunction against impeding construction of an oil pipeline expansion project on his ancestral territory. The injunction had been established in March 2018 by the same judge, a justice in the BC Supreme Court who was formerly a lawyer for the tobacco industry (Smith, 2018). The boy's alleged offence was standing on a road on Burnaby Mountain, in front of a vehicle, and praying there a few days after the injunction was established.

The boy had stood on the road as a matter of principle – peacefully – with others: Indigenous youth and elders, grandmothers from different ethnic backgrounds, and people from diverse professional and cultural milieus – some homeless, some living nearby, some from far away, some students, retired teachers, professors, city councillors, parishioners, and others. Some were also arrested for civil disobedience that day, others not. This injunction was initiated to clear the path for constructing a pipeline owned (then) by a Texan oil company, Kinder Morgan (the

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https://doi.org/10.1016/j.polgeo.2020.102298
Received 27 February 2020; Received in revised form 21 September 2020; Accepted 25 September 2020
Available online 8 October 2020

parent company linked to the infamous Enron scandals), to triple levels of diluted bitumen (heavy oil) flowing through hundreds of kilometres of land from Alberta's tar sands in the interior (see Schmidt, 2020), through Indigenous territory, to the BC west coast. The project was one that candidate-Justin Trudeau, when campaigning to be Prime Minister, publicly argued needed a whole new review process – including assessing climate risks and other aspects – before he later reversed his stance, asserting a new 'national interest' imperative to build the pipeline (Dalby, 2019).

On the day of sentencing, an Indigenous elder argued to the judge that the boy standing on unceded aboriginal land did not constitute a criminal act. The "*crime scene*," she contended, was the one unfolding in the courtroom – defying the rights of Indigenous people to preserve and protect land and water, which was the boy's stated intent. The judge did not take issue with the claim that the boy was only praying peacefully, but asserted that being on this road constituted "criminal contempt" of his injunction. He added that he could not fathom a successful challenge and that there can be no Indigenous rights defence because white people of European descent had also been arrested under the injunction; this nullified, for him, the idea that Indigenous rights needed any particular attention here. The elder argued that the boy should not be deemed "guilty" of anything, that forced appearance at nine court proceedings, causing repeated sleepless nights and anxiety, was already more than enough punishment, and that the "criminal contempt" label needed to be appealed, with the pipeline violating Indigenous people's rights on land never ceded to the British colonisers before the creation of Canada nor to any Canadian government thereafter. She added that the boy did not know what an "injunction" even was at the time of arrest, should not have been tried in adult court, and should not be punished for opposing a violation of Indigenous laws and values.

This was the first of more than a dozen cases I witnessed in the BC Supreme Court and speaks to just one instance of criminalising 'being in the way' of aggressive expansion of the fossil fuel industry. The oil industry has long been shaping legal and political systems, undermining democracy and stopping action on global warming (Bridge & Le Billon, 2017; Dalby, 2016; Huber, 2013; Mitchell, 2011; Taft, 2017; Temper, 2019). In an age of fossil fuel extractivism and amid growing concern that it may now be "too late to stop dangerous climate change" (Whyte, 2020), what do such encounters signify? What does it mean to see values of land and water protection – and what Shiri Pasternak (2017) calls Indigenous *ontologies of care* – colliding with settler-colonial courts? What are the roles of 'solidarity' in countering corporate and colonial agendas that converge in the courtroom space? How can a critical lens merging anti-colonial political ecology with legal geography help to guide an understanding of the criminalisation of peaceful civil disobedience[1] and Indigenous-led resistance?

In this article, I unpack some of the dramas that ensued over the next 15 months in this courtroom – a critical setting for grounding debate on what it means to contest interlinked climate, environmental, legal and sociocultural injustices (Chatterton et al., 2013) – and for reflecting on what some judges preclude from articulation. A plethora of legal manoeuvres, including surprises and inconsistent rationales, would be mobilised to penalise peaceful land and water protectors, while entertaining only narrowly circumscribed legal arguments. Diverse resistance strategies would also be cultivated and diverse affects experienced. Despite Indigenous-led movements seeking to bring respect to Indigenous laws (Borrows, 2002; Napoleon, 2013), courtrooms in Canada are routinely places of asserting settler-colonial power over Indigenous laws and values, denying Indigenous claims, controlling Indigenous bodies and defining – with colonial law – what is relevant or irrelevant about Indigenous land, governance systems and life (Coulthard, 2014; Crosby & Monaghan, 2018; Daigle, 2019; Hunt, 2014, p. 234; McKibben, 2017; Nunn, 2018; Palmater, 2016). While courts have been normalising this violence, courtrooms may simultaneously be places of emotional support, anti-colonial solidarity, critical expression, and intergenerational relation-building in the face of neo-colonial capitalism and colonial legal systems. Below I reflect on being part of one such diverse multi-generational and multi-cultural group, seeing relations of care built between defendants and observers-in-solidarity, as prosecutors and judges punish pipeline protestors using jarring arguments to keep climate issues and Indigenous rights – and truths – out of the legal calculus.

Linked to the above, this article explores what courtroom ethnography might generate as a vantage point for interpreting wider hegemonic arrangements and counter-hegemonic solidarities. LeQuesne (2019) advanced notions of "petro-hegemony" using Gramsci's theory on hegemony to explore dynamics of consent, compliance, coercion and resistance, exploring the Standing Rock Sioux's fight against the Dakota Access Pipeline (DAPL) in North Dakota. Estes and Dhillon (2019) also argue that unpacking hegemony in the Standing Rock case requires grappling with complex issues of Indigenous sovereignty, gender violence and environmental destruction that have all been implicated in threats of pipelines, seeing the more-than-localized nature of protests and their wider politics. In the case of the Kinder Morgan Pipeline – branded the "Trans Mountain Pipeline Expansion" (TMX) project – millions of Canadian taxpayer dollars have been spent on security and court costs, and like in the DAPL case, taxpayer money has been used to fund secret police infiltration campaigns among peaceful activists, which police spoke about proudly while on the witness stand in the TMX hearings. While participants in the courthouse shared support and prayer, including praying for the prosecutors, wider developments would also be quietly discussed in the corridors and outside. Courtroom ethnography offers fertile terrain for exploring the affective and political landscapes in and around a judicial setting, allowing an in-depth examination of colonial performance. It provides a nexus for critically linking a court injunction imposing the hegemony of oil with deep struggles for a 'just transition' from fossil fuels (Brown & Spiegel, 2019; Le Billon & Kristoffersen, 2019), valuing life, 'place' and approaches to solidarity. While fossil fuel extractivism continues to flourish in Canada and globally, exacerbating injustices of settler-colonial violence (Bosworth, 2019; Simpson, 2019), my overarching objective here is to further critiques of such violence by paying attention to how colonial legal authority is performed and enacted, but also challenged and contested in the space of the courtroom, courthouse corridors and beyond. I argue for the value of courtroom ethnographies to explore politics around oil and ontologies of caring, learning from land defenders and contrasting spectacles of aggressively imposed (neo)colonial order (and their narrative frames) with different affects and values.

In addressing blockades and civil disobedience, emphasis in political geography has been on social dynamics around *zones of extraction* (Brock & Dunlap, 2018) and collective *street spaces* as sites of policing, protest and solidarity-building (Daphi, 2017). Walenta (2020) argues that, broadly speaking, geography as a field has only very minimally engaged *courtroom ethnography* as a method, despite its considerable potential for interrogating intersections of legal space, political geographies of power and lived experiences. Likewise, Faria et al. (2019) call for more attention by geographers to the "spatial work of power in and through the legal system, connecting everyday legal goings-on and the trans-scalar structural machinations of state violence." Contextualising the political geographies of one particularly symbolic set of court proceedings – connected to a highly controversial oil pipeline expansion – provides a way of building upon this. I also extend arguments by

[1] While reflecting on 'civil disobedience' – a relational term, I caution against making assumptions about settler court jurisdiction as the appropriate legal jurisdiction. Indigenous people defending never-ceded Indigenous territory may be understood as *obedience* to and respect for Indigenous legal traditions. Actions of land, water and earth defense require contextualization with careful discussions of circumstances, settings, the violence of (settler-)colonial law as well as consideration of Indigenous law and legal orders (Borrows, 2002; Napoleon, 2013).

Simpson (2019), who, drawing from Deleuze and Guattari, suggests thinking about the relation between settler colonialism and bitumen as a "resource desiring machine"; describing the violence of the Alberta oil/bitumen story, Simpson argues: "the remaking of bitumen as a resource in the Athabasca region served a purpose even more immediate than capitalist accumulation – it served to consolidate a nascent settler colonial state's claims to authority over territory." This discussion is furthered by Schmidt (2020), unpacking setter-colonial discourses around bitumen, its political geology and temporality, and its dominance. Increasingly central to all this, I would add, is the ongoing proliferation of colonial court proceedings and contestable logics to quell civil disobedience and Indigenous resistance, involving an elaborate and understudied array of actors, processes and spaces in the use and abuse of court 'injunction' tools.

Before discussing my methodological approach to courtroom ethnography, the section below first provides some critical background to the fast-eroding public confidence around Canadian government "climate leadership" during the pipeline and settler-colonial "court justice" sagas of 2018–2020. It sets the stage for so-called threats that would be talked about – peaceful Indigenous youth who would become framed as "criminally contemptuous" and grandmothers who became "sinister seniors" in the media and sent to prison. I then discuss orientations for a courtroom ethnography and bring critical scrutiny to experiences of one particular injunction protecting TMX. Section 3 then interrogates the court's theatre of power operating to advance fossil fuel extractivism through contemporary colonial rituals. In section 4, considering diverse affects and dramas surrounding contested deployment of the term "irreparable harm" in the courtroom, I turn to some of the defendants' challenges to the court, including an eventual theatrical reproduction of courtroom dramas in a play entitled "*Irreparable harm?*" –and reconfigured public debates on injunctions in 2020 that put Canada's colonialism under new spotlights. I conclude by asking what it means for geographers to study court challenges to colonial violence and hegemonies, engaging an ethics of care.

## 2. 'Justice', climate rhetoric and pipeline sagas: political geographies in/around courts

Ethnography in courtroom settings requires engagement over time with diverse temporal, political, legal, ethical and relational concerns (Walenta, 2020). With courts around the world playing diverse roles as theatres of power, notions of courtroom ethnography and critical socio-legal analysis might give rise to any number of points of emphasis in navigating tensions around capitalist interests, environmental justice, Indigenous rights and climate concerns (Setzer & Vanhala, 2019; Williams, 2012). In certain contexts, research on climate justice is focusing attention to emerging forms of litigation and related optimism (Klaudt, 2018). As moves to criminalise peaceful oil pipeline protests (Horn, 2019) reached new levels of intensity in 2019 and early 2020, arguments supporting civil disobedience are also receiving increasing attention (Rausch, 2019). Internationally, some judges have both agreed to hear "necessity defences" and upheld these defences when acts of conscience were deemed justifiable.[2] Yet, a flurry of new evidence would indicate that industry lobbying to increasingly penalise protest has further weaponized judicial statutes against resistance (Johnson, 2019). Concerns have grown that anti-protest legislation is threatening people and the planet, beckoning critical rethinking of why governments are not using resources to prosecute fossil fuel companies instead of 'protestors' (Brown, 2019; Ellinger-Locke, 2019). The tendency of liberalism has long been to locate violence outside of the law so that "violence and law appear antithetical" (Blomley, 2003), obscuring specificities of injustice (see Barnett, 2018). In an age of rampant fossil fuel violence[3] with legal apparatuses aggressively propping up short-term wealth maximization based on unsustainable resource exploitation (Christie, 2013), there is increasing impetus to theorize violence at play in 'justice' systems and re-situate arguments and actions with regard to the necessity of land, water and earth defence.

On land stolen from Indigenous people,[4] political and judicial institutions in Canada have robust records of legitimising and protecting fossil fuel projects that are heavily opposed. Regimes for 'recognizing' the rights of Indigenous people are circumscribed by entrenched forms of settler-colonialism that perpetuate institutional racism, ongoing dispossession and narrow visions of environmental justice that tend to keep extractive interests prioritised (McCreary & Milligan, 2018; Preston, 2017). Alberta's Premier has celebrated and championed aggressive tough punishment for those who seek to oppose and disrupt oil development, arguing that Canada should find Russian President Vladimir Putin's approach to crackdowns "very instructive" (PressProgress, 2019). Meanwhile, while subsidies for oil interests persist, legal 'injunctions'– tools courts use to stop what they label as "irreparable harm" – have been used widely by corporations against Indigenous groups. A study released in 2019 by scholars at Yellowhead Institute gives ground-breaking analysis of how skewed injunctions are as legal tools in Canada, enabling fossil fuel projects and systemic bias in determining who can block whom from land; it found corporations succeeded in 76 per cent of injunctions filed against First Nations, while First Nations were denied in 81 per cent of injunctions against corporations (Pasternak & King, 2019, p. 68).

Following years of gutting environmental regulations when Conservative Stephen Harper governed as Canadian Prime Minister, there was hope in some quarters that Liberal Party leader, Justin Trudeau, would bring meaningful new attention to Indigenous consultation and consent requirements for contentious projects and to regulations that would promote climate governance leadership (Dalby, 2019)). Trudeau branded himself a feminist and climate policy leader, and committed publicly to respecting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). His government's actions around pipelines in 2017 and thereafter displayed what many saw as disappointing breaches of campaign pledges. The National Energy Board (NEB) – an industry-focused entity empowered to adjudicate the legitimacy and risks of energy-related projects – became a tool of continuity (Hunsberger & Awâsis, 2019). Trudeau's campaign pledge to overhaul the Environmental Impact Assessment (EIA) process for all projects including the Trans Mountain Pipeline did not materialise, while his promoting new fossil fuel infrastructure led to Canada being talked about as among the worst environmental criminals on the global stage (McKibben, 2017).

Diverse forms of resistance thus emerged. As (then) Green Party leader Elizabeth May articulated after her arrest for standing on the road

[2] In 2018, for example, a Massachusetts judge dismissed charges against climate activists, noting the necessity of protest (Chow, 2018). In 2019, courts in London (UK) upheld "necessity to act" defences for civil disobedience, for example, when a jury absolved two co-founders of the Extinction Rebellion of charges emerging from subversive acts to pressure divestments from fossil fuels (Corbett, 2019).

[3] By *age of fossil fuel violence*, I refer here both to the violent material and biophysical impacts (direct and indirect) of fossil fuels themselves and the vast state-corporate apparatuses (see Simpson, 2019) that drive dispossessions and structural violence in the name of promoting extractivism as progress. This term seeks, as with Michael Watts' 'petro-violence', to refer to ecological and social violence (Watts, 2001), and can be (as is here) inextricably interlinked with setter-colonial violence (see also Whyte, 2018).

[4] Unlike many places in Canada, treaties were not entered into with most Indigenous Nations in British Columbia, where the violence of colonization has been particularly ruthless. Theft of land has been through various means, including through genocidal smallpox, and the confining of Indigenous people to small tracts of reserve land; theft has continued in various forms (Manuel & Derrickson, 2017; see also; Coulthard, 2014; De Leeuw, 2016; Schmidt, 2018; Canning 2018).

in Burnaby: "The commitment to build a pipeline in 2018 when we are in climate crisis is a crime against future generations and I will not be part of it" (Brown, 2018). More passive acts of resistance took the form of the City of Burnaby refusing to pay costs of policing demonstrators. Provincial government authorities in British Columbia opposed the pipeline project as well, amid multiple jurisdictional frictions,[5] and also attempted legal challenges, albeit unsuccessfully. Yet, even if the hegemony of oil in politics was challenged by thousands of people marching on streets and blocking roads in front of construction, and by positions articulated by some regional authorities, new efforts were also afoot to re-assert oil's hegemony. When in 2018 owner of the pipeline, Kinder Morgan, conveyed "risk concerns" related to the thousands of protestors and ongoing legal challenges by Indigenous peoples, Trudeau provided 4.5 billion Canadian taxpayer dollars to this Texas-based firm to buy the pipeline, making the State the owner of TMX (Lukacs, 2017).

Courthouse moods – and ethnographies they generate – are thus invariably shaped by events both near and far. Importantly, two weeks after the above 17-year old boy's sentencing was rendered (and amid many other pending injunction cases in that same court), a different legal drama unfolded, far from this court. Tsleil-Waututh Nation - an Indigenous Nation especially affected by the oil terminal in the Burrard Inlet - earlier had mobilised resources to legally challenge the pipeline approval. On August 30th, 2018, coincidentally the same day as Canada's Federal Government offer to purchase the pipeline was accepted by Kinder Morgan shareholders in Texas, the Federal Court of Appeals ruled that the expansion project's approval was "impermissibly flawed", with unacceptable omissions in the EIA review process and fatally lacking "meaningful" consultation with Indigenous people or consideration of the impact on an endangered whale population.[6] While notably not addressing all the problems of concern (still omitting global climate threats and Indigenous health issues), the Federal Court required the project construction to be halted. Yet, the Prime Minister within hours, asserted that the project "will" go forward – seemingly regardless of what any new EIA review and Indigenous consultation processes might reveal. Crown prosecutors thereafter began to be seen in BC Supreme Court hearings for the arrested pipeline injunction defendants, clarifying that prosecutions would continue despite the court decision to halt construction. Far from acknowledging that the land and water defenders were in any way vindicated by this ruling, the aforementioned judge began to *increase* penalties for those he deemed to have breached his injunction. More trials began, and more prison sentences were issued, with more than 230 people charged by this time.

As Andrew Barry reminds us in *Material Politics* (discussing the Baku-Tbilisi-Ceyhan oil pipeline linking the Caspian Sea to the Mediterranean Sea), oil pipelines are part of structural struggles that need to be studied as dynamic and *contingent* on multiple positionalities and power relations, reflecting tensions in how histories are told and how knowledge production is approached (Barry, 2013; see also Murrey, 2015). Studying courtroom dynamics around the TMX project indeed brings forward diverse possibilities and dilemmas for grounding ideas of injustice; different timelines, subjectivities, power relations and material concerns may be prioritised. While thousands of people have expressed resistance, this has been in many ways, for many reasons. For some, opposition is a response to concerns that the 7-fold increase in oil tanker traffic right in the Vancouver harbour poses a serious threat to local populations from a spill in this area; for others, effects of tanker traffic on BC's west coast endangering the orca populations is a major motivator, for some, the pipeline's impacts on salmon figures prominently; and for many, including scientists willing to be arrested, increased greenhouse gas emissions that would result from expanded oil exports is central, framing opposition to a global climate disaster as the lead issue. The pipeline also represents the continued destruction of Indigenous health, food sovereignty and wellbeing on local scales, with oil impacts already having been shown to have serious consequences in undermining Indigenous health and food sources (Jonasson et al., 2019).

Broadly, geographers have expressed a need to sensitively think beyond "assumed-affinities" (Barker & Pickerill, 2012) that may exist when imagining diverse Indigenous and non-Indigenous activists in collective struggles. Indeed, it is precisely because of deep *diversities* of concerns, relationships and positionalities (some people more 'anti--capitalist' than others, some more inclined to use *legal* and/or *moral* arguments than others, some more focused on greenhouse gases or gender violence associated with 'man-camps' built for pipeline construction, and so forth) that resistance movements against oil pipeline expansion are vastly growing. Glossing over positionalities relating to class, culture, ethnicity, gender, and geography-based differences can lead to under-appreciating diverse values linked with what Barker and Pickerill (2019) call "place-agency" that stands in contrast to settler-colonial jurisdictional control. For many people arrested, the *central* concern is that the TMX project sits on stolen land and without consent from impacted Indigenous communities who actively oppose it. Threats of fossil fuel pipelines broadly and intensified oil risks on Indigenous land specifically, in a context of climate destruction, all became part of concerns that defendants tried to voice, with some defendants detailing illegalities committed by the pipeline construction company itself and values at stake.

### 2.1. *Learning, listening, seeing, interacting at the courthouse*

I approach courtroom ethnography here as a way of re-imagining contested proceedings, jurisdictional assertions, positionalities and embodied practices. It is, in part, a way of *unsettling* (see De Leeuw & Hunt, 2018) knowledge production in relation to machine-like prosecutorial efforts at categorising and individualising illegality and punishing acts of conscience with colonial law; partly it is about contrasting these moves with the courageous stances of defendants, the collective mobilisation and the ethics of care displayed amid contested regimes of extractivism. As I learned through more than a hundred and fifty hours of attending court proceedings that at times dragged on for hours of judicial jargon, prosecutors often snowed defendants with their version of legal precedents and case law, narrowly circumscribing spaces for defendants to articulate their concerns. Constricted space for 'evidence' was central to a system of guaranteeing guilty verdicts and punishment. The injunction here served – like injunctions elsewhere – "as a blunt instrument in opposition to Indigenous law" (Pasternak & King, 2019, p. 29) with proceedings structured to confirm what a judge knew already: that many people stood or sat (or prayed) on a road. Courtroom ethnography became a way of exploring a system mobilised to subordinate Indigenous rights and voices to procedural discussions, using vast state resources in the service of oil industry expansion; it also became a process of researcher interactions with people in the court corridors and beyond, where not only issues of this court were explored but also other struggles (beyond this injunction), situated knowledges, and intersecting solidary efforts.

Over more than a dozen cases (trials and sentencing hearings) from mid 2018 to mid 2020, all concerning this one injunction, I met many "sinister seniors" – women and men in their 60s, 70s, and 80s, some of whom regularly came to court sessions to offer solidarity to people on trial. Some had trials and sentencing hearings earlier in 2018; their "sinister" label came initially from the judge telling them that standing on a road was a "sinister act of contempt" (the "*sinister senior*" label

[5] While settler-colonial legality and legitimacy in making jurisdictional claims can be called into question (see Pasternak, 2014), it is noteworthy that although Canada's settler-colonial legal structures affords jurisdiction over projects that cross provincial jurisdictions to the Federal government, the Canadian constitutional framework distributes legislative powers over the environment to both the federal parliament and provincial legislatures, generating many legal challenges when differences emerge (see Hoberg, 2018).

[6] See Tsleil-Waututh Nation v Canada (Attorney General) 2018 FCA 153 (CanLII).

thereafter became self-inflicted - worn as a badge of honour). Many grandmothers spoke about solidarity with Indigenous rights at trials, and about oil and the future for younger generations. Coming to the court was an endeavour to learn, to show solidarity, to see the performance of power in grotesque forms as well as "subtle dramas" (Flower, 2018) with significant and sometimes not-so-subtle meanings, and to talk about what values matters – and what dilemmas exist in framing a "necessity to act" defence. Not all defendants chose to advance such defences, which required substantial paperwork. Being in the court provided ways of seeing unique choices that each defendant engaged, and that different prosecutors employed, where word choices, tone and affect all mattered.

While this methodology thus involved listening in the courtroom and taking notes, at times it explored the creativity of people mobilising against the pipeline expansion. I interacted with defendants, observers, and defence lawyers, as well as reviewed transcripts; these included statements prepared for the judge – some delivered only in part or not at all in the hearings. The evidence that mattered most to the judge was never evidence about conscientious objections or greenhouse gases but rather what members of the Royal Canadian Mounted Police (RCMP) showed on the stand – 'evidence' such as news articles or Facebook posts citing defendants' words, indicating that they engaged in "calculated defiance" or an "organised" plan to be on the road. My task evolved to include revisiting these sources, too, venturing into some of the voluminous legal cases referenced (several thousand pages of which were circulated by the many lawyers involved; a single defendant recounted being given more than 600 pages when charged). Conversations in the gallery during breaks and elsewhere in the courthouse, and beyond, explored experiences in hundreds of trials and sentencing hearings. I spoke with courtroom observers and defendants in coffee shops, over meals and on the street, exploring testimonies and meanings around them – and also what it means to witness. In being there in the courtroom, day after day, a courtroom ethnographer becomes not merely an observer but inescapably part of the proceedings – at times making unavoidable eye contact with judge and prosecutors as well as becoming part of the camaraderie of the gallery itself. At times the ethnography became a process of reflecting, in an awkward courthouse setting and, if only partially, on urgent needs for geographers – efforts toward more meaningful engagement with Indigenous ontologies of place, relations with place and legal practices of place (Daigle, 2019).

Faria et al. (2019) argued for more work by geographers to interrogate ways of connecting everyday legal activities and "the *trans*-scalar structural machinations of state violence." Indeed, to situate the spatial politics of courts, multiple spaces need to be seen as interconnected. On one occasion, after a court session finished, four fellow courtroom observer-companions and I travelled together from the courthouse in downtown Vancouver to a NEB hearing in Nanaimo on Vancouver Island, to see a parallel space of pipeline politics – where efforts were afoot by the Federal Government to pressure Indigenous leaders who opposed the pipeline. NEB hearings took place in a conference venue where Indigenous groups had to travel considerable distance to make presentations. Some Indigenous leaders lambasted this venue as an insulting "Hilton Hotel version" inappropriate for oral traditional evidence – highly inaccessible and not open to the public or easily open to Indigenous communities, reflecting the government's poor commitment to genuine consultation. Our seeing this 'sterilized' NEB environment thus further contextualized the courthouse space. My approach was thus not just about studying the courtroom as a space in itself but also as a nodal point for interacting and interpreting wider events, places of contention and processes unfolding, and seeing solidarities and affects that challenge oil and the dominance of colonialism in governance and judicial systems.

Separate from but concurrent to the courtroom ethnography work, I also collaborated on a project with members of the Tsleil-Waututh Nation focused on life within Tsleil-Waututh territory (Spiegel et al., 2020), which informs engagement on wider inter-relating issues of knowledge production with Indigenous youth and elders dialoguing in solidarity. My positionality *vis-à-vis* this courtroom over the August 2018–January 2020 period thus had various dimensions that inflected my learning. As someone who conducts environmental justice-oriented research projects with Indigenous communities locally and internationally, I approached this courtroom – and the TMX issues at stake – as a locally and globally important space of contention. As someone who grew up in Canada in schooling systems that utterly lacked proper education on Indigenous histories or on the brutality of colonization, I found being part of the courthouse solidarity group to offer particular vantage points for critical learning; my positionality was also as one who participated in raising legal funds to support those being disproportionately affected by state/corporate violence, while encountering a range of methodological tools for critical learning including interviewing artists on their experiences and histories of social justice work. Over time, I went from being a courtroom novice to a 'regular' attendee, allowing appreciation of the sensitive ways in which diverse positionalities were embraced in the group, regardless of whether a person was arrested, or whether one person chose to plead a certain way, or how the 'lead' concerns about the TMX were framed; this also allowed for attentiveness to inconsistencies in the logics mobilised by prosecutors. Methodologically, courtroom ethnography can be challenging as it is a time-consuming method (see also Walenta, 2020); for me, the returning time and again to the court allowed for not just keeping a diary but more importantly, relationship building that is crucial to this methodology, at times sharing notes (and drafts of this article) with defendants and supporters who also then offered further insights.

In the next two sections I reflect mainly on experiences in the courtroom itself, focusing particularly on two recurring and dialectically opposing themes respectively: the court as a theatre of power and place of suppression and punishment – where settler-colonial manipulations of both civil and criminal contempt labels play out to suit extractive agendas and arbitrary logic; and the courtroom as a space of contrasting ideas of 'irreparable harm' and a place of critical solidarity-building. These themes are addressed respectively in the following two sections.

## 3. A theatre of power: erasure of Indigenous law and an injunction in a climate emergency

> *"It is ironic that civil disobedience seems only acceptable when it lies comfortably in the past. In 1946, Viola Desmond was prosecuted for challenging racial segregation in Nova Scotia by refusing to leave a whites-only area of a movie cinema. That incident propelled the civil rights movement in Canada. In 2010, Ms. Desmond was granted the first posthumous pardon in Canada and the government of Nova Scotia apologized for prosecuting her. Later, in 2018, Canada acknowledged that the real and greater crime was the existence of racial segregation in Nova Scotia. It did this by placing Ms. Desmond's image on our current $10 bill – but this did not occur until 71 years after her act of civil disobedience. The consensus of climate scientists is that we do not have that kind of time with climate change.*
>
> *Viola Desmond broke the law. It may not have been government policy, but segregation in Canada was legal. Slavery was legal. The genocide of indigenous peoples, the theft of their lands, the brutality of residential schools were all within the law … I would like to close by acknowledging that we are here on the traditional unceded territory of the Squamish, Musqueam and Tsleil-Waututh peoples. They have much to teach us about respect for the earth, and our need to live in harmony with the ecosphere as a matter of survival. I believe it is time for us to listen to them."*
>
> - Statements to the BC Supreme Court before sentencing - by Will Offley (arrested pipeline protestor), Vancouver, 2018

To deflect Indigenous rights issues, oil industry promoters have sought to legitimize the contested TMX project by stating that it is "just"

a "twinning" of a pre-existing pipeline built in 1951 along with some new routes. This argument rests on the premise that theft of a violent colonial 'past' era justifies ongoing and new dispossession and new destruction. It also assumes that denying Indigenous jurisdiction is an acceptable way of doing 'development'. As some defendants sought to remind the BC judge during the injunction hearings, in 1951 government systems were also in place to overtly continue genocide and forcibly take Indigenous children from their parents and put them in residential schools to extinguish their culture (see also De Leeuw, 2016); for this and a host of other racist colonial practices, "dispossession was the goal" (Manuel & Derrickson, 2017). Revisiting histories such as those in the above statement to the court, multiple people on trial noted the existence of Indigenous law and queried the court why they were not being adjudicated according to *these* laws. Statements to the judge by an artist and arrestee, spoke of Indigenous legal practices engaging oral traditions, efforts by the Tsleil-Waututh Nation at regenerating sustainable futures, and Kinder Morgan's illegal activities on the land as already witnessed: "*Our actions at Kinder Morgan's gates were necessary*," his statement noted, "*to help press the pause button until real justice is restored.*"

In a juridical context where historical erasures and ongoing systemic violence shaped a judge's (and several prosecutors') embracing of narrow visions of justice, the courtroom here was an "affective theatre of power" (Bens, 2018, p. 12) in several senses. The judge who created the injunction claimed at one point that his courtroom was "*not theatre.*" He said this to chide people in the gallery after one defendant's words conveying values of respect for nature and Indigenous rights led to quiet but audible sounds of support from observers; on that day, proceedings were in a regular courtroom instead of the special basement room with the glass barrier (the usual place for the hearings). Yet, *theatre* is an inescapably relevant notion. As communicated to me by the artist of Fig. 1, the motivation for this drawing – created right after one of the trials – is partly to render that theatre of power visible, showing the judge *performing coloniality*. For Bens (2018), the very purpose of *courtroom ethnography* is to *recognise* theatres of power and to "keep both the linguistic and the non-linguistic in mind when analysing the law and the state" (Bens, 2018, p. 14). Courts perform as 'theatre' overtly when their function is primarily *showing* powers of control. This was the case unambiguously here; this judge's decisions to pursue new trials let alone raise prison sentences – even after the Federal Court of Appeals ruled the government's approval of the pipeline expansion as illegitimate – was an illustration of *his subjective power to perform*. He made other subjective and aggressive choices in expanding his injunction orders as well, as discussed below, and turned his court into a theatre for investigating emotions; defendants were repeatedly asked if they would 'purge' their 'guilt' when brought before the judge, and those accused of contempt would have to admit whether they knew about his injunction when standing on the road (some did not know about it) and express remorse in either case. The prison sentence he rendered would hinge in large part on how he felt the defendant *performed*, how their subservience in his theatre of power played out.

On August 16th – still prior to the Federal Court ruling – I met people in the BC courtroom lobby after a woman was sent to jail for 4 days. Discussions were rife with conversation about the Prime Minister's campaign pledge reversals, environmental justice matters, and the limited space for mounting defences within the courtroom. As one of the court observers explained to me, this judge did not even allow the first group of people arrested (in March) to read short prepared statements to the court. This restriction was eventually modified, after protest, and only after Crown prosecutors – who regularly sought the highest possible prison sentences – told the judge they had no problem with such statements being read aloud. People arrested shortly after the introduction of the injunction were given fines, but prison sentences started to increase significantly as time progressed. I spoke with defendants waiting with anxiety for anticipated 14-day prison sentences from 'Judge Pipeline's' injunction. Yet sentences were eventually increased up to 28 days, with some later defendants sent to jail for months.[7]

Some of the people in the BC court gallery had been attending each case since the *very* start of these contempt trials to show solidarity. I was told that I missed one occasion where this judge responded to an Indigenous defendant who tried to explain that his people had been on the land since time immemorial. "What is *time immemorial*?" the judge was said to have queried. Beyond diverse cultural and generational differences among those on trial (reflecting diverse peaceful efforts in defending land, water and earth[8]), various positionalities in the courtroom observation gallery also were playing themselves out. Before I arrived on August 16th, one of the people who swooped briefly into the public gallery reportedly came because he used to oppose the same judge when that judge was a lawyer for the asbestos and tobacco industry. One person expressed that this judge's injunction was creating a huge embarrassment for the BC judicial system. After the conclusion of the day's sentencing hearing, we talked about how trials for serious offences are being dismissed because of time/resource pressures on the criminal justice system. "But all the time in the world is being made for prosecuting big criminals like grandmothers," a courtroom friend relayed to me. We also discussed developments on Burnaby mountain by the pipeline construction site; the "Camp Cloud" protest camp (a makeshift camp) was closed by police at dawn that very morning. Newspapers were not allowed to cover details up close; land and water defenders wished that drones were there to better capture the situation. People charged at Camp Cloud later saw their charges dismissed as they were under a different judge, underscoring that the performativity of power includes its own subjective and arbitrary logic.

A Member of Parliament who would be elected mayor of Vancouver the next year, Kennedy Stewart, was one of the early arrestees under the injunction; an article on his reaction conveyed a paradoxical sense of maintaining "respect for the court" on one hand and the need for civil disobedience on the other (National Observer, 2018). For many, the role of this court was felt to be a clear abuse of process. A comment written underneath the above article conveyed one of the central frustrations: *"Just wondering if anyone has had a chance to ask the judge how else is anyone able to register their objections to this whole fiasco and be acknowledged if he (the judge) has refused to entertain any background – any environmental concerns, ethics, etc. Don't forget, every other avenue of communicating one's objections has been shut down, which is why people are doing all these 'unlawful' actions in the first place."* Another comment came in the form of reinforcing solidarity: *"I am grateful to all the people who have been willing to stand up to the lies, bullying, and manipulations of the state. Civil disobedience is a basic necessity of a democracy. This movement is spreading, as more people realize what the situation truly is. Protection of our basic rights to clean water and soil is at the heart of our survival."* At this point, amid rushed NEB hearings for the pipeline's permitting, many were unsure of what resistance possibilities remained. Although a victory had just been achieved in the United States with regulators blocking the Keystone Pipeline (NRDC, 2018), the NEB in Canada was speedily granting permission for TMX construction, and just the week prior

[7] One seventy-one year old was sentenced to 5 months in jail – close to the longest sentence served in a political case involving criminal contempt in BC. During the logging resistance in Clayoquot Sound in the early 1990s, at least one person was sentenced to 6 months in jail.

[8] People arrested for standing on the roads were consistently peaceful. The injunction's original '10-min warning' system was eliminated after police found that some protestors took turns switching positions as the 10-min were about to end. Indigenous strategies included those of the Tiny House Warriors, who were protecting land belonging to their ancestors by building houses on the path to TMX. Other resistance strategies involved a Watch House ("Kwekwecnewtxw" or "a place to watch from" in the henqeminem language, used by members of the Coast Salish Peoples) as a place to monitor activities of the pipeline construction in sensitive ecological and spiritual places. Some defendants were told they could not return to the location that encompassed the Watch House, even though it was not blocking TMX access in any way.

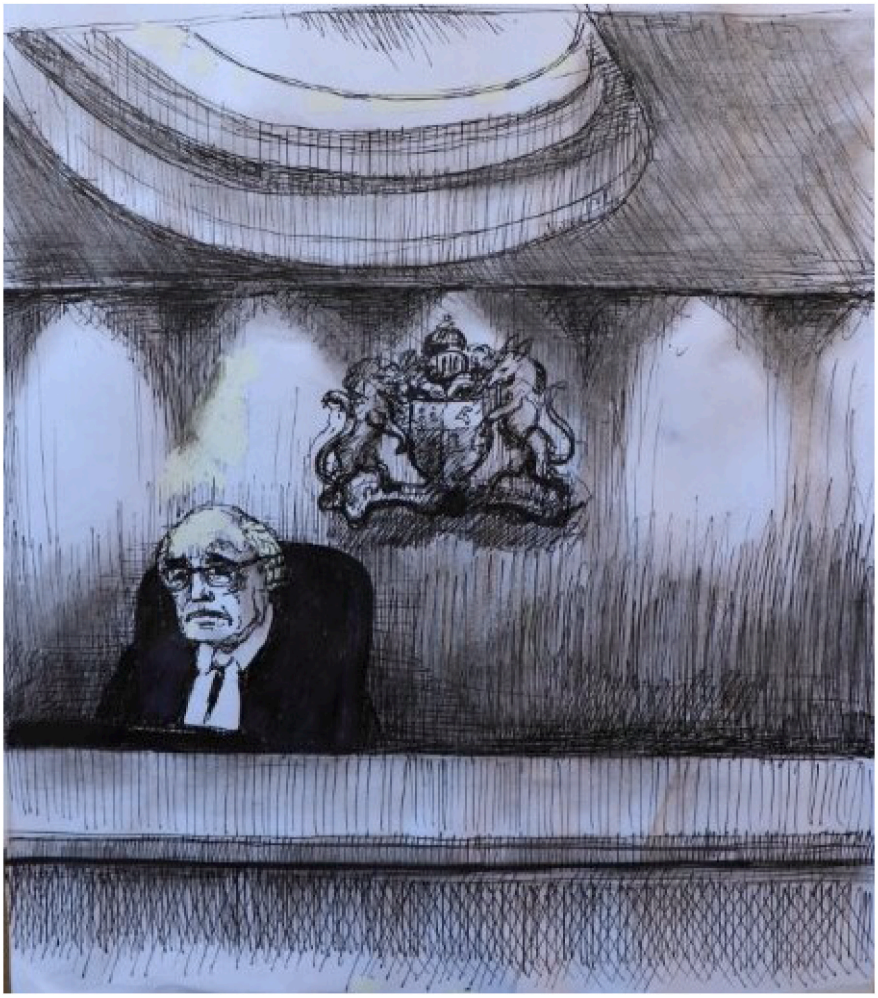

**Fig. 1.** "My Lord" - Artistic depiction of judge presiding in Trans Mountain Pipeline Hearings at the British Columbia Supreme Court - Artist: George Rammell, reproduced with permission.

declared that it approved more than 72 per cent of the route (Calgary Herald, 2018).

### 3.1. Courtroom power dynamics surrounded by evidence of climate crisis in the air

A critical issue looming throughout these 2018–2020 trials was the question of what truth and evidence, if any, matter in a colonial justice system of an extractivist state. To speak about a new 'post-truth era' – now fashionable (almost cliché) in geography – is, as one Indigenous activist told me, potentially quite misleading, given that colonization has long been served by post-truth narratives. At various moments in these 'contempt' trials, the judge called the TMX construction a pipeline "enhancement" rather than "expansion" – distorting truth through manipulating language. Yet, certain truths were also being indelibly *felt,* even if words could dance around them. On August 20th, 2018, those who came to the courthouse had to travel through thick smoke from forest fires that engulfed Vancouver – an increasing impact of climate disaster; air quality in the city reached unprecedented danger levels. Some choking in the court corridor wondered if Trudeau would finally meaningfully *feel* fossil fuels as creating *imminent peril* when he comes to BC where he was scheduled to soon visit. The juxtaposition of what was transpiring outside and inside the courthouse added to the already-existing sense of absurdity in the hearings.

At this point, around half those charged so far had pled guilty to obtain reduced sentences. While the mistreatment of Indigenous people was dismissed by the judge as irrelevant, it was obvious to those who were at the Burnaby protest sites that Indigenous people were treated more violently, physically, and subjected to derogatory statements from RCMP officers. During the break, the solidarity group assembled talked about incidents when police were seen to be violent with Indigenous people. We also talked about fears some had of losing their houses due to a "SLAPP" suit (Strategic Lawsuit Against Public Participation) from Kinder Morgan, designed to intimidate – a corporate tactic that led to the initiation of this injunction in the first place.[9]

Importantly, until November 2018 all the cases were tried under "criminal contempt" – not "civil contempt"; the judge was adamant that pleading "civil contempt" was *not* an option – he reiterated this frequently. The *public and symbolic* nature of resistance acts, he stressed, made it a criminal contempt issue, despite efforts by some defendants to plead otherwise. On November 23rd, it thus took me some time to appreciate that the judge had turned his logic entirely around. "The judge is having it both ways," one courtroom observer whispered to me, explaining that the change regarding civil versus criminal contempt that day was intended to facilitate new intimidation. The day before, an

[9] After using lawsuits to threaten people, Kinder Morgan was caught having made errors in marking certain land as 'its' land, and thus lawsuits were dropped. However, the effect of the lawsuits, people understood, was to bolster the granting of the injunction so as to have Crown prosecutors take the role of going after those who the company felt was interfering.

Indigenous woman had tried to argue that she should be heard in Indigenous courts, not in *this* court, and the judge stressed that it was only in this court and only under the criminal contempt charge that these cases could be considered. Yet on that day, Trans Mountain Corporation lawyers argued for "*civil contempt*" charges for the two new defendants, an Anglican Priest and her parishioner, who, the lawyers argued "have not apologized and purged their contempt" and referenced "exhibition a" and "exhibition b" – local newspaper articles, where one defendant was quoted as expressing *"the absurdity of a Texas company on unceded territory"*; the lawyer read it aloud as if it was incriminating. These defendants had chained themselves to a tree because, as they explained, they were respecting pre-existing Coast Salish law. The Trans Mountain Corporation lawyers were using this as a testing ground for new mechanisms of inflicting fear, threatening a prohibitively exorbitant "special cost" component which defendants could be forced to pay.

Therefore, arguments that day were all *reversals of* previous positions. A defence lawyer tried to remind the judge that the "public component" and "symbolism" of the actions of these defendants made it "criminal contempt" – not "civil contempt" – according to the judge's own rigidly embraced logic in hearings so far. She read brief biographies of the women charged: a 48-year old mother of two whose biography was brimming with contributions to her community; and a 52-year old Minister, also mother-of-two, whose biography was equally replete with extensive laudable community work. The priest and parishioner shared stories that warned against making bad moral choices, countering the Trans Mountain Corporation lawyer's ridicule for coming within 5 m of a "property line" by re-articulating this territory in spiritual and environmental terms.

The intimidation tactics at play here were powerful components of what Valdivia (2008, p. 464) calls "petroleum colonization" (in her context, discussing Ecuador) – where authority is never just about controlling land and resources but also entangling people, emotion and social relations in asymmetrical power relations. Critiquing the use of injunctions, contempt hearings and cost awards as tactics of intimidation in Canada, Mayada (2010) argued a decade ago for adopting measures to make it "more difficult for private individuals, corporations, and government to use the threat of imprisonment and crippling cost awards to dissuade aboriginal and environmental protestors from vindicating their rights"; he noted that "it is not unusual for the Crown to take over private prosecutions" in controversial cases around moral and Indigenous rights matters and stresses benefits of that. Here, the reverse was done. One defendant expressed her understanding that she could face a 7-day jail term if she took action on Burnaby Mountain but she fully expected to face the Crown, which cannot seek court costs. By professing his willingness to award costs the judge set yet another new precedent in this saga – a precursor to larger looming conflicts ahead, as discussed below, amid reconfigured solidarity-building and ethics of care linking the court space and beyond. The inconsistent rationales and dynamics of intimidation here reflect how the injunction was used to *suspend* not simply norms about the public's relation to territory[10] or the socio-political possibilities of rights, but also truth and time itself.

## 4. Articulating *irreparable harm* and remaking political geographies of *care*

> *"To establish imminence, all we have to is to turn on the television or read today's newspaper."*
>
> -Defence counsel's words to the BC Supreme Court, December 2018

The final part of my analysis here focusses in on one of the most striking reoccurring power dynamics in these courtroom proceedings: a judge's strident suppression of "necessity to act" defences and awkward characterizations of defendants as uncaring troublemakers – contrasting markedly with land and water protectors' deep intergenerational concerns for the future of the planet and anti-colonial solidarity-building. Framings of care, irreparable harm and imminent peril have become critical points of debate in climate justice discussions globally, from examinations of Greta Thunberg's influences to actions by Extinction Rebellion, Greenpeace and far beyond (Fallon, 2018). Discussions of direct action in response to the imminent threats of climate change – and the irreparable harm with which it is associated – are reshaping geography as a field in significant ways, raising questions about academic priorities in supporting radical change (Castree, 2019). In the BC Supreme Court's "contempt" trials, various efforts at advancing necessity defences were tersely dismissed by the court, despite abundant evidence that this was a last resort not taken by defendants without careful consideration, with all alternatives thoroughly exhausted in attempting to influence the NEB[11] prior to standing on the road in Burnaby Mountain. It is instructive to consider the political geographies of care and justice that emerged in response to the judge's disregard for the issues at hand – vital inter-related notions in critically challenging narrow visions of "imminent peril."

Prosecutorial discourses here, in targeting land and water defenders, revolved around settler-colonial logics that assume the desirability of resource extraction; though unsurprising, the abrasive words were spectacularly incongruent to the demeanour of those being targeted. Prosecutors in early December 2018 aggressively stated – as if fact – that women elders showed "no concern for the community" when they stood on the road in Burnaby mountain to resist the pipeline expansion. The defendants were said by the prosecutors to have engaged in "excessive lawlessness", "foolish bravery," with "no concern for the impact of their actions on community resources." Prosecutorial language here – apparently copy-and-pasted from other legal cases to show precedent in a colonial system that works precisely through logics of territorial and social de-contextualization – suggested that the words "community resources" and "concern" have no meanings besides those favouring an oil company's use of state resources to enforce an injunction. Using this jargon, the Crown prosecutor spent more than an hour detailing, uninterrupted, legal precedents on sentences, to ensure that no appeals could succeed.

Contrasting values and notions of care underpinning the 'necessity' defense were then ushered forward on December 3rd, when cases were heard of a 73-year old retired lawyer (eventually handed a 28-day sentence) and a retired high school science teacher, whose affidavit noted that her actions were a response to the monstrous failure of the Canadian political system to prioritize the climate emergency. A robust legal defence was presented with two key arguments: first, that these proceedings were an *abuse of process*, and second, that the defendants' actions *more than meet the evidentiary requirements for a "necessity defence."* For the latter, only the "air of reality" has to be met to advance this argument to trial. The defence provided a Detailed Outline of Proposed Evidence, including science on greenhouse gases and lists of famous scientists ready to testify. Nonetheless, a senior Crown prosecutor – brought in specially to rebut necessity defence arguments – argued that a "reasonable alternative" could be "to not act at all" in the face of climate concerns or to employ "alternative" actions such as writing to Parliament, as if they were not already exhausted, and that the necessity case should be "summarily dismissed" as a situation "where the future harm is not probable." To nobody's surprise, the judge sided with the prosecution; but his wording and the swiftness of his response was startling: he did this within seconds of the conclusion of

[10] The judge initially granted Kinder Morgan an interim injunction prohibiting any person to come within 50 m of its facility. After defence lawyers argued that this violates constitutional rights, the judge amended the order to prohibition within a 5-m injunction zone but also expanded the injunction to include roads that directly "or indirectly" lead to the construction work sites.

[11] The National Energy Board (NEB) was later rebranded as the Canadian Energy Regulator.

preliminary arguments and memorably stated that while dire consequences of climate change may be foreseeable or likely, they are not yet a "virtual certainty."

Intertwined matters of settler-colonial language, jurisdiction and judgement raised immediately jarring questions for those in attendance. Did the Crown prosecutors and judge really have to *deny the certainty* of climate change? Was the suspension of climate change as an imminent peril vital to make this injunction seem legitimate? Several inter-relating issues converge here. Canada's legal system has less case law on the necessity defence compared to some other countries, including the United Kingdom (UK). After the defence's case referenced legal precedents from the UK and the United States where some courts have upheld necessity defences, the Crown argued that laws internationally are not relevant to Canada's "imminence" requirement. Prosecutors also contended that since some cases cited by the defence were not "*injunction*"-specific civil disobedience (even if they were cases of civil disobedience doing far more disruption), they were not relevant. The Crown's argument that there was no "close temporal connection" between perceived threats and climate impacts further underscored how an injunction can be used to advance "the production of colonial ecological violence" (Bacon, 2019) by more than simply burying truths but actively fomenting untruths in de-linking *time*[12] and climate crisis.

My purpose here is not to prognosticate as to whether the Canadian Supreme Court will hear an appeal on "necessity to act" arguments, although given the vast scale of oil production increases linked to the TMX project and its incompatibility with the Paris Climate Accord, some political geographers might well focus here on the *necessity* arguments. More central to my point here is emphasizing the other of the two main defence arguments – that the injunction and how it was used constituted an abuse of process; it functioned as a judicial tool to deny rights and responsibilities. While legal geographers and political ecologists write about legal pluralism and multi-level jurisdiction (O'Donnell et al., 2019), and Indigenous law as a component of justice is (to an extent) acknowledged by the Canadian Supreme Court, proceedings in the BC courthouse showed an injunction being used to close down all such pluralistic principles, values and ethics, even before they could be articulated. As articulated by other scholars (Peel & Osofsky, 2018; Simpson, 2017; Wong & Richards, 2020), Indigenous legal traditions are deeply rooted in place and in the ontologies of care that underlie responsibility for land protection. In this regard, *intergenerational care*, *necessity to act*, and *Indigenous responsibilities for land protection* weaved throughout the arguments of various defendants. John Borrows, a member of the Anishinabe Ojibwe Nation and leading scholar on Indigenous law, stressed that closer linkage between Canadian and Indigenous legal systems would be vital: "Indigenous legal principles form a system of 'empirical observations and pragmatic knowledge' that has value both in itself and as a tool to demonstrate how people structure information. First Nations laws embrace ecological protection, and they could be woven into the very fabric of North American legal ideas" (Borrows, 2002, p. 35). While 'reconciliation' with Indigenous people is rhetorically promoted by Canadian politicians and often part of an acutely superficial 'solidarity' discourse (Boudreau Morris, 2017; Daigle, 2019), the abuse of injunctions now arguably stands as among the most symbolically powerful illustrations of the triumph of a colonial system above other systems, and a blunt tool for fortifying oil interests. Injunctions in Canada are repeatedly being used to deny Indigenous law, values and necessity defences point blank.

Injunctions thus ultimately have to be understood as more than just corporate weaponry in an arsenal of tactics to manipulate law around oil projects. They are partly that; but far more than that, pro-extractive injunctions here have been predicated on moving to a different terrain – that of a political space of exception beyond 'normal' law, where rights can be suspended and new, tailor-made 'justice' can be fashioned to the judicial preferences of politically-appointed judges, who take on their own troubling interpretations in defending their very own injunction orders. In this exceptional space, a 'new normal'[13] is created for the purposes of criminalising Indigenous and non-Indigenous resistance alike and "easing the operation of extractive capitalism" (Ceric, 2020). In this new normal, past precedents that have to do with necessity defences or Indigenous rights are deemed irrelevant and the only 'irreparable harm' that is pertinent is harm to corporate profits and the hegemonic 'order' it seeks.

### 4.1. *Reconfiguring political geographies of care*

Political geographies of *care* were, however, reconfigured and dramatically remade in responding to injunction violence. People attending trials as participants and observers found, in the courthouse corridor and gallery, spaces for building anti-colonial solidarities and linking concerns about TMX to other struggles internationally, other Indigenous rights struggles near and far, and for fortifying intergenerational support in a context of multiple overlapping global crises. Figs. 2–4 provide an illustration of some of these – depicting, respectively, the extensive attendance in the courtroom gallery there to support defendants on trial, with words of defendants captured by the artist in the drawing itself (Fig. 2); the pain at seeing the settler-colonial court's contempt for Indigenous truths (Fig. 3); and the moment of collective revulsion at a judicial system's exclusion of scientific evidence that was readily available for presentation (Fig. 4). Solidarity-building also took on other creative forms. "Irreparable Harm?", a play created after some of the trials, was performed by the "Sinister Sisters Ensemble", a group composed of activists and theatre folk, young and old, Indigenous and settlers, including people who were arrested for breaching the TMX injunction. The play re-performed court scenes and testimony, revisiting emotions, solidarities and judgments, as well as the twists and turns in the courtroom sagas. A project of public educating became pivotal in this process, seeking to both recontextualise what "rule of law" means in real terms and re-frame who is doing "irreparable harm" to whom and to the planet, challenging settler-colonial court's mantras.

By February 2020, TMX injunction trials were still going on for arrests from as early as August 2018 – and in some cases, repeat arrestees. Very little news media attention had been dedicated to TMX court proceedings in this period, which involved moves by RCMP to contravene official injunction protocol by arresting people based just on their review of video surveillance several days after the alleged infractions, with no face-to-face warnings. Subtle forms of resistance were now increasingly playing out. An Indigenous elder who had been watching over the land in Burnaby – and witnessing illegal company construction activities – on January 29$^{tth}$ defied the judge's instructions to plea, instead expressing concerns about what happened as a result of the crimes of the Crown kidnapping Indigenous children. Although these encounters were relatively hidden from public view, public discourse about BC court injunctions would suddenly be remade, thrust into national and global spotlights the very next week. On February 6th, militarised police began intensifying raids and arrests in Indigenous communities elsewhere in BC, in Wet'suwet'en territory, to remove Wet'suwet'en people from obstructing the construction of long-resisted gas pipelines on their (also never ceded) land (Bliss & Temper, 2018). Aggressive injunction "enforcement" was caught on video, capturing police pointing guns and belligerently manhandling women. RCMP violence on Wet'suwet'en territory catapulted public consciousness about injunctions; solidarity movements linking Indigenous and non-Indigenous people together sprouted across the country. Trains throughout the land were cancelled by Indigenous-led blockades

[12] See Hilson's (2018) for wider discussion on "time" and climate litigation.

[13] For a wider legal history of injunctions in Canada and in British Columbia, in particular, see Ceric (2020).

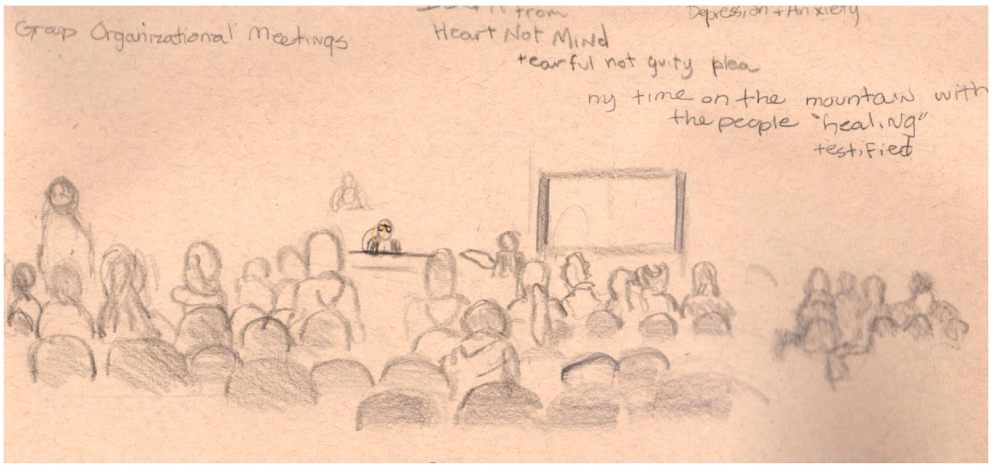


**Fig. 2.** Depiction of the courtroom gallery and witnessing words by one defendant telling the judge "my time on the mountain with the people was healing", defiantly but gently, as well as about the anxiety linked to the oil pipeline and arrests. Artist Joe Pepper, reproduced with permission.


**Fig. 3.** The Truth is Not a Defence – "I get pain in my bones thinking of the charge: that a corporate … entity which has no life except on paper, can hold a human being of blood and bones in contempt for being Indigenous and Human and representative of the living …. The black sludge, bitumen … will obliterate knowledge of our life blood connection to the flow of blood and water. The injunction disavows the truth for Indigenous People who have lived experience long forgotten … Who are "they" to hold the living in contempt? (June 13, 2018). Artist and writer -Joe Pepper, reproduced with permission.

thousands of miles away, with slogans such as "*when justice fails, block the rails*"; ports, bridges and roads were also shut down, for some representing a "watershed moment" (The Star, 2020) and a recognition that "*reconciliation is dead*" unless there are major state changes on Indigenous rights.

The colonial imposition of state violence was thus laid bare through injunctions and their court enforcement. Simultaneously, care was being nurtured through solidarity actions. State efforts were already heavily ramping up to monitor "persons of interest"; some people I met in the courthouse were well aware of being monitored by RCMP, online and physically. Immediately following the mass solidarity actions with Wet'suwet'en, the ever-expanding phenomena of 'injunctions to protect injunctions' took hold. New injunctions to stop solidarity-blockade actions emerged to address the "inconveniences" for businesses. A prominent academic writing on these unfolding developments, Shiri Pasternak, tweeted: "*I'm waiting for an injunction to be issued that encompasses the whole country.* #Wetsuweten #ShutDownCanada" (tweet, January 2020). Some have pointed out the "*breath-taking hypocrite of the howls for rule of law*" (Ditchburn, 2020), accentuating the failure to recognise that "*for most of Canada's history, the rule of law has been openly flouted when it comes to Indigenous land and rights*."

To this I add that critically studying what transpires in courtrooms helps dispel any residual assumptions that the legal system in Canada proceeds with neutral objective processes, illuminating asymmetrical power relations and cultural imperialism at play – as well as how these are experienced viscerally. Both the TMX and Wet'suwet'en injunctions illustrate how judges routinely exude bias in favour of the fossil fuel industry's narratives when defining "irreparable harm" and in rigidly enforcing forms of legal territorialisation that "invert traditional expectations of justice" (Sylvestre et al., 2020). Even within confined visions of an economic-profits-above-all-else philosophy, industry narratives that blocking pipeline construction constitute "harm" to the taxpaying public have themselves been shown to be untenable.[14] A judge's moves during injunction proceedings not only routinely side-stepped evidence on financial matters, including financial harms of climate change itself,[15] but also countless other more-than-merely-financial harms that are unequally distributed by race, gender and class, with more than human ecosystems at stake. For settler-colonial courts, care for corporate interests routinely trumps forms of caring that are central to Indigenous laws – care for land, water,

[14] Despite the injunctions purportedly created to stop financial harm, assessments reveal that several billion dollars of taxpayer subsidies would be needed for the TMX project (with costs considerably more than double the originally quoted amount [www.wcel.org/media-release/federal-government-hiding-true-cost-trans-mountain-pipeline and https://www.cbc.ca/news/canada/british-columbia/trans-mountain-pipeline-expansion-support-cost-survey-1.5468730]), highlighting that significant financial harms would occur to the broad taxpaying public if the project is to advance.

[15] Both defendants on trial and those in the gallery often noted that the billions of dollars linked to the costs of climate change should figure into 'financial assessments' – as well as the moral questions linked to why the Canadian government is not devoting the TMX subsidisation money to benefit clean energy industries and Indigenous safe drinking water programmes.

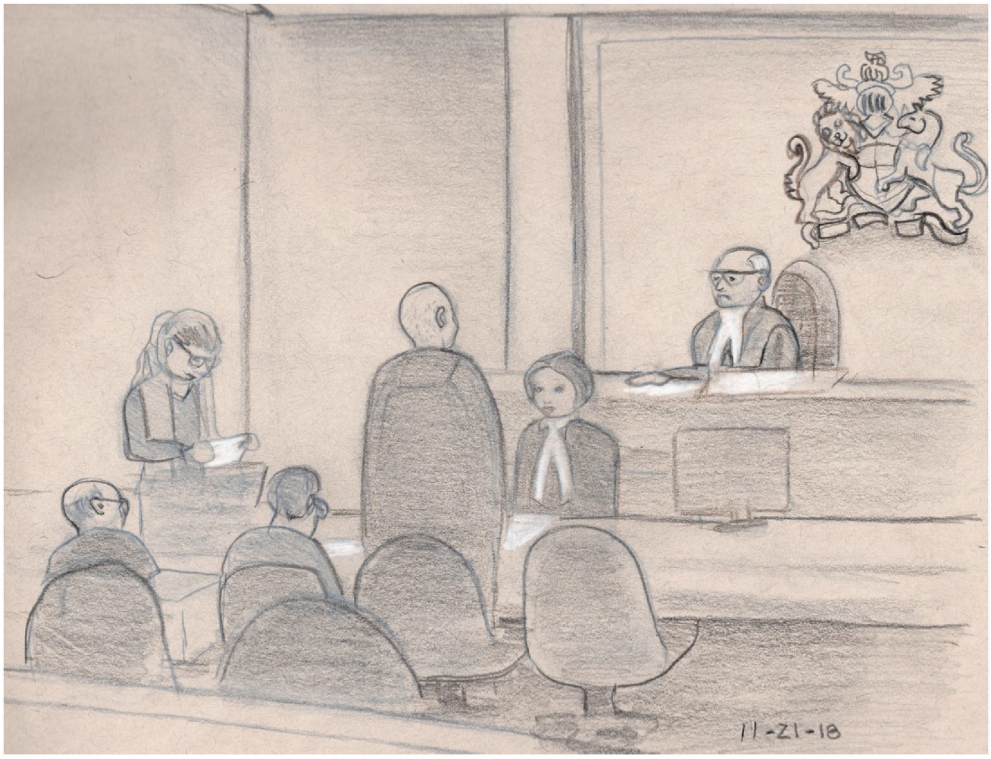


**Fig. 4.** (Not) Discussing Toxins as Reckless Endangerment: "… The reckless endangerment of neighbourhoods make the mountain particularly vulnerable … An expert witness, directly affected who is also a university professor, bio-chemist and cancer research specialist was not allowed to give her expert testimony due to Court interference." Artist-witness-writer: Joe Pepper – reproduced here with permission.

people and other inhabitants of the planet; and for many people who came to the BC courthouse, each day in the court seemed to make it increasingly clear that far too sparse attention was being paid to every one of the critical concerns. As one fellow courtroom observer and supporter of land and water protection remarked in a letter to the Office of the B.C. Attorney General, amid the systemic racism on display:

> *"The blatant bias and privileging of the Crown throughout the proceedings has been offensive and disturbing to witness. The power differentials that exist between the well-moneyed Crown working in tandem with the Trans Mountain Pipeline Expansion against the Indigenous land defender on Legal Aid are clear to the members of the public watching the trial … We can see that no justice will be served in these courts, and that the Crown is a well-oiled tool in the ongoing systemic discrimination against Indigenous peoples and all who hold values that respect the land."* [16]

At the centre was the ethical problem of a judge's injunction enabling a company to clear Indigenous people and others from roads on land never ceded by Indigenous people in the first place. Amid deceptive news media reportage that helped to distort public debate on harm, political geographies of care in the courtroom have thus become about reclaiming, pointing to more than inconsistencies and omissions under settler-colonial law itself, but more importantly, taking seriously the foundational point that theorizing pipeline governance ultimately necessities engaging with Indigenous modes of care and jurisdiction over development (McCreary & Turner, 2018; see also Asch, 2019). Being an ethnographer in the court gallery inexorably leads to reflecting on what jurisdiction a settler-colonial court actually has on land that was stolen from Indigenous people, and that remains stolen. It also leads to an interrogation of affect – including how *harms* are felt, what these harms do to the future, and why *these* harms are not guiding 'injunctions'. Perhaps most importantly of all, attending the courtroom dramas in these injunction hearings raises the question of what it would mean to *start* the conversation from the point of view of Indigenous laws – profoundly different premises for grounding understandings of harm and care.

In this vein, Indigenous laws of the People of the Inlet, the Tsleil-Waututh Nation, *command* engagement with "*a sacred obligation to protect, defend, and steward the water, land, air, and resources of the territory*" (Tsleil-Waututh Nation legal principles as cited in: Curran et al., 2020). In one court appearance, the Defence counsel for three Indigenous defendants pointed to Section 13 of the Trans Mountain injunction order, which excludes "*persons acting in the course of or in the exercise of a statutory duty, power or authority*." The defence argued for recognizing the co-existence of multiple systems of law, and cited the foundational belief in Indigenous law held by the defendants that they carried the duty and authority to act as they did to protect the land, water, and all

[16] This article was originally submitted in March 2020 prior to further court proceedings for three Indigenous land defenders I attended in August and September 2020. The letter cited here (by Dr. Rita Wong in September 2020) during the final revisions to the article was written in relation to these latter trials and sentencing hearings as the land defenders faced 28-days in jail during a pandemic. Two of the land protectors were quite surprised that they were being prosecuted based on surveillance camera footage of them in ceremony and praying for 30 min in front of a TMX road before leaving on their own, with authorities not following the injunction's own procedures (that require a 5-step process including notification by police and opportunities to leave before arrest).

living things.[17] The argument was immediately rejected by the judge. Notably, at sentencing hearings in September 2020, Indigenous elders from the Tsleil-Waututh Nation and Chief Judy Wilson of the Union of BC Indian Chiefs again re-confirmed that these defendants had been given the responsibility to act exactly as they did, and that their action was in keeping with Indigenous laws and sacred obligations with which they were explicitly entrusted. Despite the BC provincial government passing UNDRIP legislation, the Crown and judge's vocabularies, epistemic starting points, jurisdictional assumptions and relational practices in the court all remained rigidly aligned – through the TMX injunction – as anathematic to sacred obligations. While talk of 'decolonial' approaches widely circulate in political discourses outside of courts, settler-colonial violence in the courtroom continues to flourish in the most blatant of ways, denying truths and rigidly embracing fossil fuel-friendly conceptualisations of 'care' and 'harm' to drive the punishing of those peacefully resisting.

## 5. Concluding remarks

This article has provided just a glimpse into what is at stake in challenging court injunctions designed to advance the narrowest ideas of 'justice' as framed by the expanding fossil fuel industry. Diverse moments in the trials and sentencing hearings brought out different points of emphasis – moves of prosecutors and the judge toward denying the imminent threats of climate change, mocking Indigenous values and laws, aggressive word choices to characterise defendants, and arbitrary impositions based on ever-changing rationales of criminal versus civil contempt to inflict maximum distress to those courageous enough to stand up. Building on political ecology scholarship that scrutinizes the hegemony of oil and bitumen in contemporary political relations, particularly work by Simpson (2019) and Schmidt (2020), I have argued that critical attention is needed to settler-court *performances of power* in criminalising land and water protectors, through both subtle and overt courthouse manoeuvres. While it is possible to argue that civil disobedience and direct action is now becoming increasingly 'mainstreamed', the efforts of land and water defence often remain poorly understood – and strategically misrepresented – by those watching from the sidelines. With growing numbers of people willing to put their bodies on the line in anti-colonial solidarity, courtroom ethnography generates spaces of contextual and intersectional interaction for viscerally understanding the *ethos of collective care* in the midst of violent processes of colonial 'rule of law', providing avenues for thinking carefully about geographies of justice and injustice, fossil fuels and spatial politics.

The period of 2018–2020 saw unprecedented levels of controversy around pipeline expansion in Canada and globally, with diverse narratives, power relations and frames for de-/re-contextualising protest, civil disobedience and direct action associated with defending Indigenous rights, earth, land, water and future generations. In January of 2020, the United Nations Committee on the Elimination of Racial Discrimination implored Canada to immediately stop the construction of TMX and two other large projects until it obtains approval from affected First Nations; failing to engage with this urging, government leaders responded that enforcing injunctions is the first priority, reflecting its primary commitment not to climate justice nor to Indigenous rights but to the fossil fuel industry. Given rising tensions created by court injunctions as systemic weapons of structural racism and injustice (Pasternak & King, 2019), courtroom ethnography offers an increasingly needed terrain for witnessing and critically understanding state violence, subtleties of brute instruments of power, and also nuances of resistance and affective landscapes both *within* and *surrounding* courthouses. Such approaches require learning through being present – with eyes open – paying careful attention to various scales of spatial politics and the inter-linkages of different jurisdictional propositions, affects and struggles. The TMX hearings illustrate how contemporary judicial uses of injunctions in Canada's settler-colonial state do not bear anything resembling a "reconciliation" era with Indigenous people; and *experiencing* injunction hearings over time, over the protracted proceedings, offers a vantage point for seeing vast resources dedicated by state institutions to suppressing issues fundamental to both UNDRIP and the Paris Climate Accord. In this age of fossil fuel violence,[18] the task for critical geographers is to engage with the various positionalities, struggles and identities at play, as well as the plethora of mobilisations and articulations of science, history and local knowledge that – in theory – could guide fundamentally different understandings of "irreparable harm" – and of care.

Ultimately, if courtroom ethnography offers avenues for challenging "petroleum colonization" (Valdivia, 2008) and de-centring the logics of settler-colonial laws through alternatives voices, dilemmas thus also emerge. Critical attention will be needed in the years ahead on legal geographies, social movements and changing political ecologies of ongoing climate disaster. But writing about setter-colonial courtroom proceedings requires commitment to epistemologies of difference and ontologies of care that are already subordinated by Eurocentric 'justice' systems. *Starting* with a settler-colonial courtroom space, even if showing its own inconsistencies and violence, risks mirroring its form and further denying agency to spaces of Indigenous law as the rightful starting points of the conversation. Methodological lesson-learning during the process of courtroom ethnography underscores the importance of building relations that transcend courtroom milieus, exploring a myriad of histories, solidarities, and forms of expression that give meaning to value systems that link social and ecological justice, destabilizing assumptions about legal contestation, civil disobedience and jurisdictional authority. Now, in the midst of a resurgence of Indigenous legal scholarship, political geography as a field needs urgently to heed calls for engaging Indigenous values and law more centrally, to better understand struggles faced in land and water protection, to disrupt ongoing colonial violence, and to guide fundamentally different visions for 'climate justice' and the spatial politics of the future.

## Declaration of competing interest

No conflict of interest.

## Acknowledgements

On unceded traditional territories of the Tsleil-Waututh, Musqueam and Squamish First Nations, many people have advanced and supported deeply important movements to address the struggles discussed here. I particularly acknowledge all the courageous land and water defenders who came to the court as defendants. I wish to thank George Rammell

[17] The defence also cited the Royal Proclamation of 1763, and a meeting held the following year in Niagara between approximately 2000 Indigenous leaders and the British official William Johnson establishing an agreement between the British Crown and First Nations that recognized and respected nation-to-nation relationships. The judge argued that these 1763 and 1764 agreements occurred before BC was part of Canada and dismissed their relevance in these proceedings. For in-depth discussion of these early documents, see Pasternak (2014) "Jurisdiction and Settler Colonialism: Where do laws meet?" and Borrows (1997) "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government."

[18] Fossil fuel violence around the TMX pipeline took on new forms in March of 2020, as the coronavirus (COVID-19) pandemic accomplished what the injunctions could not do – keep land and earth defenders from preventing pipeline construction. While stay-at-home orders for public good required an end to blockades, TMX construction was deemed by the government "an essential service" and continued despite concerns about bringing disease onto Indigenous territory. Meanwhile, as of September 2020, injunction court hearings from 2018 resistance are still continuing.

and Joe Pepper for kindly allowing their artistic work to appear here, and also to the many people who shared insights, including land and water defenders, lawyers, fellow courtroom observers, and others. Any views expressed or errors here are solely my own responsibility. The research was made possible thanks to a UK Economic and Social Research Council (ESRC) Future Research Leader award, for which I am also grateful.

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