

Patterns of Protest:
Property, Social Movements, and the Law in British Columbia

by

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Supervisory Committee

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Abstract

Embracing a spatial and historical lens and the insights of critical legal theory, this dissertation maps the patterns of protest and the law in modern British Columbia—the social relations of adjudication—the changing ways in which conflict between private property rights and customary rights invoked by social movement actors has been contested and adjudicated in public spaces and legal arenas. From labour strikes in the Vancouver Island coal mines a century ago, to more recent protests by First Nations, environmentalists, pro- and anti-abortion activists, and urban “poor peoples” movements, social movement actors have asserted customary rights to property through the control or appropriation of space. Owners and managers of property have responded by enlisting an array of legal remedies and an army of legal actors—lawyers, judges, police, parliaments, and soldiers—to restore control over space and assert private property rights. For most of the past century, conventional private property claims trumped the customary claims of social movements in the legal arena, provoking crises of legal legitimacy where social movement actors questioned the impartiality of judges and the fairness of adjudicative procedures. Remedies and legal technologies asserted by company lawyers, awarded by judges, and enforced by police and soldiers were often severe—from Criminal Code proscriptions against riotous assembly and deployment of military force, to the equitable remedy of the injunction and lengthy prison sentences following criminal contempt proceedings. But this pattern shows signs of change in recent years, driven by three major trends in British Columbia and Canadian law: (1) the effective assertion of indigenous customary rights; (2) growing recognition of the importance of human rights in democratic societies, particularly in the context of the *Canadian Charter of Rights and Freedoms*; and (3) changes in the composition of the legal profession and judiciary. This changing legal landscape has created a new and evolving legal space, where property claims are increasingly treated as contingent rather than absolute and where the rights of one party are increasingly balanced by customary rights, interests, and aspirations of others. Consequently, we are seeing a trend toward the dilution of legal remedies traditionally available to the powerful, creating space for the assertion of non-conventional property claims and the emergence of new patterns of power relations.

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List of Abbreviations

AIM.....	American Indian Movement
AFN.....	Assembly of First Nations
BCCA.....	British Columbia Court of Appeal
BCFL.....	British Columbia Federation of Labour
BCGEU.....	BC Government Employees' Union
BCTF.....	British Columbia Teachers' Federation
BCSC.....	British Columbia Supreme Court
CCF.....	Co-operative Commonwealth Federation
CFL.....	Council of Forest Industries
CLC.....	Canadian Labour Congress
CMA.....	Canadian Manufacturers Association
CPC.....	Communist Party of Canada
HTG.....	Hul'qumi'num Treaty Group
HNC.....	Haida National Council
IBEW.....	International Brotherhood of Electrical Workers
IPS.....	Islands Protection Society
IWA.....	International Woodworkers of America
IWW.....	Industrial Workers of the World
LSBC.....	Law Society of British Columbia
MLL.....	Miners' Liberation League
NBBC.....	Native Brotherhood of British Columbia
NDP.....	New Democratic Party
RCMP.....	Royal Canadian Mounted Police
SC.....	Social Credit Party
SCC.....	Supreme Court of Canada
SPC.....	Socialist Party of Canada
SPEC.....	Society Promoting Environmental Conservation
TAPS.....	Together Against Poverty Society
UBCIC.....	Union of British Columbia Indian Chiefs
UFAWU.....	United Fishermen and Allied Workers' Union
UMWA.....	United Mine Workers of America
VBT.....	Vancouver Board of Trade
VDLC.....	Vancouver and District Labour Council
VSE.....	Vancouver Stock Exchange
VWC.....	Vancouver Women's Caucus
VOW.....	Voice of Women
WCWC.....	Western Canada Wilderness Committee
WFM.....	Western Federation of Miners
WFP.....	Western Forest Products

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For Linda and Julian

Chapter 1.

Introduction: The Social Relations of Property, Protest, and the Law

In 1959, British Columbia Supreme Court Justice Norman Whitaker, a former Liberal speaker of the provincial legislature, sentenced labour journalist George North to thirty days in prison for publishing an editorial that lamented the “closeness of the companies and the courts.” North’s writings in *The Fisherman* newspaper, particularly his editorial “Injunctions Won’t Catch Fish Nor Build Bridges,” were found to incite “defiance of the court’s authority,” thereby interfering with the administration of justice in BC.¹ The case occurred in the context of a tense labour dispute between the Dominion Bridge Company and the Ironworkers’ union, which had obstructed construction of the Second Narrows Bridge over Burrard Inlet in Vancouver. The George North case illuminates a larger phenomenon in the legal history of British Columbia and Canada—a pattern where

¹ John Stanton, *Never Say Die! The Life and Times of John Stanton, a Pioneer Labour Lawyer* (Ottawa: Steel Rail, 1987), 129; “Injunctions Won’t Catch Fish Nor Build Bridges,” *The Fisherman* (Vancouver), 26 June 1959.

judges and other members of the legal community have been called upon to intervene in response to protest, often in the form of *ex parte* and interlocutory injunctions that sought to curb the agency of social movements attempting to assert customary rights in the face of competing private property rights. Often, these legal clashes between competing property claims occasioned crises of legal legitimacy, a fundamental questioning of the fairness of the judiciary and adjudicative procedures.

Embracing a spatial and historical lens and the insights of critical legal theory, this dissertation maps the patterns of property, protest, and the law in modern British Columbia—the social relations of adjudication—the changing ways in which conflict between private property rights and customary rights invoked by social movement actors has been contested and adjudicated in public spaces and legal arenas. From labour strikes in the Vancouver Island coal mines a century ago, to more recent protests by First Nations, environmentalists, pro- and anti-abortion activists, and urban “poor peoples” movements, social movement actors have asserted customary rights to property through the control or appropriation of space. Owners and managers of property have responded by enlisting an array of legal remedies and an army of legal actors—lawyers, judges, police, parliaments, and soldiers—to restore control over space and uphold private property rights. For most of the past century, conventional private property claims trumped the customary claims of social movements in the legal arena, provoking crises of legitimacy where social movement actors questioned the impartiality of judges and the fairness of adjudicative procedures. Remedies and legal technologies asserted by company lawyers, awarded by judges, and enforced by police and soldiers were often severe — from Criminal Code proscriptions against riotous assembly and deployment of military force, to the equitable remedy of the injunction and lengthy prison sentences

following contempt proceedings. But this pattern appears to be loosening in recent years, driven by three major trends in British Columbian and Canadian law: (1) the effective assertion of indigenous customary rights; (2) growing recognition of the importance of human rights in democratic societies, particularly in the context of the *Canadian Charter of Rights and Freedoms*; and (3) changes in the composition of the legal profession and the judiciary, reflecting changing societal attitudes and representation of more diverse social, cultural, and ideological constituencies. This has created a new and evolving legal space, where property is increasingly contingent rather than absolute and where the rights of one party are balanced by customary rights, interests, and aspirations of others. Consequently, we are seeing a trend toward the dilution of legal remedies traditionally available to the powerful, creating space for the assertion of non-conventional property claims and the emergence of new patterns of power relations.

1.1 Property Claims, Public Spaces, and Crises of Legal Legitimacy

Midway through the writing of this dissertation, I personally became engaged in a battle between customary and private claims to property, when I was named in a statement of claim relating to protests over a Coastal Salish burial ground at a place called Grace Islet in the Salish Sea. The private owner in fee simple of the rocky islet off Salt Spring Island sought to build a private vacation home on the identified cultural heritage site, which included nearly two dozen burial cairns, and alleged trespass by indigenous and non-indigenous people who were protesting at the site and disrupting the construction process. Upon being served by counsel for the plaintiff property owner, I worked with pro bono legal counsel, other named defendants, and lawyers retained by the Chief of the Tsawout First Nation to successfully defeat an interlocutory injunction application that aimed to

restrain further protests. As BC Supreme Court Justice Douglas Thompson ruled in postponing the hearing on the plaintiff's application, which alleged trespass on lands the plaintiff owned in fee simple, "[the issue] may be as simple as the plaintiff says it is, or it may not be that simple."² Two weeks later, counsel for the plaintiff discontinued the civil action and agreed to pay costs, shortly after receiving robust statements of defence and affidavits outlining how the Tsawout and other Coast Salish people were asserting customary rights by attending at the burial ground, and how non-indigenous supporters (myself included) were rendering assistance in the exercise of these customary rights. Justice Thompson's preliminary ruling, and the response of the plaintiff in abandoning the lawsuit, demonstrated a growing contingency in the jurisprudence of customary and conventional claims to property—an increasingly liminal legal space where judges and other legal actors appear more reluctant to unilaterally grant interlocutory orders to enforce private rights and dismiss customary rights asserted by parties aligned with social movements.

This liminality is not confined to assertions of indigenous customary rights, as I have observed in legal proceedings since the Grace Islet case. It can also be found in emerging jurisprudence relating to rights enshrined in the *Canadian Charter of Rights and Freedoms*, including Courts' interpretations of freedom of association that support assertions of workers' rights, and interpretations of the right to security of the person, which translate into a growing recognition of the right of people who are homeless to shelter themselves in public spaces. As the dissertation neared completion, I submitted a 900-page affidavit (inclusive of twenty-six exhibits of evidence) relating to "the right to

² "Protesters in Grace Islet dispute given month to prepare case," *Times Colonist* (Victoria), 23 September 2014.

sleep” in the City of Victoria and a homeless encampment that had taken shape on the Victoria Courthouse grounds. In denying an application from the Province of British Columbia for an injunction ordering the removal of the encampment, Chief Justice Christopher Hinkson declared:

Ultimately, in determining whether or not to grant an interim injunction at this time, I find that the balance of convenience is overwhelmingly in favour of the defendants, who simply have nowhere to move to, if the injunction were to issue, other than shelters that are incapable of meeting the needs of some of them, or will result in their constant disruption and a perpetuation of a relentless series of daily moves to the streets, doorways, and parks of the City of Victoria.³

Demonstrating a phenomenon at the heart of the argument in this dissertation, the courts in British Columbia appear to be increasingly reluctant to act with haste in enforcing conventional private property claims in response to protest, at least at the interlocutory stage, particularly when such claims clash with robust assertions of customary and constitutional rights.

Stirrings of this more contingent approach to property rights could be discerned in the 1980s, for example in the Meares Island case relating to logging of old-growth rainforest in Clayoquot Sound, *MacMillan Bloedel Ltd. v. Mullin* (1985). In that case, the BC Court of Appeal ruled in a landmark three-to-two decision that the balance of convenience favoured the granting of an injunction to the Nuu-chah-nulth First Nation to restrain logging operations by the company, MacMillan Bloedel Ltd., pending the determination of an Aboriginal title claim. This decision was handed down even though the logging company had a valid license and all other regulatory approvals required to harvest trees on the Crown land. Writing for the majority of judges on the appellate panel, Justice Peter Seaton succinctly described the rationale for granting the injunction:

³ *British Columbia v. Adamson*, 2016 BCSC 584.

“If logging proceeds and it turns out that the Indians have the right to the area with the trees standing, it will no longer be possible to give them that right.” Seaton also acknowledged the limits of appropriate judicial intervention, suggesting the real issue at the heart of the dispute was a political one between the First Nation and the Crown, which would be resolved through negotiation and a reasonable exchange. He declared “there is a problem about tenure that has not been attended to in the past,” and that he was not prepared to ignore it, even if the province chose to ignore the problem and even if industry had undertaken substantial capital investments based on particular assumptions about tenure over the land.⁴

For most of British Columbia’s post-contact legal history, however, judges and other members of the legal community appear to have sided squarely with established owners and managers of property, and against social movement actors who challenged those property claims by asserting customary rights through the control or appropriation of space. This is particularly apparent in the case law relating to labour disputes, particularly until the 1970s when the legislature responded to public concern by narrowing the courts’ jurisdiction in this area. The case law of environmental disputes also displays an overwhelming pattern of judges and other legal actors intervening in favour of private property interests to natural resources, rather than ecological claims asserted by members of the public aligned with environmental organizations. “There is an almost unlimited supply of cases dealing with interlocutory injunctions,” Justice Seaton noted in the Meares Island case. “Each of the decisions represents an attempt on the part of the court to see that justice is done. Often it is an attempt to preserve property so that a

⁴ *MacMillan Bloedel Ltd. v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154 (also 1996 BCSC 708).

claimant will not find at the end of a successful trial that the subject matter is gone, and always there is an attempt not to impede others unnecessarily.”⁵

The case studies examined in this dissertation highlight the changing pattern of protest and the law in British Columbia—the changing social relations of adjudication—centred around crises of legal legitimacy where private property interests and social movement interests clashed, and intervention by the legal community prompted a questioning of law’s legitimacy. Crises of legal legitimacy strike at the root of the functioning of law in society.⁶ They highlight the often-tense relationship between judges and social movement actors while raising troubling questions over the ability of the state and its network of judges, legislators, police, and officials to make and enforce rules in a manner consistent with the norms of a free and democratic society. As Eric Tucker noted, law does not operate in a vacuum, and it often lacks internal consistency, reflecting “legal and social zones of toleration,” a system of formal rules and informal social attitudes of legal actors which vary based on the social contexts of the time.⁷ Crises of legal legitimacy expose the liminal legal spaces created within and between these zones of toleration. Crises of legal legitimacy also cast critical light on the appointment procedures, composition, and impartiality of the judiciary, illuminating the socio-political background of judges and their relationships to corporations, political parties, and private individuals and groups. A core tenet of natural justice is the maxim that justice must not only be done but must be seen to be done. At diverse moments in British Columbia’s history, social movement actors arrived at the conclusion that justice was being denied in

⁵ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

⁶ For a discussion of law’s legitimacy, see David Dyzenhaus, “The Legitimacy of Legality,” *University of Toronto Law Journal*, 46, no. 1 (Winter 1996): 129-180. See also Alan Hyde, “The Concept of Legitimation in the Sociology of Law,” *Wisconsin Law Review*, 17 (1983): 379-426.

⁷ Eric Tucker, “‘That Indefinite Area of Toleration’: Criminal Conspiracy and Trade Unions in Ontario, 1837-77,” *Labour / Le Travail*, 27 (Spring 1991): 17.

both appearance and in fact, that judges and the courts—by deploying the state’s monopoly on coercive violence in the service of vested property interests—were serving as agents of injustice rather than justice. Such crises of legal legitimacy therefore provide a potent lens through which to examine broader questions of the relationship between law and society and the social relations within which law and adjudication operate.

A core argument in this dissertation—that growing legal recognition of customary claims to property by social movement actors has moderated legal interventions on behalf of conventional private property interests—cuts against a body of literature on neoliberalism and the erosion of democratic rights. Influential studies, such as Panitch and Swartz’s *From Consent to Coercion* (1983, revised 2003), identify a general retrenchment of workers’ rights and other democratic rights in the face of neoliberalism, the erosion of a “post-war compromise” between capital and labour that shaped social relations in western societies in the decades following the Second World War.⁸ I do not discount the destructive impacts of neoliberalism on social rights, including the harm caused by a retreat from redistributive social programs, taxation policies, and statutory protections that provide a measure of security for working people and other equity-seeking groups in capitalist societies. However, I argue in this dissertation that in the judicial arena at least, the decades since the passage of the *Constitution Act, 1982*, have witnessed growing recognition for customary and constitutional claims to property by social movement actors, and a corresponding weakening of legal interventions on behalf of private property interests. This interpretation builds upon concepts in Dominique Clément’s, *Canada’s Rights Revolution* (2008) and *Equality Deferred* (2014) on the

⁸ See Leo Panitch and Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3rd Edition (Toronto: Garamond, 2003); also Leo Panitch and Donald Swartz, “Towards Permanent Exceptionalism: Coercion and Consent in Canadian Industrial Relations,” *Labour / Le Travail*, 13 (Spring 1984): 133-157.

development of the “human rights state” in British Columbia and Canada in tandem with social movement mobilization.⁹ It also suggests a widening ambit for the “legal and social zones of toleration” described by Tucker.¹⁰

Many of the cases examined in this dissertation relate to contempt of court proceedings, arising from defiance of court injunctions by social movement actors challenging private property rights. It is therefore worthwhile at this stage to briefly describe the basic contours of the law in this area, to provide some context for subsequent chapters. In the leading case of *Poje* (1953), a British Columbia labour case discussed in Chapter 3, the Supreme Court of Canada drew a distinction between *criminal contempt of court*—a public challenge to the court’s authority that brings the administration of justice into disrepute—and lesser forms of *civil contempt of court*, where the defendant has disobeyed a civil injunction in less public ways, and which can be addressed by ordinary civil (rather than criminal) procedures and sanctions.¹¹ Contempt of court is a controversial area of law, the only non-statutory criminal offence remaining in Canadian law; judges’ inherent jurisdiction to initiate criminal proceedings against those who defy their authority is preserved under section 9 of the Criminal Code, with a “lack of clarity of definition of procedure and the elements of the offence.”¹² This ambiguity contributes to allegations of abuse of process and has fuelled calls for reform. As the Law Reform Commission of Canada noted in 1977, the law of contempt is “unnecessarily

⁹ See Dominique Clément, *Canada’s Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008); Dominique Clément, *Equality Deferred: Sex Discrimination and British Columbia’s Human Rights State, 1953-84* (Vancouver: UBC Press, 2014). Also Ross Lambertson, *Repression and Resistance: Canadian Human Rights Activists, 1930-1960* (Toronto: University of Toronto Press, 2004).

¹⁰ See Eric Tucker, “‘That Indefinite Area of Toleration’: Criminal Conspiracy and Trade Unions in Ontario, 1837-77,” *Labour / Le Travail*, 27 (Spring 1991): 15-54.

¹¹ *Poje v. Attorney General for British Columbia*, 1953 1 SCR 516; also *Canadian Transport Co. (UK) Ltd. v. Alsbury*, 1952 BCSC, 6 W.W.R. (N.S.) 473.

¹² Marie Henein, ed., *2018 Martin’s Annual Criminal Code – Student Edition* (Toronto: Thomson-Reuters, 2017), p. 44; *Criminal Code*, RSC 1985 c. C-46, s. 9.

complicated,” it “lacks organizing principles,” and “the continuing use of common law contempt offences is an unnecessary anomaly.”¹³ Four decades later, the law of contempt remains unreformed and these criticisms continue to resonate among social movement actors and others who find themselves facing contempt proceedings.

The law of injunctions is similarly ambiguous, deriving from equity rather than statute with a corresponding lack of definition. However, some clarification of rules has emerged over time, and the authority of private parties to seek judicial relief in the form of injunctions is provided for in BC’s *Law and Equity Act*, section 39, which states that an injunction may be granted “in all cases in which it appears to the court to be just or convenient that the order should be made.”¹⁴ This wide discretion is tempered to an extent by the leading Canadian authority, *RJR-MacDonald* (1994) (largely superseding *Wales*), which established a three-stage test to determine whether an injunction should be granted: (1) Is there a serious question to be tried?; (2) Will the party seeking the injunction suffer irreparable harm if relief is not granted (meaning harm that cannot be recovered through an award of money damages)?; and (3) Does the balance of inconvenience favour the granting of the injunction?¹⁵ Many cases hinge on the final stage of this test, including cases involving social movement challenges to private

¹³ Law Reform Commission of Canada, *Contempt of Court: Offences Against the Administration of Justice, Working Paper 20* (Ottawa: Department of Justice Canada, 1977), 2.

¹⁴ *Law and Equity Act*, RSBC 1996, c. 253, s. 39(1).

¹⁵ The previous leading case on the granting of injunctions in BC, *British Columbia (Attorney General) v. Wale*, has been largely superseded by *RJR-MacDonald* in most judicial decisions. In *RJR-MacDonald*, the Supreme Court of Canada built on tests established in the British case *American Cyanamid Co (No 1) v Ethicon Ltd.* (1975) and the Canadian case *Manitoba (A.G.) v. Metropolitan Stores Ltd.* (1987). The Supreme Court found that the first stage of the test, whether there is a serious issue to be tried, “should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits.” See *RJR – MacDonald Inc. v. Canada (Attorney General)*, (1994) 1 SCR 311; *American Cyanamid Co (No 1) v Ethicon Ltd.*, 1975 UKHL 1; *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, 1987 1 SCR 110; *British Columbia (Attorney General) v. Wale*, 1986 9 BCLR (2d) 333 (BCCA); *Wale v. British Columbia (Attorney General)*, 1991 1 SCR 62.

property rights. The emerging jurisprudence suggests a growing inclination on the part of judges to recognize the balance of inconvenience as favouring customary claims to property, and a growing reluctance to automatically issue injunctions to enforce private rights.

1.2 Critical Approaches to Property, Social Movements, and the Law

This dissertation examines patterns of protest and the social relations of adjudication through the powerful interdisciplinary lenses of spatiality and time, harnessing the interpretive potential of legal geography and the historical method. The case studies illuminate moments when social-movement actors asserted customary and constitutional claims to property through the control or appropriation of space, prompting owners and managers of property to tap a changing arsenal of legal tools to contain or defeat these challenges. With judges often at the apex of the legal order, the study is informed by the sociological method of social network analysis, treating the judiciary as a distinct social group, with its own traditions, practices, interests, values, and associations. The study also engages recent and older literature on the legal history of BC and Canada, including biographical treatment of particular judges and courts as well as broader analyses of the development of legal institutions, statutes, and the common law. By examining diverse social movements, the study intersects with the literature in several areas of law. It begins with the law of employment and labour, where the operation of modern injunctions developed in the BC context, before moving into more recent arenas of social and legal contestation: feminist law, environmental law, indigenous law, and poverty law. In the process, it explores common-law concepts including property, contempt of court, tort, and the equitable remedy of the injunction. The study fills a lacuna in these areas of legal

scholarship, while contributing to the fields of labour and working-class history, political economy, and historical and sociological studies of social movements and the state in BC and other Canadian and international jurisdictions.

Space—and conceptions of property—are socially constructed, and therefore contingent and open to contestation and divergent understandings. This contingency in the conceptualization of space and property is reflected in changing legal responses to social movement challenges to private property rights. Doreen Massey, a pioneer in the field of legal geography, suggested that “we need to conceptualize space as constructed out of interrelations, as the simultaneous coexistence of social interrelations and interactions at all spatial scales, from the most local level to the most global.”¹⁶

Overlapping, concurrent, and competing property claims are at the heart of the case studies examined in this dissertation, with social movement actors asserting customary claims to space and property, and the “legitimate” owners and managers of property invoking legal powers to re-establish control over space and assert competing claims. Nicholas Blomley has noted that “legal spaces are embedded in broader social and political claims,” constituted “by often competing visions of space and political life under law.”¹⁷ Violence (and the threat or exercise of law’s coercive power) plays an important role in this legal delineation of space, according to Blomley: “Physical violence, whether realized or implied, is important to the legitimation, foundation, and operation of a Western property regime. ... Both property and space, I argue, are reproduced through various enactments.”¹⁸ Often, social movement actors viewed the spaces they were

¹⁶ Doreen Massey, *Space, Place, and Gender* (Minneapolis: University of Minnesota Press, 1994), 264.

¹⁷ Nicholas Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Press, 1994), xi.

¹⁸ Nicholas Blomley, “Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid,” *Annals of the Association of American Geographers*, 93, no. 1 (March 2003), 121.

occupying as “public,” while property managers and owners sought to define them as extensions of the “private” business domain.

The connection between space and property is illuminated by works in the fields of legal geography and critical geography, including pioneering works by Massey and Blomley; Mariana Valverde’s research on space, time, and jurisdiction; essays in a collected volume by Jane Holder and Carolyn Harrison; and studies on “the right to the city” beginning with Henri Lefebvre and extending to more recent works by Don Mitchell, Lynn Staeheli, David Harvey, Mark Purcell, and others.¹⁹ As Staeheli and Mitchell note in their study of protest in twenty-first-century America, “understanding public space as a set of property relationships is foundational.”²⁰ Theoretical work on “the right to the city” provides powerful insights into processes of marginalization, displacement, and resistance in the context of neoliberal restructuring, which are examined in depth in the final case study. The spatial lens is also informed by works on the legal regulation of protest, including international work by David Mead, and studies

¹⁹ See Doreen Massey, *Space, Place, and Gender* (Minneapolis: University of Minnesota Press, 1994); Doreen Massey, *Spatial Divisions of Labour: Social Structures and the Geography of Production* (New York: Methuen, 1984; 2nd ed. New York: Routledge, 1995); Nicholas Blomley, David Delaney, and Richard T. Ford, eds., *The Legal Geographies Reader: Law, Power, and Space* (Oxford: Blackwell, 2001); Irus Braverman, Nicholas Blomley, and David Delaney, eds., *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford, CA: Stanford University Press, 2014); Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (London: Routledge, 2015); Jane Holder and Carolyn Harrison, *Law and Geography* (New York: Oxford, 2003); Henri Lefebvre, “Le Droit à la Ville,” *L’Homme et la société*, 6 (1967): 29-35; Henri Lefebvre, *Le Droit à la Ville* (Paris: Anthropos, 1968); Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford, 2003); David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London and New York: Verso, 2012); Anna Minton, *Ground Control: Fear and Happiness in the Twenty-First-Century City* (London: Penguin, 2009); Mark Purcell, “Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant,” *GeoJournal*, 58 (2002), 99-108.

²⁰ Lynn A. Staeheli and Don Mitchell, *The Peoples’ Property? Power, Politics, and the Public* (New York and London: Routledge, 2008), xx. See also Don Mitchell and Lynn A. Staeheli, “Permitting Protest: Parsing the Fine Geography of Dissent in America,” *International Journal of Urban and Regional Research*, 29, no. 4 (December 2005): 796–813.

in labour geography.²¹ In her recent research on legal standing and judicial review of environmental decision-making in the United States, Melinda Benson demonstrates how legal *procedures*, which are often treated as neutral in legal scholarship, can have a decisive impact on the outcome of legal proceedings. According to Benson, law “reflects a dynamic relationship between spatial forms and social discourses with corresponding productions of control, authority, and power.”²²

This dissertation also employs a historical approach in the structuring and interpretation of material, examining the social relations of adjudication with an emphasis on how judicial reasoning and the broader social relations of law change over time. I define social relations of adjudication as the social context within which law and adjudicative processes operate, including the ways in which class interests, social-economic power relations, and other forms of social relations and tensions are manifested within courtrooms, in adjudicative procedures and outcomes, and in the dynamics between legal actors involved in adjudicative processes—including parties to disputes, lawyers, judges, police, soldiers, state officials, and legislatures. What patterns can be discerned in these social relations of adjudication and in the approach of legal actors to social movement protest? How have legal procedures, judges’ attitudes, and lines of judicial reasoning changed over time? What elements of injunction law and other legal technologies have remained constant as the locus of judicial intervention shifted from

²¹ David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Oxford and Portland: Hart, 2010); Noel Castree et al., *Spaces of Work: Global Capitalism and Geographies of Labour* (London: Sage, 2004); Andrew Herod, *Geographies of Globalization: A Critical Introduction* (Oxford: Wiley-Blackwell, 2009); Andrew Herod, “Workers, Space, and Labor Geography,” *International Labor and Working-Class History*, 64 (Fall 2003): 112-138; Al Rainnie, Andrew Herod, and Susan McGrath-Champ, “Spatialising Industrial Relations,” *Industrial Relations Journal*, 38, no. 2 (2007): 102-11.

²² Melinda Harm Benson, “Rules of Engagement: The Spatiality of Judicial Review,” in *The Expanding Spaces of Law: A Timely Legal Geography*, ed. Irus Braverman, Nicholas Blomley, and David Delaney, (Stanford, CA: Stanford University Press, 2014): 217.

unorganized workers to union members to indigenous sovereigntists to anti-abortionists to environmentalists to anti-poverty activists? Eric Tucker highlights the complex relationship between history and law, distinguishing “the nuance and complexity that is the hallmark of good historical work” from “law-office” history, fodder for legal briefs where advocates and judges invoke history for merely instrumental purposes.²³ American historian Alfred H. Kelly pejoratively described this process as creating history by “judicial fiat.”²⁴ In contrast, this dissertation takes both the historical process as well as the evolution of technical legal rules seriously, revealing the social relations of adjudication through attention to the changing legal technology deployed in response to protest in modern British Columbia.²⁵ In examining the social relations of adjudication with particular reference to tension between customary claims to property and more narrowly conceived private property claims, this dissertation builds on concepts in Janice Neeson’s *Commoners* (1993), which examined the extinguishment of the legal concept of the “common right” in the context of the enclosure movement in England from the fifteenth to nineteenth centuries.²⁶ The dissertation also connects with an important international literature on tensions between customary rights and private property in

²³ Eric Tucker, “The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada,” *Labour/Le Travail*, 61 (Spring 2008), p. 161. See also Morton J. Horwitz, “The Conservative Tradition in American Legal History,” *American Journal of Legal History*, 17:3 (July 1973), 275-294; Donald J. Bourgeois, “The Role of the Historian in the Litigation Process,” *Canadian Historical Review* 67:2 (June 1986), 195-206; John Phillip Reid, “Law and History,” *Loyola of Los Angeles Law Review*, 27 (November 1993), 193–223.

²⁴ Alfred H. Kelly, “Clio and the Court: An Illicit Love Affair,” *Supreme Court Review* (1965), 119-158.

²⁵ See Mariana Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory,” *Social & Legal Studies*, 18 (2009), 139-157.

²⁶ J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (Cambridge: Cambridge University Press, 1992).

diverse global contexts, including Chakravarty-Kaul's recent study of common land and customary law in colonial India.²⁷

Theoretically, this dissertation is located in the critical school of legal scholarship, viewing the operation of law, struggles over rights, and the behaviour of legal actors in a socio-political context of economic power and contested class relationships. My findings regarding the contingent and contextual nature of property rights align the dissertation with Joseph Singer's "social relations" model of property, which Blomley locates among "progressive property critiques" of the "ownership model":

Property is much more diverse than the ownership model allows. Breaking the 'confines' of the ownership model would appear to be a powerful move, opening property up to diverse possibilities. While property can, indeed, be individualized, paranoid and antisocial, it can also be collective, inclusive and indelibly human.²⁸

This dissertation is also informed by studies into the legal regulation of economic power, such as Bakan's *The Corporation* (2003).²⁹

The historical method in this dissertation aligns the work with critical approaches to labour law, conceptualizing worker rights as historically contingent and contested, rather than evolving in a straightforward natural progression, as industrial pluralists have claimed.³⁰ Commenting on the recognition of collective bargaining as a *Charter-*

²⁷ See, for example, Minoti Chakravarty-Kaul, *Common Lands and Customary Law: Institutional Change in North India over the Past Two Centuries* (Oxford: Oxford University Press, 1996).

²⁸ Nicholas Blomley, "Performing Property: Making the World," *Canadian Journal of Law and Jurisprudence*, 26, no. 1 (January 2013): 45; Joseph William Singer, "The Reliance Interest in Property," *Stanford Law Review*, 40, no. 3 (February 1988): 611-751. See also Joseph W. Singer, "The Reliance Interest in Property Revisited," *Harvard Journal of the Legal Left*, 7 (2011): 79-82; Brenna Bhandar, "Disassembling Legal Form: Ownership and the Racial Body," in *New Critical Legal Thinking: Law and the Political*, eds. Matthew Stone, Illan Wall, and Costas Douzinas (Abingdon: Birkbeck Law Press, 2012), 112-127.

²⁹ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin, 2004).

³⁰ For leading works in the industrial pluralist school, see Paul C. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980); Harry Arthurs, "Landscape and Memory: Labour Law, Legal Pluralism, and Globalization" in T. Wilthagen, ed., *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: Koninklijke Nederlandse Akademie van Wetenschappen, 1998) 21-3.

protected right, Tucker described the Supreme Court of Canada's historical claims in *Health Services v. BC* as "flawed," arguing (like Judy Fudge) that collective bargaining is a deeply rooted *social practice* rather than a long-standing *procedural right*.³¹ It took the development of statutes and a corresponding statutory regime—a process driven by struggles of working people and their organizations—to translate the social practice into a recognized legal right. Reflecting complex jural relations (as Hohfeld described them), recognition of workers' legal rights necessarily placed restrictions on the freedom of employers.³² In British Columbia and other Canadian jurisdictions, collective bargaining has been rigorously contested, both before and after the advent of modern labour law, in workplaces, statutes, regulations, and courtrooms. Judges have been called upon to intervene in disputes between workers and employers, as conflict over the balance of power in industrial relations—motivated by a basic antagonism of interests—erupted into work stoppages and demands by employers and legislators for judges and police (at times even soldiers) to intervene to resume production. This pattern persists irrespective of changes in labour legislation, the political allegiances of office-holders, or variations in the scope and practices of state and quasi-state agencies.³³

In the era of "labour before the law," courts intervened to enforce laws against breach of contract and criminal conspiracy, informed by the pre-modern law of master and servant, a topic examined in works by John Orth, Randall Echlin, Hamar Foster, and

³¹ Tucker, "The Constitutional Right to Bargain Collectively," 166 and 168; Judy Fudge, "Brave New Worlds: Labour, the Courts, and the Canadian Charter of Rights and Freedoms," *Windsor Year Book of Access to Justice*, 28, no. 1 (2010), 39-40.

³² See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (New Haven: Yale University Press, 1919); Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History," *Canadian Labour and Employment Law Journal*, 15 (2009-2010), 337-338.

³³ See Bryan D. Palmer, "What's Law Got To Do With It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority," *Osgoode Hall Law Journal*, 41, nos. 2/3 (Summer-Fall 2003): 465-489.

others.³⁴ As Echlin points out, “the para-military code of discipline of the Hudson’s Bay Company” shaped relations between workers and employees as much as the English common law in colonial-era British Columbia.³⁵ Indeed, it was a strike of coal miners at Fort Rupert on northern Vancouver Island that prompted the appointment of the colony’s first justice of the peace.³⁶ Absenteeism, desertion, and similar infractions, whether by individual workers or combinations thereof, resulted in fines and prison sentences for the industrializing workforce of late-nineteenth- and early-twentieth-century BC. The case study of the Vancouver Island “war” of 1912-1914, which saw more than 200 coal miners jailed as military forces occupied the island coalfields during a bitter labour dispute, highlights contested legal relations in this era of “labour before the law.” Criminal sedition charges were also deployed at tense moments during the twentieth century to curb radical protest movements, as Dennis Molinaro and others have demonstrated—against socialist union organizer William Pritchard and other leaders of the One Big Union during the wave of general strikes that followed the First World War,

³⁴ John V. Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906* (Oxford: Oxford University Press, 1991); Randall S. Echlin, “From Master and Servant to McKinley and Beyond: 200 Years of Employment Law in British Columbia, 1810 to 2010,” in *Employment Law Conference, 2010 – Day 1* (Vancouver : Continuing Legal Education Society of British Columbia, 2010): 1-41; Eric Tucker, “‘That Indefinite Zone of Toleration’: Criminal Conspiracy and Trade Unions in Ontario, 1837-77,” 27, *Labour/Le Travail* (Spring 1991), 15-54.

³⁵ Echlin, “From Master and Servant and McKinley and Beyond,” 6; Hamar Foster, “British Columbia: Legal Institutions in the Far West, from Contact to 1871,” *Manitoba Law Journal*, 23 (1996), 309-310. See also Hamar Foster, “Mutiny on the Beaver: Law and Authority in the Fur Trade Navy, 1835-1840,” *Manitoba Law Journal*, 20 (1991), 15-45; William J. Burrill, “Class Conflict and Colonialism: The Coal Miners of Vancouver Island During the Hudson’s Bay Company Era, 1848-1862,” MA thesis, University of Victoria, 1987. The role of the Hudson’s Bay Company in relation to indigenous people was highlighted in the *Kikkik* case (1958) and has also been examined in diverse scholarly studies, including Dorothy Eber, *Images of Justice: A Legal History of the Northwest Territories As Traced Through the Yellowknife Courthouse Collection of Inuit Sculpture* (Montreal: McGill-Queen's University Press, 1997).

³⁶ Echlin, “From Master and Servant and McKinley and Beyond,” 7.

and again in the 1930s against Arthur “Slim” Evans and Communist organizers sinking roots among sections of the working class.³⁷

With the advent of modern “free collective bargaining” after the Second World War, courts and judges continued to play a central role in determining the balance of power in labour relations and shaping the outcome of specific disputes. From deciding the law of picketing to levying injunctions, fines, and prison sentences against working-class leaders and unions, the role of the courts was a matter of heated public and scholarly controversy during North American capitalism’s long boom in the 1950s and 1960s, prompting institutional change. However, even after authority to issue injunctions was moved from BC courts to the administrative framework of the Labour Relations Board in the 1970s, judges continued to play an important role in labour relations, providing judicial oversight to tribunal decisions, levying financial and other penalties against offending unions, and even issuing injunctions from time to time.³⁸

The broad contours of the legal regulation of collective bargaining in twentieth-century Canada are traced in Tucker and Fudge’s *Labour Before the Law* (2001) and Peter McInnis’s *Harnessing Labour Confrontation* (2002). There is also an older literature that illuminates judicial intervention in BC labour disputes, notably A.W.R. Carrothers’s *The Labour Injunction in British Columbia* (1956), studies by economist

³⁷ Dennis G. Molinaro, *An Exceptional Law: Section 98 and the Emergency State, 1919-1936* (Toronto: University of Toronto Press, 2017); Dennis Molinaro, “State Repression and Political Deportation in Canada, 1919-1936,” (PhD dissertation: University of Toronto, 2015), 189-196; Peter MacKinnon, “Conspiracy and Seditious as Canadian Political Crimes,” *McGill Law Journal*, 23 (1977): 622-43; Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press, 2001), 170; Barry Wright, Eric Tucker and Susan Binnie, eds., *Canadian State Trials, Volume IV: Security, Dissent, and the Limits of Toleration in War and Peace, 1914-1939* (Toronto: University of Toronto Press, 2015).

³⁸ See Joseph M. Weiler and Peter A. Gall, eds., *The Labour Code of British Columbia in the 1980’s* (Calgary and Vancouver: Carswell Legal Publishers, 1984); Alan F.J. Arbitise, “‘A Worthy, if Unlikely Enterprise’: The Labour Relations Board and the Evolution of Labour Policy and Practice in British Columbia, 1973-1980,” *BC Studies*, 56 (Winter 1982-3), 3-43.

Stuart Jamieson, and a report prepared by future Justice Thomas Berger for the BC Federation of Labour as working-class anger against injunctions and the jailing of labour leaders mounted in the 1960s.³⁹ Insight on relationships between statutes, the courts, and the BC Labour Relations Board can be found in studies by Richard Brown, Bora Laskin, Earl Palmer, James Dorsey, and Weiler and Gall, including valuable comparative material on the law of picketing in other Canadian provinces.⁴⁰ Edward Fisher's 1979 doctoral dissertation is also important, assessing the relationship between labour laws and strike activity in the postwar period.⁴¹ Recent studies by David Camfield, Chris Hurl, and Moroz and Isitt highlight changes in labour policy under Gordon Campbell's Liberal government and the struggles of hospital workers and teachers.⁴² Commentary on the

³⁹ Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press, 2001); Peter McInnis, *Harnessing Labour Confrontation: Shaping the Postwar Settlement in Canada, 1943-1950* (Toronto: University of Toronto Press, 2002); A.W.R. Carrothers, *The Labour Injunction in British Columbia: A Study of the Operation of the Injunction in Labour-Management Disputes in British Columbia, 1946-1955 with Particular Reference to the Law of Picketing* (Toronto and Montreal: CCH Canadian, 1956); Stuart Marshall Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-1966* (Ottawa: Task Force on Labour Relations, 1968); Stuart Marshall Jamieson, "Regional Factors in Industrial Conflict: The Case of British Columbia," *Canadian Journal of Economics and Political Science*, 28:3 (August 1962), 405-16; Thomas R. Berger, *Injunctions in British Columbia* (Vancouver: British Columbia Federation of Labour, c. 1966).

⁴⁰ Richard Brown. "Picketing: Canadian Courts and the Labour Relations Board of British Columbia," *University of Toronto Law Journal*, 31: 2 (Spring 1981), 153-199; Bora Laskin, "Labour Law: 1923-47," *Canadian Bar Review*, 26 (1948), 286-294; Earl E. Palmer, "The Short, Unhappy Life of the 'Aristocratic' Doctrine," *University of Toronto Law Journal*, 13:2 (1960), 166-189; James E. Dorsey, "Abandonment of Trade-Union Bargaining Rights and the Labour Code of British Columbia," *UBC Law Review*, 11 (1977), 40-80; Joseph M. Weiler and Peter A. Gall, eds., *The Labour Code of British Columbia in the 1980's* (Calgary and Vancouver: Carswell Legal Publishers, 1984); Harry Glasbeek, "Class War: Ontario Teachers and the Courts," *Osgoode Hall Law Journal*, 37, no. 4 (1999), 805-842.

⁴¹ Edward George Fisher, "The Effects of Changes in Labour Legislation on Strike Activity in British Columbia, 1945-1975," PhD diss., University of British Columbia, 1979. Also E.G. Fisher, "Strike Activity and Wildcat Strikes in British Columbia: 1945-1975," *Relations industrielles / Industrial Relations*, 37, no. 2 (1982), 284-312.

⁴² See David Camfield, "Neoliberalism and Working-Class Resistance in British Columbia: The Hospital Employees' Union Struggle, 2002-2004," *Labour/Le Travail*, 57 (Spring 2006), 9-42; Benjamin Isitt and Melissa Moroz, "The Hospital Employees Union Strike and the Privatization of Medicare in British Columbia, Canada," *International Labor and Working-Class History*, 71 (Spring 2007), 91-111; David Camfield, "CUPE's Sympathy Strikes in British Columbia, October 2005: Raising the Bar for Solidarity," *Just Labour: A Canadian Journal of Work and Society*, 11 (Autumn 2007), 35-42; David Camfield, "Sympathy for the Teacher: Labour Law and Transgressive Workers' Collective Action in British Columbia, 2005," *Capital & Class*, 99 (2009), 81-107; Chris Hurl, "The Structure of Betrayal: Trade Union Bureaucracy and Public Sector Struggles in British Columbia," *Studies in Political Economy*, 83 (Spring

recent Supreme Court of Canada decision in *Health Services and Support—Facilities Bargaining Association v. British Columbia* (2007 SCC 27) explores conflicting interpretations of freedom of association and the evolution of this principle at common law and in the *Charter* era.⁴³

It was in the labour context that the law of injunctions matured in BC, moving beyond an obscure equitable remedy to become a frequently-wielded device to curb the agency of workers who acted collectively during bargaining disputes and challenged employers' property rights. BC courts entertained applications for no fewer than 224 *ex parte* injunctions in response to labour disputes in the decade that ran from 1956 to 1965 and denied only two, establishing procedures and principles that would be applied in later legal responses to anti-abortion, environmental, indigenous, and anti-poverty protests.⁴⁴ Reflecting the origins of modern injunction law in the labour context, this dissertation is grounded in the literature of the law of employment and labour, mapping the social relations, jurisprudence, and forms of state intervention that shaped disputes between workers and employers.

Moving thematically to examine how the law of injunctions was applied in response to later protest movements, this study engages the rich and varied international literature on social movements, including works by Alain Touraine, Manuel Castells, Frances Fox Piven, William Carroll, and others. What is a social movement? For the

2009); David Camfield, "Comment: Analyzing the 2004 HEU Strike and Union Bureaucracy," *Studies in Political Economy*, 84 (Autumn 2009), 181-190; Sara Slinn, "Structuring Reality So That the Law Will Follow: British Columbia Teachers' Quest for Collective Bargaining Rights," *Labour/Le Travail*, 68 (Fall 2011), 35-77.

⁴³ Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada," *Labour/Le Travail*, 61 (Spring 2008), 151-180; Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support case in Canada and Beyond," *Industrial Law Journal*, 37:1 (March 2008), 25-48. See also Dianne Pothier, "Twenty Year of Labour Law and the Charter," *Osgoode Hall Law Journal*, 40:3/4, 369-399.

⁴⁴ Thomas R. Berger, ed., *Injunctions in British Columbia* (Vancouver: British Columbia Federation of Labour, c1966), 17.

purposes of this dissertation, I employ a definition of a social movement as an aggregation of people subscribing to a common ideology who work collectively to achieve shared goals, often embracing a common critique and pursuing a common challenge to the prevailing normative order. This definition draws from the work of Castells, acknowledging a space for non-class-based movements—even reactionary social movements, such as Al-Qaeda or (as in the case of the current study) anti-abortionists—as well as Habermas’s work on the role of ideology in social-movement mobilization. Focusing on the structure, goals, and tactics of movements, rather than their material basis, Castells suggested that non-class-based movements, such as the feminist movement, “have made major contributions to the redefinition of the goals and values of a society.”⁴⁵ Piven provided valuable insight on how the emergence of protest movements reflected a shift in both the (1) *consciousness* and (2) *behaviour* of social movement actors: the former hinged on an individual’s loss of faith in the legitimacy of the system and corresponding conception of their own “rights” and capacity to effect change; the latter signalled a shift in the behaviour of individuals, from quiescence to defiance, which was acted out collectively.⁴⁶ Concepts of hegemony and counter-hegemony, and intersections between diverse social movements, are highlighted in Carroll’s introduction to *A World to Win* (2016): “Building an alternative hegemony ...

⁴⁵ Manuel Castells, *The City and the Grassroots: A Cross-Cultural Theory of Urban Social Movements* (Berkeley and Los Angeles: University of California Press, 1983), 301. Also Alain Touraine, *The Voice and the Eye: An Analysis of Social Movements* (Cambridge: Cambridge University Press, 1981); Stuart Lowe, *Urban Social Movements: The City After Castells* (London: Macmillan, 1986); Kenneth H. Tucker Jr., “Ideology and Social Movements: The Contributions of Habermas,” *Sociology Inquiry*, 59, no. 1 (January 1989): 30-47.

⁴⁶ See Frances Fox Piven and Richard A. Cloward, *Poor People’s Movements: Why They Succeed, How They Fail* (New York: Pantheon, 1977), 3-4. Also Frances Fox Piven, “The Social Structuring of Political Protest,” *Politics and Society*, 6, no. 3 (September 1976): 297–326.

implies a protracted ‘war of position’ in which a coalition of oppositional movements wins space and constructs mutual solidarities.”⁴⁷

The relationship between social movements and the law engages distinct fields of legal research. This includes the rich and growing literature on indigenous law, including Borrows’ *Canada’s Indigenous Constitution* (2010), essays in Hamar Foster, Heather Raven, and Jeremy Webber’s edited collection *Let Right Be Done* (2007), and historical studies of conflict over law, property, authority, land, and indigenous rights.⁴⁸ There is also a specific literature on the phenomenon of indigenous protest in BC, notably Nicholas Bromley’s study of road blockades, and a recent national study by Belanger and Lackenbauer, providing powerful interpretive insight on spatiality and the regulation and contestation of space.⁴⁹ The environmental movement and its clashes with authority have also given rise to a diversity of literature, including M’Gonigle’s green legal theory, Wilson’s foundational work on the politics of wilderness preservation, and several studies

⁴⁷ William K. Carroll, “Social Movements and Counter-Hegemony,” in *World to Win Contemporary Social Movements and Counter-Hegemony*, ed. William K. Carroll and Kanchan Sarker (Winnipeg: ARP Books, 2016), 47. For an older collection of essays on social movements, see Samuel Clark, J. Paul Grayson, Linda M. Grayson, eds., *Prophecy and Protest: Social Movements in Twentieth-Century Canada* (Toronto: Gage, 1975).

⁴⁸ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Hamar Foster, Heather Raven, and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mill, Ont.: Oxford University Press, 1999). See also Alan Hanna, “Making the Round: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective,” *Ottawa Law Review*, 45, no. 3 (2015): 365-402; Tina Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994); R. Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2003).

⁴⁹ Nicholas Blomley, “‘Shut the province down’: First Nations Blockades in British Columbia, 1984-1995.” *BC Studies*, 111 (Autumn 1996): 5-35; also Steven Point, “Understanding Native Activism,” *BC Studies*, 89 (Spring 1991): 124-129. See also Nicholas Blomley, “Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid,” *Annals of the Association of American Geographers*, 93, no. 1 (March 2003), 121-141; Yale D. Belanger and P. Whitney Lackenbauer, *Blockades Or Breakthroughs?: Aboriginal Peoples Confront the Canadian State* (Montreal and Kingston: McGill-Queen’s University Press, 2015).

on the Clayoquot Sound protests of 1993.⁵⁰ In the area of the women's movement and legal politics of abortion, we can look to studies by Sethna and Hewitt, Thompson, Wasserlein, and Mitchell, though none focus on the operation of injunctions as they relate to BC's "bubble law."⁵¹ There is also the recent collection of essays on policing of protests against the Group of 20 (G20) global leaders' summit in Toronto in 2010, *Putting the State on Trial* (2015).⁵²

1.3 Politics of the Judiciary

This dissertation engages, and builds upon, studies on the legal history of BC and Canada, including studies of the judiciary and recent research on specific judges and the BC Court of Appeal and other Canadian courts.⁵³ As Fudge and Tucker note in their work

⁵⁰ Michael M'Gonigle, "Green Legal Theory: A New Approach to the Concept of Environmental Law," *Ökologisches-Wirtschaften*, 4 (2008): 34-38; Jeremy Wilson, *Talk and Log: Wilderness Politics in British Columbia* (Vancouver: UBC Press, 1998); Warren Magnusson and Karena Shaw, eds., *A Political Space: Reading the Global through Clayoquot Sound* (Montreal and Kingston: McGill-Queen's University Press, 2002); Frank Zelko, "Making Greenpeace: The Development of Direct Action Environmentalism in British Columbia," *BC Studies*, 142/143 (Summer/Autumn 2004): 197-239; Lorna Stefanick, "Baby Stumpy and the War in the Woods: Competing Frames of British Columbia Forests," *BC Studies*, 130 (2001): 41-68; Debra J. Salazar and Donald K. Alper, "Reconciling Environmentalism and the Left: Perspectives on Democracy and Social Justice in British Columbia's Environmental Movement," *Canadian Journal of Political Science*, 35 (September 2002): 527-566; Ronald MacIsaac and Anne Champagne, eds., *Clayoquot Mass Trials: Defending the Rainforest* (Gabriola Island: New Society, 1994); Ronald B. Hatch, ed., *Clayoquot & Dissent* (Vancouver: Ronsdale, 1995); Pierre Walter, "Adult Learning in New Social Movements: Environmental Protest and the Struggle for the Clayoquot Sound Rainforest," *Adult Education Quarterly*, 57, no. 3 (May 2007): 248-263; Michaela Killoran Mann, "'Clearcut' Conflict: Clayoquot Sound Campaign and the Moral Imagination," MA thesis, Université Saint Paul University, 2013.

⁵¹ Christabelle Sethna and Steve Hewitt, "Clandestine Operations: The Vancouver Women's Caucus, the Abortion Caravan, and the RCMP," *The Canadian Historical Review* 90, no. 3 (2009): 463-495; Ann Thomson, *Winning Choice on Abortion: How British Columbia and Canadian Feminists Won the Battles of the 1970s and 1980s* (Vancouver: Trafford, 2005); Frances Wasserlein, "'An Arrow Aimed at the Heart': The Vancouver Women's Caucus and the Abortion Campaign 1969-1971" (MA thesis, Simon Fraser University, 1990); Don Mitchell, "The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the Rise of the 'Purely Atomic' Individual," *Political Geography*, 24, no. 1 (January 2005): 77-100.

⁵² Margaret E. Beare, Nathalie Des Rosiers and Abigail C. Deshman, eds., *Putting the State on Trial: The Policing of Protest during the G20 Summit* (Vancouver: UBC Press, 2015).

⁵³ See, for example, Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years* (Vancouver: UBC Press, 2010); Hamar Foster and John McLaren, "'For the Better Administration of Justice': The Court of Appeal for British Columbia, 1910-2010," *BC Studies*, 162 (Summer 2009), 5-24.

on the law of picketing, “a large majority” of Court of Appeal judges believed “that the privilege to trade was of significantly greater social value than the privilege of workers to act collectively.”⁵⁴ Fudge and Tucker consider both the *internal* and *external* explanations for judicial reasoning in labour cases, finding that the internal impulses of the “taught tradition of the common law” and judicial precedent—favouring individual rights, freedom of contract, and the supremacy of private property—cannot provide a complete explanation. Rather, they argue that the social background of judges and institutional processes such as recruitment must also be considered to understand judges’ behaviour in labour cases.

Insights gleaned through the sociological method of *social network analysis* is particularly useful in this regard, providing a means for assessing judicial reasoning through the analysis of judges as a distinct social group, with their own norms, institutions, interests, cultural practices, and associations. While this dissertation does not purport to provide a social network analysis of the British Columbia judiciary, it is informed by William Carroll’s methodology examining corporate networks in Canada and beyond, as well as works by Scott and Carrington, Knoke and Kuklinski, Katz and Stafford, and others.⁵⁵ Tigar and Levy’s influential book *Law and the Rise of Capitalism*

Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: Osgoode Society for Canadian Legal History, 2005); William Kaplan, *Canadian Maverick: The Life of Ivan C. Rand* (Toronto: University of Toronto Press, 2009).

⁵⁴ Judy Fudge and Eric Tucker, “‘Everybody knows what a picket line means’: Picketing before the British Columbia Court of Appeal,” *BC Studies*, 162 (Summer 2009), 75.

⁵⁵ William K. Carroll, *Corporate Power and Canadian Capitalism* (Vancouver: UBC Press, 1986); William K. Carroll, *Corporate Power in a Globalizing World: A Study of Elite Social Organization* (Toronto: Oxford University Press, 2004); William K. Carroll, *The Making of a Transnational Capitalist Class: Corporate Power in the 21st Century* (London: Zed Books, 2010); John Scott and Peter J. Carrington, eds., *Sage Handbook of Social Network Analysis* (London: Sage, 2011); David Knoke and James H. Kuklinski, *Network Analysis* (London: Sage, 1982); David Knoke, *Political Networks: The Structural Perspective* (Cambridge: Cambridge University Press, 1990); David Knoke and Song Yang, *Social Network Analysis, Revised Edition* (London: Sage, 2007); Daniel Martin Katz and Derek K. Stafford, “Hustle and Flow: A Social Network Analysis of the American Federal Judiciary,” *Ohio State Law Journal*, 71, no. 3 (2010),

(1977) demonstrated how the close connection between lawyers and the ascendant *bourgeoisie* contributed toward the development of the modern legal system, and its particular legal ideology and approaches toward property rights, contract rights, and individual rights.⁵⁶ A recent contribution in the field of labour history, Kramer and Mitchell's *When the State Trembled* (2010), similarly provides insight on mapping the often-invisible associations and allegiances that contribute to state and non-state responses to social-movement protest.⁵⁷ Michel Foucault's work on power relations provides additional insight into the functioning of legal processes, actors, and institutions. According Foucault, "one must analyze institutions from the standpoint of power relations ... [T]he fundamental point of anchorage of the relationships, even if they are embodied and crystallized in an institution, is to be found outside the institution."⁵⁸ Drawing from Canadian and transnational material, processes of judicial appointment are relevant to understanding the composition and functioning of the judiciary.⁵⁹

The question of possible bias of judges and the politics of the judiciary is often treated as a taboo subject, striking at the root of common law ideals of fair and independent hearings between the parties. To allege bias on the part of judges casts doubt on the whole legitimacy of legal reasoning and the rule of law. Public commentary often focuses on an allegedly "liberal" bias of judges and criticism of "judicial activism" to advance equality claims of minority groups. In contrast, traditional Marxist critiques of

457-509; M.H. Zack, "Researching Organizational Systems Using Social Network Analysis," *Proceedings of the 33rd Annual Hawaii International Conference on System Sciences* (2000)

⁵⁶ Michael E. Tigar and Madeleine R. Levy, *Law and the Rise of Capitalism*, 2nd Edition (New York: Monthly Review Press, 2000; orig. pub. 1977).

⁵⁷ Reinhold Kramer and Tom Mitchell, *When the State Trembled: How A.J. Andrews and the Citizens' Committee Broke the Winnipeg General Strike* (Toronto: University of Toronto Press, 2010).

⁵⁸ Michel Foucault, "The Subject and Power," *Critical Inquiry*, 8 (Summer 1982): 791; see also Mariana Valverde, "Spectres of Foucault in Law and Society Scholarship," *Annual Review of Law and Social Science*, 6 (2010): 45-59.

⁵⁹ Kate Malleson and Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006).

structural inequality and bias in class societies have coloured legal scholarship in this area. John Griffith's work *The Politics of the Judiciary* (1977) examined judicial bias in the British context, suggesting that the "Oxbridge" background of judges and their high incomes prior to appointment to the bench influenced their handling of cases relating to labour and public order, giving rise to a distinct group identity:

These judges have by their education and training and the pursuit of their profession as barristers acquired a strikingly homogenous collection of attitudes, beliefs, and principles which to them represents the public interest. ... The judges define the public interest, inevitably, from the viewpoint of their own class."⁶⁰

This class background of judges shaped their approach to judicial reasoning and created a bias in favour of property interests and stability:

it is demonstrable that on every major social issue which has come before the courts during the last 30 years—concerning industrial relations, political protest, race relations, government secrecy, police powers, moral behaviour—the judges have supported the conventional, established, and settled interests.⁶¹

Griffiths concluded, however, that judicial bias operated on an institutional level, with reform requiring more than a mere change of personnel. "There are those who believe that if more grammar or comprehensive schoolboys, graduating at red brick or new glass universities, became barristers and then judges, the judiciary would be that much less conservative. This is extremely doubtful"⁶² A similar line of reform proposals speculates on whether the appointment of more women to the bench has had the effect of making the exercise of law less patriarchal or partial.⁶³

⁶⁰ J.A.G. Griffiths, *The Politics of the Judiciary* (London: Fontana, 1977), 213-214. See also Alan Paterson, "The Judges, the House of Lords and Politics," *International Journal of the Legal Profession*, 16, no. 1 (March 2009), 43-48.

⁶¹ Griffiths, *The Politics of the Judiciary*, 213.

⁶² Griffiths, *The Politics of the Judiciary*, 208.

⁶³ Bertha Wilson, "Will Women Judges Really Make a Difference?" *Osgoode Hall Law Journal*, 28 (1990), 507-522; Nathan Theodore Nemetz, "Concept of an Independent Judiciary," *UBC Law Review*, 20 (1986),

The theme of judicial bias is explored in the Canadian context, and through diverse interpretive lenses, in works by Alan Cairns, Peter Russell, F.L. Morton, and others.⁶⁴ As Morton notes in *Law, Politics and the Judicial Process in Canada* (2002), “the authority of contemporary Canadian courts still rests on the ancient requirement of impartiality In order to insure impartiality, we expect a judge to be independent of our adversary.”⁶⁵ While offering a more muted criticism than Griffiths, Morton raises important questions over the role of judges in the public arena as exemplified by controversies involving Justices Berger, McLachlin, Bienvenue, L’Heureux-Dubé, and Bastarache. Former BC Chief Justice Nathan Nemetz, who had represented unions prior to his appointment to the bench, suggested that Griffiths’s criticism “cannot be overlooked,” that “judicial attitudes towards political and social questions lack an understanding of the views of labour unions, minorities and the underprivileged.”⁶⁶ James Walker’s research on the Supreme Court of Canada has illuminated the influence that the religious background of judges can have in shaping judicial reasoning.⁶⁷

Moving to the American context, we find a study that challenges assertions of judicial bias. Ashenfelter, Eisenberg, and Schwab draw from statistical analysis of civil rights cases to conclude that there is no clear evidence linking the partisan allegiances of judges to their decisions: “[I]ndividual judge characteristics cannot be assumed to

291-292; Marie-Claire Belleau and Rebecca Johnson, “Judging Gender: Difference and Dissent at the Supreme Court of Canada,” *International Journal of the Legal Profession*, 15, nos. 1-2 (2008): 57-71.

⁶⁴ Alan C. Cairns, “The Judicial Committee and Its Critics,” *Canadian Journal of Political Science*, 4, no. 3 (1971): 301-345; Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen’s University Press, 1992); Peter H. Russell, “The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform,” *Osgoode Hall Law Journal*, 6, no. 1 (1968): 1-38; F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, 3rd Edition (Calgary: University of Calgary Press, 2002).

⁶⁵ F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, 3rd Edition (Calgary: University of Calgary Press, 2002), 169.

⁶⁶ Nathan Theodore Nemetz, “Concept of an Independent Judiciary,” *UBC Law Review*, 20 (1986), 290.

⁶⁷ James W. St. G. Walker, “Race,” *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo, Ontario: Laurier University Press, 1997).

influence substantially the mass of cases.”⁶⁸ Duncan Kennedy, meanwhile, sees a fundamental arbitrariness in judicial reasoning—a decisive choice in every case notwithstanding the common claim that judges “find” (rather than “make”) the law.⁶⁹ However, Kennedy’s views on the radical contingency of the law can be tempered by a more structural analysis, which acknowledges the degree of discretion enjoyed by judges (shaped by particular backgrounds and interests), while tracing enduring patterns in lines of judicial reasoning and action.⁷⁰

The literature on bias and the British Columbia judiciary is slim, particularly with respect to labour and social movements. In his recent history of the BC Court of Appeal, Christopher Moore quotes sitting Court of Appeal Justice Ian Donald, who practiced labour law with the firm Rankin & Co. before his call to the bench, and recalled that early BC judges were

unsympathetic to trade unions, administering a regime that was not particularly friendly to labour or employees in general. They understood managers and industrialists and owners, they worked with those people, met them at the Vancouver Club.

It changed during my years in practice [1970s and 1980s], with judges who had more knowledge of modern trends, more tolerance of differences. You began to have some judges who had dealt in labour matters. You could lose at trial and

⁶⁸ Orley Ashenfelter, Theodore Eisenberg, and Stewart J. Schwab, “Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes,” *Journal of Legal Studies*, 24: 2 (June 1995), 281.

⁶⁹ Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge: Harvard University Press, 1997). As Kerry Rittich argued in a review of Kennedy’s work, “instability and choice are part of the structure of adjudication itself.” Kerry Rittich, “Who’s Afraid of the *Critique of Adjudication*? Tracing the Discourse of Law in Development,” *Cardozo Law Review*, 22 (2001), 929-945. See also Steven J. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992), p. 141.

⁷⁰ See also Gordon L. Clark, “A Question of Integrity: The National Labor Relations Board, Collective Bargaining and the Relocation of Work,” *Political Geography Quarterly*, 7, no. 3 (July 1988): 209-227. As Clark concludes in his study of adjudication, bias, and integrity within the US National Labor Relations Board (NLRB): “[O]ne must be also cautious of ascribing too much power to agents and institutions. Having identified the bases of one set of decisions, it should not be assumed that these decisions will hold in all subsequent cases. Again, the evidence presented in this paper should be enough to persuade those who imagine adjudication to be final to realize that this is rarely true. There may be instances where a case is exhausted, but the landscape is littered with the results of previous decisions, some consistent with the past, others quite contrary to the latest incarnation. The map of adjudication must be rationalized, if only to convince others of the integrity of the NLRB.” Clark, “A Question of Integrity,” 223.

actually win at the Court of Appeal.⁷¹

Hamar Foster and John McLaren discuss this change, from a body with the corporate mindset of “a small group of economically successful, middle-class white men whose politics were acceptable to the federal government of the day” and who had worked in private practice for clients with the financial resources to retain them, toward a more diverse body that “demonstrates some sensitivity to changes in the composition of Canadian and BC society, and to the changing social values and mores.”⁷²

We can also turn to non-scholarly works, such as memoirs of labour lawyers John Stanton and Harry Rankin, who served as counsel in many of the cases examined in Chapter 3 of this dissertation. Though hardly lacking bias themselves, Stanton and Rankin offer rich detail on these heated events and provide analyses that are atypical of the practicing legal profession. Writing about the George North case, Rankin pulls no punches: “[the Attorney General] made the courts an instrument for the bosses! Under the Social Credit government there were *more* injunctions issued here than in any other province, or in any other country using our system of justice.”⁷³ Rankin also describes the political screening process for access to the BC Bar (and, by extension, the judiciary), tense hearings before the Benchers of the Law Society in 1950 where he was questioned about his attitudes on the Korean War and his affiliation with the Communist Party. Rankin narrowly passed the Benchers’ screening process that year (and again in 1972, when he faced disciplinary hearings for alleging a two-tier justice system with respect to indigenous people). However, he is unequivocal about the political purposes of the

⁷¹ Ian Donald, interviewed by Christopher Moore, 13 May 2008, as quoted in Moore, *BC Court of Appeal*, 196.

⁷² Hamar Foster and John McLaren. “‘For the Better Administration of Justice’: The Court of Appeal for British Columbia, 1910-2010,” *BC Studies*, 162 (Summer 2009), 16-17. See also Robert A.J. McDonald, *Making Vancouver: Class, Status and Social Boundaries, 1863-1913* (Vancouver: UBC Press 1996).

⁷³ Harry Rankin, *Rankin’s Law: Recollections of a Radical* (Vancouver: November House, 1975), 149.

Benchers' procedure: "This was simple political intimidation, the Law Society letting a whole generation of law students know that it was unacceptable to do any real thinking about change."⁷⁴

However, the Law Society's actions are placed in a more measured historical context in a recent article by Wesley Pue, examining the case of Gordon Martin. A war veteran, UBC law school graduate, and former candidate of the Labor-Progressive Party (as the Communist Party was then called), Martin was denied admission to the Bar after completing his articles on grounds that he lacked an ill-defined "good repute." When Martin filed an application for judicial review, the BC Court of Appeal refused to overrule the Benchers' decision, rigorously grilling Martin on his ties to Communism. Challenging contemporary and scholarly criticism, Pue locates the decision of the Benchers and Court of Appeal judges in differing notions of "character" and administrative law that prevailed in mid-twentieth-century BC; the Benchers may have lacked evidence in a legal sense, but their decision, and that of the Appeal Court, was informed by the context of the palpable fear of Communism that existed in North America at the time.⁷⁵

1.4 Critical Theory Beyond Base and Superstructure

Navigating this expansive literature and conflicting interpretations of judicial independence, this dissertation is informed by a neo-Marxist conception of law's role in society. While rejecting a crude "base-superstructure" schema, which dismisses law as a

⁷⁴ Rankin, *Rankin's Law*, 72.

⁷⁵ W. Wesley Pue, "Banned from Lawyering: William John Gordon Martin, Communist," *BC Studies*, 162 (Summer 2009), 111-136; see also W. Wesley Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia and Faculty of Law, University of British Columbia, 1995), 240-44.

blunt instrument of class rule, it locates judicial reasoning in the context of contested social relations and competing social constructions of space, giving serious consideration to ways in which class relationships and economic power influence adjudicative processes and the response of legal actors. It is informed by, yet departs from, strict structuralist approaches that coloured the work of political economists from Adam Smith to Karl Marx to more recent theorists. Smith declared in a 1762 lecture:

Laws and governments may be considered ... as a combination of the rich to oppress the poor, and preserve to themselves the inequality of goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to an equality with themselves by open violence.⁷⁶

Marx embraced this structuralist view of the law in his early writings, introducing the base-superstructure dichotomy in the preface to *The Contribution to the Critique of Political Economy* (1859): “The totality of these relations of production constitute the economic structure of society, the real foundation on which there arises a legal and political superstructure”⁷⁷ In the *Communist Manifesto* (1848), Marx and Friedrich Engels went further, proposing that jurisprudence was “but the will of [the ruling] class made into a law for all ... determined by the economical conditions of the existence of [that] class.”⁷⁸

Marx himself, as well as later generations of scholars, refined Marxist theory, preserving its critique of structural inequality and the economic purposes to which law was deployed, while retreating from economic determinism, which conflated all legal

⁷⁶ Adam Smith, *Lectures on Jurisprudence*, Edited by R.L. Meek, D.D. Raphael, and P.G. Stein (Oxford: Clarendon, 1978), 208, as quoted in Hay, “Time, Inequality, and Law’s Violence,” 173.

⁷⁷ Karl Marx, “Preface to A Contribution to the Critique of Political Economy,” *Preface and Introduction to A Contribution to the Critique of Political Economy* (orig. pub. 1859; Beijing: Foreign Language Press, 1976), 3.

⁷⁸ Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* (Orig. pub. 1848; London: Verso, 1998), 55.

acts and institutions into manifestations of class behaviour. This refined structuralist approach located the law and state actions within a framework of capital accumulation and contested social relations, while allowing a wide degree of autonomy for how law actually operated in specific contexts. There was no need to identify a bourgeois hand at the tiller, controlling the *instruments* of legality; rather, law's operation could be explained with reference to the balance of class forces in society, the need for social stability, and long-term interests of capital accumulation, which would nudge the activities of the state (including its legal system and adjudicative processes) into alignment with the interests of the bourgeoisie.⁷⁹ Neo-Marxists suggested that crude economic determinism risked obscuring the explanatory potential of more nuanced approaches. According to Andrew Vincent, orthodox Marxism's wholesale rejection of the legitimacy of law prevented a more meaningful discussion of the ways in which class shapes the nature of the law, its reform, and its future.⁸⁰

This critique echoed British historian E.P. Thompson, who rejected the view that “the revolutionary can have no interest in law, unless as a phenomenon of ruling-class power and hypocrisy.”⁸¹ A pioneer of the “cultural turn” in labour and working-class history, Thompson sought to root Marxism's high-level political economy, with its emphasis on states, epochs, and historic conflict between the classes, in a ground-level view of the daily lived experiences of working people. This required a more nuanced appreciation of law's operation. Occupying a “narrow theoretical ledge,” Thompson accepted “part of the Marxist-structural critique” of law, confirming “the class-bound and

⁷⁹ See William J. Chambliss, “The State, the Legal Order, and Social Problems,” in *Social Problems, Law, and Society*, ed. Kathryn A. Stout et al. (Oxford: Rowman & Littlefield, 2004), 407.

⁸⁰ Andrew Vincent, “Marx and Law,” *Journal of Law and Society*, 20, no. 4 (Winter 1993): 371-397; see also Terry Eagleton, “Base and Superstructure Revisited,” *New Literary History*, 31, no. 2 (Spring 2000): 231-240.

⁸¹ E.P. Thompson, *Whigs and Hunters: The Origin of The Black Act* (London: Pantheon, 1975), 259.

mystifying functions of the law,” while rejecting orthodox Marxism’s “ulterior reductionism” and modifying its “typology of superior and inferior (but determining) structures.” Thompson called for separating law conceptually from the superstructure, analyzing its operation as an institution, as an ideology, as well as its own internal logic, rules, and procedures.⁸²

This bottom-up method is exemplified in Thompson’s *Whigs and Hunters* (1975), which locates a series of capital statutes in early modern England in the social relations of the King’s forest and the subsistence economy of hunters, trappers, and gatherers who lived off deer meat, rabbit, fish, peat, and firewood that they poached and pilfered from Crown and private lands. Tying the material conflict in the forest to the ascendancy of early Whig liberalism, Thompson elegantly conveys two competing conceptions of justice—between the King’s law, as exercised by the keepers of the forest, and an older customary law based on rights held in common, which motivated armed resistance by the “Blacks”, agrarian rebels committed to “enforcing the definition of rights to which the ‘country people’ had become habituated.”⁸³ This conflict between competing conceptions of legal legitimacy was settled by Britain’s parliament in *The Black Act* (1723), which made it a capital crime to cut wood or hunt deer with “faces blacked” in the King’s forest.⁸⁴ Prior to this point, law “was less an instrument of class power than a central arena of conflict,” occasioning strong senses of entitlements among both the elite as well as commoners.⁸⁵ “When it ceased to be possible to continue the fight at law, men still felt

⁸² Thompson, *Whigs and Hunters*, 260. See also Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (London: Maurice Temple Smith, 1972).

⁸³ Thompson, *Whigs and Hunters*, 64.

⁸⁴ *The Black Act* (1723) 9 George I c. 22, appendix to Thompson, *Whigs and Hunters*, 270-277.

⁸⁵ Thompson argues that in order to effectively mediate and legitimize class relations, law must “seem to be just,” upholding “its own logic and criteria of equity,” and, “on occasion, by actually *being* just.” Widely

a sense of legal wrong; the propertied had obtained their power by illegitimate means.”⁸⁶

It was only when the Whigs and landed property owners had narrowed the ambit of the law to exclude common property rights from the law’s protection that commoners responded by enforcing these rights with arms and violence. Orthodox Marxism, by simplistically dismissing all law as a blunt instrument of ruling-class power, lacks such explanatory potential.

Departing from a “highly schematic Marxism,” Thompson defends the ideal of the rule of law as “a cultural achievement of universal significance” and “an unqualified human good.”⁸⁷ The legacy of successive struggles against autocracy, law imposes “inhibitions upon power.” To effectively mediate and legitimize class relations, law must “seem to be just” by upholding “its own logic and criteria of equity” and, “on occasion, by actually *being* just.”⁸⁸ Law as a logic of equity “must always seek to transcend the inequalities of class power which, instrumentally, it is harnessed to serve.”⁸⁹ To discard the rule of law as a sham of class rule is a “desperate error of intellectual abstraction,” Thompson argues, “a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power.” Moreover, such an approach throws away “a whole inheritance of struggle *about* law.”⁹⁰ Law may fall short of its rhetoric, and it may serve to mediate, legitimate, and reinforce unequal class relations, but this does not mean that the rule of law itself should be viewed as analogous to the exercise of unmediated force.

held notions of justice engendered by this ideological component of the law become part of the law itself. See Thompson, *Whigs and Hunters*, 263-4.

⁸⁶ Thompson, *Whigs and Hunters*, 261.

⁸⁷ Thompson, *Whigs and Hunters*, 265-266.

⁸⁸ Thompson, *Whigs and Hunters*, 263.

⁸⁹ Thompson, *Whigs and Hunters*, 268.

⁹⁰ Thompson, *Whigs and Hunters*, 266.

1.5 Case Studies and Thematic Structure of Dissertation

Each case study in this dissertation provides a powerful window into the social relations of adjudication and how the legal community has responded to conflict between private property rights and social movements. As Robert Sharpe noted, “legal historians have adopted a method developed by social historians and turned to the study of ordinary cases that have faded from modern memory.”⁹¹ The attitudes, actions, pronouncements, and procedures of legal actors are examined through interviews and detailed reading of reasons for judgement and published decisions, alongside public debates inside and outside the legislative assembly as recorded in Hansard and the daily press. These case studies provide a framework for understanding the behaviour of the legal community as a distinct social group. The voices of social-movement actors, accessed through interviews and archival records, reveal contested notions of the rule of law, competing customary claims to space and property, and questioning of the impartiality of legal actors and wider questions of law’s legitimacy. Records of corporations, government departments, and other interested parties further illuminate legal responses to conflict between private property interests and social movements.

The dissertation is organized thematically and chronologically around seven chapters. This introductory chapter explores the social relations of adjudication and connects the work with a powerful and diverse cross-disciplinary literature. Chapter 2 examines legal responses during “the Vancouver Island war,” the tense coal miners’ strike of 1912-14 when miners’ challenged the rights of Canadian Collieries Ltd. and the

⁹¹ Robert J. Sharpe, *The Lazier Murder: Prince Edward County, 1884* (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2011), p 6.

state responded with military force in the era of “labour before the law.” Chapter 3 explores conflict between private property and workers’ rights in the period following the Second World War, the heyday of collective bargaining where workers achieved a larger share of wealth through increased union density and militant strikes, prompting the development of modern injunction law and bitter controversies over the imprisonment of labour leaders. Chapter 4 moves toward the close of the twentieth century, exploring how the law of injunctions was adapted from the labour context during battles over reproductive choice, as anti-abortionists invoked a customary and constitutional right to freedom of expression and the British Columbia legislature responded with the “Bubble Law,” a statute aimed at restraining protest around abortion clinics and protecting the right of women to access health services. Chapter 5 engages environmental law, looking at the crisis of legitimacy when 900 people defied injunctions and were jailed for contempt of court in a challenge to the property rights of logging companies over the old-growth rainforests of Vancouver Island’s Clayoquot Sound. Chapter 6 examines indigenous assertions of customary rights to space and property, manifested in road blockades and other challenges to the property law of the settler society, and a corresponding weakening and mellowing of judicial and state responses to social-movement protest. Chapter 7, finally, moves the study into the twenty-first century and up to the present, examining the phenomenon of urban “tent cities”, the Occupy movement, and successful efforts by poor people and their advocates to assert a *Charter*-protected “right to sleep” and “right to shelter” in public spaces, revealing conflict between the common law of trespass and growing legal recognition of human rights in the *Charter* era.

The pattern of protest and the law in modern British Columbia and the wider social relations of adjudication demonstrate continuity and change. Social movement actors have consistently asserted customary rights through the appropriation or control of space, challenging prevailing private property rights and provoking responses by members of the legal community, even as the locus of social contestation has shifted from labour strikes in the early twentieth century to protests over indigenous rights, reproductive choice, environmental protection, and poor people's rights by the twenty-first century. The legal technology and attitude of legal actors has also changed over time, from the rough-and-tumble response of military intervention in the coal mining wars of the early twentieth century and the indiscriminate granting of injunctions in the postwar period, to a more measured approach in recent years, reflecting growing recognition of indigenous rights and human rights and changes in the social composition of the judiciary and legal profession. Crises of legal legitimacy occasioned by the legal community's response to conflicts between social movements and private property interests continue to surface, exposing a deep questioning of the fairness of legal actors, institutions, and adjudicative procedures, but these are manifested in new ways as property itself becomes a more contingent and less certain entity in the face of competing claims.

Chapter 2.

Masters, Servants, and Judges during the Vancouver Island “War”

In August 1913, 213 coal miners were jailed at Nanaimo and nearby mining towns for their role in an event that British Columbia’s labour movement described at the time as “the Vancouver Island war.”¹ Against the backdrop of a deep economic recession, declining global prices for coal, and the rising drumbeat of world war, workers paralyzed the operations of Canadian Collieries Ltd. and other mine operators for nearly two years, in a dispute for union recognition that grew from a walkout in a single mine against the dismissal of a union-appointed gas inspector. As the “war” deteriorated, with violent conflict between strikers, replacement workers, and mine managers—including the burning down of mine managers’ homes and the barricading of replacement workers in mine shafts—the British Columbia government responded with a firm hand, deploying

¹ J. Kavanagh, *The Vancouver Island Strike* (Vancouver: British Columbia Miners Liberation League, n.d. [c. 1913]).

the militia in “Aid to the Civil Power” to occupy the island coalfield (the third time soldiers intervened in a labour dispute in the island coal mines, and the longest deployment of the militia in a Canadian labour dispute up to that point in time).²

Local magistrates and Supreme Court judges played a key role in the state’s response to the “Vancouver Island War,” informed by the pre-modern law of master and servant and criminal conspiracy, which governed the employment relationship prior to the era of collective bargaining. Magistrates and judges also intervened to enforce laws against unlawful assembly, intimidation, and rioting, imposing penalties that had the effect of curbing miners’ collective power and aiding Canadian Collieries Ltd. and other employers to resume production in the island pits. “The State is a class institution functioning in the interest of the ruling class,” wrote Vancouver trade unionist and Socialist party member Jack Kavanagh in a pamphlet issued in the midst of the strike.³ Kavanagh’s claim reveals the deep chasm that emerged between sections of British Columbia’s working class and the province’s legal, political, and economic elite, a crisis of legal legitimacy where labour fundamentally questioned the fairness of state institutions, the independence of the judiciary, and the legitimacy of adjudicative processes. This crisis of legal legitimacy was rooted in conflicting visions of the employment relationship and the unwillingness of workers to occupy the subordinate

² Desmond Morton, “Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867–1914,” *Canadian Historical Review* 51, no. 4 (1970): 423–424. See also Lt-Col. F. A. Robertson, “The 5th B.C. Regiment, Canadian Garrison Artillery, and Early Defences of the British Columbia Coast” (manuscript, D. Hist., file 954.203 (D1), chap. 20); Maj. T. V. Scudamore, “Aid to the Civil Power,” *Canadian Defence Quarterly*, 9, no. 2 (January 1932); *Canadian Annual Review* (1913), 681–2; L.W. Bentley, “Aid to the Civil Power: Social and Political Aspects, 1904–1924,” *Canadian Defence Quarterly* 8, no. 1 (1978): 47–51; Desmond Morton, “Bayonets in the Streets: The Canadian Experience of Aid of the Civil Power, 1867–1990,” *Canadian Defence Quarterly* 20, no. 5 (1991): 30–34; Judy Torrance, “The Response of Canadian Governments to Violence,” *Canadian Journal of Political Science* 10, no. 3 (1977): 473–496; Martin F. Auger, “On the Brink of Civil War: The Canadian Government and the Suppression of the 1918 Quebec Easter Riots,” *Canadian Historical Review* 89, no. 4 (December 2008): 503–540.

³ Kavanagh, *The Vancouver Island Strike*, 1.

space reinforced by the law of master and servant, breaking the law to assert customary claims to employers' property—and exposing the tense social relations of adjudication at this tense moment in BC's legal history.

The “Vancouver Island war” provides fertile ground for a dialogue between an older labour historiography and newer works in critical legal scholarship. It builds upon recent Canadian works by Echlin, Grove and Lambertson, and Fudge and Tucker, as well as an international literature on the law of master and servant.⁴ As Orth noted, the law of employment and labour incorporates elements of property, contract, tort, and the criminal law—“the instinctual resort of elites confronted with new and unsettling realities.”⁵ This study also engages earlier works on the Vancouver Island coal miners' strike, including studies by Roy and Schade on the role of the militia, Norris's work on organizational aspects of the dispute, Hinde's study on the role of women, Kavanagh's contemporary account, and Phillips's treatment of the strike's broader significance in BC labour history.⁶ Local histories of Nanaimo and Vancouver Island illuminate important aspects

⁴ Randall S. Echlin, “From Master and Servant to McKinley and Beyond: 200 Years of Employment Law in British Columbia, 1810 to 2010,” in *Employment Law Conference, 2010 – Day 1* (Vancouver: Continuing Legal Education Society of British Columbia, 2010): 1-41; Alan Grove and Ross Lambertson, “Pawns of the Powerful: The Politics of Litigation in the Union Colliery Case,” *BC Studies*, 103 (Fall 1994): 10-11; Eric Tucker, “‘That Indefinite Area of Toleration’: Criminal Conspiracy and Trade Unions in Ontario, 1837-77,” *Labour / Le Travail*, 27 (Spring 1991): 15-54; Judy Fudge and Eric Tucker, “‘Everybody Knows What a Picket Line Means’: Picketing Before the British Columbia Court of Appeal,” *BC Studies*, 162 (Summer 2009), 53-79; Judy Fudge and Eric Tucker, “Work on Trial: Canadian Labour Law Struggles,” in *Work on Trial: Canadian Labour Law Struggles*, ed. Fudge and Tucker (Toronto: Irwin, 2010), 1-12; Douglas Hay and Paul Craven, eds., *Masters, Servant, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill and London: University of North Carolina Press, 1994).

⁵ John V. Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906* (Oxford: Oxford University Press, 1991), 2.

⁶ Reginald Roy, “The Seaforths and the Strikers: Nanaimo, August 1913,” *BC Studies*, 43 (Autumn 1979): 81-93; Daniel Schade, “A Militia History of the Occupation of the Vancouver Island Coalfields, August 1913,” *BC Studies*, 182 (Summer 2014): 11-44; John Norris, “The Vancouver Island Coal Miners, 1912-1914: A Study of an Organizational Strike,” *BC Studies* 45 (1980): 56-72; John R. Hinde, “‘Stout Ladies and Amazons’: Women in the British Columbia Coal Mining Community of Ladysmith, 1912-14,” *BC Studies*, 114 (1997): 33-57; Kavanagh, *The Vancouver Island Strike*; Paul A. Phillips, *No Power Greater: A Century of Labour in British Columbia* (Vancouver: Boag Foundation, 1967).

of the strike and the island's working class tradition.⁷ By engaging this diverse interdisciplinary literature, this chapter makes an original contribution to the fields of the law of employment and labour, legal history, and studies of the judiciary, as well as works in labour history and the politics of protest in British Columbia and Canada.

While there is a substantial literature on the Vancouver Island strike, treatment of legal aspects of the dispute and the arrested miners' stories has been peripheral at best. Even the experience of 21-year-old Joseph Mairs of Ladysmith, who died in state custody at Oakalla Prison while incarcerated for the Criminal Code offence of rioting, remains shrouded in unanswered questions. Kavanagh's 1913 pamphlet and Hinde's larger study of coal mining at Ladysmith provide the most thorough treatment, with Hinde suggesting that: "The arrival of the militia was seen as a declaration of war against the striking miners and politicized the dispute, as the state, rather than just the mining companies, became the focus of working-class agitation throughout the province."⁸ This chapter therefore aims to fill a scholarly lacuna, applying the same detailed treatment deployed by Grove and Lambertson in their study of the Union Colliery case to the legal issues surrounding the "Vancouver Island war." While Grove and Lambertson use jurisprudence to map the social relations of ethnicity in late-nineteenth-century British Columbia, this chapter maps the social relations of adjudication, examining the ways in which conflicting conceptions of property shaped the response of workers, companies, and

⁷ Jan Peterson, *Hub City: Nanaimo, 1886-1920* (Victoria: Heritage House, 2003), 206-212; Lynne Bowen, *Boss Whistle: The Coal Miners of Vancouver Island Remember*, Revised Edition (Nanaimo: Rocky Point Books, 2003; orig. pub. 1982); John Douglas Belshaw, *Colonization and Community: The Vancouver Island Coalfield and the Making of the British Columbian Working Class* (Montreal and Kingston: McGill-Queen's University Press, 2002); John R. Hinde, *When Coal Was King: Ladysmith and the Coal-Mining Industry of Vancouver Island* (Vancouver: UBC Press, 2004); Roger Stonebanks, *Fighting for Dignity: The Ginger Goodwin Story* (St. John's: Canadian Committee on Labour History, 2004); Susan Mayse, *Ginger: The Life and Death of Albert Goodwin* (Madeira Park, BC: Harbour, 1990).

⁸ Hinde, *When Coal Was King*, 204.

members of the legal community during the dispute. Like Grove and Lambertson, my method connects lawyers' arguments and judges' decisions in the courtroom to the changing statutory regime and the broader social-political context or "extra-legal" values that inform judicial reasoning.⁹ In the process, this chapter illuminates technical aspects of how the employment relationship was conceived and regulated in early-twentieth-century British Columbia, as well as broader social and political questions relating to patterns of protest and the legitimacy of adjudicative procedures in British Columbia and beyond.

2.1 Early Legal Regulation of the Employment Relationship in BC

At the dawn of the twentieth century, employment relations in British Columbia were characterized by a sharp antagonism of interests between workers and employers. Robber barons such as coal-mine owner Robert Dunsmuir had coloured the industrial relations landscape a decisively anti-union hue, at the same time that militant organizations such as the Western Federation of Miners (WFM), the Industrial Workers of the World (IWW), and the United Mine Workers of America (UMWA) sought to extend the benefits of union protection to Anglo-Canadian workers on BC's resource frontier (while excluding indigenous workers and workers from Japan, China, and India from their ranks).¹⁰ As several political economists have demonstrated, conditions of life and work for itinerant workers on this "corporate industrial frontier" imbued industrial relations and politics

⁹ Grove and Lambertson, "Pawns of the Powerful," 3.

¹⁰ For the development of Vancouver Island's coal economy, see H.K. Ralston, "Miners and Managers: The Organization of Coal Production on Vancouver Island by the Hudson's Bay Company, 1848-1862," in E. Blanche Norcross, ed., *The Company on the Coast* (Nanaimo: Nanaimo Historical Society, 1983), 42-55; also Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001).

with a militant, radical edge.¹¹ Alongside burgeoning unions of railway workers, miners, construction workers, and various trades in the province's emerging towns and cities, radical politics were pursued through the Socialist Party of Canada and other groups advocating for an "end to the wages system" and "production for use rather than profit."¹²

This was long before the era of "free collective bargaining"—a time period described in Fudge and Tucker's *Labour Before the Law*—when legal actors and institutions approached industrial conflict through the lens of "the common law's traditional bias in favour of employers' private rights."¹³ However, as Hay and Craven point out, the law of master and servant was "in its essentials statute law," existing as a separate body of law that had remarkably little contact "with the high legal regimes in which it was everywhere nestled." The law of master and servant rested on three principal assumptions:

The first was the idea that the employment relation was a matter of *private contract* ... between an employer who thereby acquired the right to command and an employee who undertook to obey. The second was the provision for *summary enforcement* of these private agreements by lay justices of the peace and other magistrates, largely unsupervised by the senior courts. The third was *punishment* of the uncooperative worker: not

¹¹ Martin Robin, "British Columbia: The Company Province," in *Canadian Provincial Politics: The Party Systems in the Ten Provinces, Second Edition*, ed. Martin Robin (Scarborough: Prentice-Hall, 1978), 28-60; James Conley, "Frontier Labourers, Crafts in Crisis and the Western Canadian Labour Revolt," *Labour/Le Travail*, 23 (Spring 1989), 1-37; Jeremy Mouat, "The Genesis of Western Exceptionalism: British Columbia's Hard Rock Miners, 1895-1903," *Canadian Historical Review*, 71:3 (September 1990), 317-45.

¹² Allen Seager, "Socialists and Workers: The Western Canadian Coal Miners, 1900-21," *Labour/Le Travail*, 16 (Fall 1985), 23-60; Gerald Friesen, "Yours in Revolt: Regionalism, Socialism, and the Western Canadian Labour Movement," *Labour/Le Travailleur* 1 (1976), 141-157; Ross Alfred Johnson, "No Compromise – No Political Trading: The Marxian Socialist Tradition in British Columbia," PhD diss., UBC, 1975; Ronald Grantham, "Some Aspects of the Socialist Movement in British Columbia," MA thesis, University of British Columbia, 1942; A. Ross McCormack, *Reformers, Rebels, and Revolutionaries: The Western Canadian Radical Movement, 1899-1919* (Toronto: University of Toronto Press, 1977).

¹³ Fudge and Tucker, *Labour Before the Law*, 302. See also Eric Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77," *Labour / Le Travail*, 27 (Spring 1991): 15-54.

damages to remedy the breach of contract, but whipping, imprisonment, forced labor, fines, the forfeit of all wages earned.¹⁴

In the Canadian context, the law of criminal conspiracy, unlawful assembly, intimidation, and breach of contract augmented the operation of contract, tort, and property at common law—providing sufficiently robust responses when workers' collective actions disrupted the public order and threatened private rights, engaging an array of state actors in the legal regulation of the employment relationship: police, soldiers, politicians, lawyers, lay magistrates, and judges.

According to Fudge and Tucker, employers “could refuse to hire union members and could fire those who became union members after taking up employment. Moreover, to protect the property and contract rights of employers and of workers who were not members of the union, the criminal law narrowly defined the scope of permissible tactics that workers acting collectively could use to advance their interests.”¹⁵ When the tools of police, judges, and lawyers seemed inadequate to curb militant collective action, the militia was deployed to occupy the Vancouver Island coalfields in response to strikes by Dunsmuir's workers (a pattern mirrored in Atlantic Canada in the state's response to militant agency of Cape Breton miners).¹⁶ That Dunsmuir's son, James, served as BC's premier and lieutenant-governor seemed to confirm in the eyes of workers that the state was no neutral body, that the executive function had been hijacked by a narrow class interest and that the law was therefore serving as a vehicle for the exploitation of the

¹⁴ Douglas Hay and Paul Craven, eds., *Masters, Servant, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill and London: University of North Carolina Press, 1994), 1-3.

¹⁵ Fudge and Tucker, *Labour Before the Law*, 2. See also Eric Tucker, “‘That Indefinite Zone of Toleration’: Criminal Conspiracy and Trade Unions in Ontario, 1837-77,” 27, *Labour/Le Travail* (Spring 1991), 15-54.

¹⁶ See Don Macgillivray, “Military Aid to the Civil Power: The Cape Breton Experience in the 1920's,” *Acadiensis*, 3, no. 2 (Spring 1974), 45-64; Desmond Morton, “Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867-1914,” *Canadian Historical Review*, 51, no. 4 (1970), 407-425; Jeremy Mouat, “The Politics of Coal: A Study of the Wellington Miners' Strike of 1890-91,” *BC Studies*, 77 (Spring 1988): 3-29.

working class rather than as a means for achieving its equality, dignity, and emancipation.¹⁷ A clash between a customary conception of justice and the actual (often brutal) exercise of state power engrained a deep-seated distrust and contempt for the law within BC's emerging industrial working class.

Tentative steps toward the legal protection and regulation of the collective rights of employees had been taken before the dawn of the twentieth century, as workers carved out "narrow exemptions from prosecution for criminal conspiracy," rendering that offence largely obsolete.¹⁸ Statutory protections for workers were further expanded, as the locus of legal remedies shifted from the criminal law toward civil actions against unions, influenced by a tense strike of hard-rock miners at the interior town of Rossland and the landmark British House of Lord's decision in *Taff Vale* (1901), which held unions liable in tort for loss-of-profits damages incurred by employers during strikes. In October 1901, the LeRoi Mining Company had applied for and received a court injunction restraining members and officers of the Western Federation of Miners at Rossland (as well as smaller unions) from "watching or besetting" various locations (including local railway stations and strike-breakers homes) "for the purpose of persuading or otherwise preventing persons from working for the plaintiffs" or procuring persons "to commit a breach of ... contracts" entered into with the company.¹⁹ The injunction, combined with the use of replacement workers from the United States (employed in violation of the *Alien Labour Act*), resulted in the defeat of the strike. In early 1902, as a civil suit for damages against the union went to trial, the local labour-

¹⁷ Phillips, *No Power Greater*, 5-9 and 38-39.

¹⁸ Orth, *Combination and Conspiracy*, 153; see also Paul Craven, "Workers' Conspiracies in Toronto, 1854-72," *Labour / Le Travail*, 14 (Fall 1984): 49-70; Eric Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77," *Labour / Le Travail*, 27 (Spring 1991): 17.

¹⁹ As quoted in A.W.R. Carrothers, "Legislative History of the BC Trade-Unions Act: The Rossland Miners Case," *UBC Legal Notes*, 2, no 4 (March 1956): 340. (339-346)

backed member of the legislative assembly for Rossland introduced a bill protecting unions from injunctions and civil liability for damages for “any threat or act of intimidation or conspiracy”; the legislation included a clause providing for retroactive effect of the indemnity provisions.²⁰ A substitute bill, lacking retroactivity as well as the proscription against injunctions, received majority support in the politically unstable legislature, despite opposition from the governing *laissez-faire* Liberals (at a time when BC’s party system was at its inception and the Socialist MLA for Nanaimo, former mining clerk James Hawthornthwaite, had recently won election). Notwithstanding its ambiguities, economist Paul Phillips described the *Trade-Unions Act 1902* as “a major triumph for labour.”²¹

The federal government also intervened during the Rossland strike, deploying the young labour relations expert William Lyon Mackenzie King to investigate. King arrived at Rossland in late 1901 and reported that “discrimination by the company against members of the union ... was probably the most important cause” of the strike.²² King, who had been appointed as Canada’s first deputy minister of labour a year earlier, served as secretary to a 1903 Royal Commission on Industrial Disputes in BC, which responded to sympathetic strikes of coal miners and railroad workers by proposing legislative provisions for the conciliation and investigation of disputes.²³ Building on these recommendations, King was influential in Canada’s selection of conciliation as its preferred means of settling industrial disputes, a decision embodied in the 1907 *Industrial Disputes Investigation Act* (“the Lemieux Act”) (legislation prompted by a strike of

²⁰ Carrothers, “Legislative History of the BC Trade-Unions Act,” 341.

²¹ Phillips, *No Power Greater*, 33-34.

²² Phillips, *No Power Greater*, 33.

²³ Canada, *Report of the Royal Commission on Industrial Disputes in the Province of British Columbia* (1903), 73-74.

Prairie coal miners). However, as Jeremy Webber has argued, this legislation had only a limited impact on how labour relations were actually conducted in BC and other Canadian jurisdictions.²⁴ Moreover, conciliation boards appointed under the legislation uncritically accepted the supremacy of capital and the subordination of labour in the employment relationship; this included the authority of employers to direct the work process, control wealth created through productivity gains, and negotiate individually with workers.²⁵ Indeed, when King was called upon to directly intervene in a strike of Fernie coal miners in 1907—the first test of the new *IDI Act*—labour roundly criticized his capitulation to employers’ demands for the open shop, perceiving a broader anti-union bias extending from the selection of investigative chairpersons under the act to delays that facilitated the use of strike-breakers.²⁶ From the outset, BC miners and their organizations would condemn the federal labour law as favouring employers’ interests and revealing the bias of the state in relations between workers and employers; however, at other times, miners and other workers would seek protection under the limited provisions of the *IDI Act*, most notably as vicissitudes in the labour market and business cycle curbed their bargaining power.

On the ground, residual elements of the law of master and servant informed the attitude of employers and the approach of judges as industrial disputes arose with increased frequency and intensity in the first decades of twentieth-century BC. This legacy of the common law combined with emerging statutes to arm employers with an array of legal tools to curb working-class agency—from the coercive apparatus of the

²⁴ Jeremy Webber, “Compelling Compromise: Canada Chooses Conciliation Over Arbitration, 1900-1907,” *Labour/Le Travail* 28 (Autumn 1991), 15-57; see also Jeremy H.A. Webber, “Standards of Industrial Justice: Ideology and the Reports of Conciliation Boards Under the Industrial Disputes Investigation Act 1907-1925,” LLM thesis, York University, 1988.

²⁵ Webber, “Standards of Industrial Justice,” 339-40.

²⁶ Phillips, *No Power Greater*, 47. See also Webber, “Standards of Industrial Justice,” 173-88.

criminal law to enforce breaches in the employment contract; to injunctions issued in equity (often with workers and the organizations denied notice and hearing); to public-order proscriptions against unlawful assembly, rioting, and intimidation; to the ultimate tool at the disposal of states to assert their authority: military occupation.²⁷ The Vancouver Island miners' strike of 1912-1914 saw coal-mining employers appeal to magistrates, judges, police, politicians, and soldiers to tap this arsenal of legal tools in a coordinated and ultimately successful effort to curb the collective agency of the striking island coal miners. The exercise of the law and legal actors and institutions during the strike fuelled a deep resentment among the island miners and a broader layer of organized workers in British Columbia. They saw a thoroughly unequal playing field and viewed the state and its apparatus as serving employers' interests to the detriment of the rights, interests, and aspirations of the working class. As Fudge and Tucker noted with reference to an earlier coal miners' strike that resulted in military occupation at the Cape Breton coal field, "the law overwhelmingly favoured the employers."²⁸

2.2 The "Big Strike," 1912-14

The Vancouver Island miners' strike began on 16 September 1912 in the town of Cumberland—after the Canadian Collieries Ltd. mine manager fired union activist Oscar Mottishaw and his fellow miners voted to take a mass "holiday" to protest the dismissal.²⁹ This borrowed a tactic developed by British and American workers to evade

²⁷ See the Criminal Code of Canada (1892), ss. 520-524 (Parts 5 [Unlawful Assemblies, Riots, Breaches of the Peace] and 39 [Offences Connected with Trade and Breaches of Contract]).

²⁸ Fudge and Tucker, *Labour Before the Law*, 74.

²⁹ Canadian Collieries mine manager Robert Henderson later claimed that he ordered contractor Richard Coe to dismiss Mottishaw because he had started work underground without Henderson's permission. The union viewed the dismissal as discrimination for Mottishaw's filing of the gas report with the province's inspector of mines. Stonebanks, *Fighting for Dignity*, 41.

legal proscriptions against criminal breach of contract. The immediate issue behind Mottishaw's dismissal was his role as a union-appointed gas inspector under the terms of the *Coal Mines Regulation Act 1911* and his filing of a "true report" warning of dangerous gas levels at No. 2 mine in Extension (in the preceding three decades, nearly 400 island miners had been killed in gas explosions). But the larger issue behind the strike was the employer's refusal to recognize the United Mine Workers of America (UMWA), which had organized locals at Cumberland, Nanaimo, Extension, and South Wellington and, in June 1912, sent a request to all companies on Vancouver Island to open negotiations on wages and other issues.³⁰ In 1910, two eastern-Canadian capitalists, William Mackenzie and Donald Mann, had purchased the Dunsmuir's island mining assets, creating the Canadian Collieries (Dunsmuir) Ltd., which, like the previous employer entity, was vehemently anti-union. Other coal operations on the island included the Pacific Coast Coal Mines at South Wellington, the Vancouver & Nanaimo Coal Company's Jingle Pot mine at Nanaimo, and the Nanaimo operations of the Western Fuel Company, an American-owned firm, which implemented a "system of espionage" to guard against unionization.³¹

The strike therefore erupted in the context of a concerted campaign by coal-mining employers to keep the union out of the Vancouver Island coalfields and a sense of desperation among the miners that collective organization offered the only hope of achieving safety at work and a decent income for themselves and their families. When the Cumberland miners attempted to return to work the day after their "general holiday," they found notices posted at the entrances to the mines instructing them to collect their tools

³⁰ Kavanagh, *The Vancouver Island Miners Strike*, 1-2; Stonebanks, *Fighting for Dignity*, 31-39.

³¹ Stonebanks, *Fighting for Dignity*, 31-36 and 51-52; Kavanagh, *The Vancouver Island Miners Strike*, 4 and 14.

unless they were prepared to sign individual contracts agreeing to work at the existing conditions for a period of two years. When workers at the Extension mines near Ladysmith held their own “holiday” the following day to protest the action at Cumberland, they too were summarily dismissed by Canadian Collieries Ltd. As the socialist trade-unionist Jack Kavanagh wrote at the time, “Thus commenced the strike on Vancouver Island—by a lock-out at the hands of the mine owners.”³² From its origins at Cumberland and Extension in September 1912, the strike raged on through 1913 and 1914, spreading over the entire island coalfield, with UMWA District president Robert Foster declaring a district-wide strike on 30 April 1913, the eve of international workers’ day (a decision affirmed at a mass meeting of Nanaimo miners the following day).³³ The Conservative premier of the province, Richard McBride (who also held the portfolio of minister of mines), refused repeated overtures from the union and the BC Federation of Labor to intervene to negotiate a settlement.³⁴

By the summer of 1913, tensions had reached a fever pitch. Work had largely stopped in the mines at Nanaimo and nearby South Wellington, at Extension near Ladysmith to the south, and in Cumberland to the north. Work proceeded intermittently and contentiously when the company, aided by police, brought replacement workers into the pits. A month into the dispute, 120 special provincial police were hired to protect the strikebreakers.³⁵ Chinese and Japanese workers, who had originally refused to work, were physically segregated from the Anglo-European strikers by special police and induced to return to work under the threat of deportation. Other replacement workers, shipped from as far away as San Francisco and Britain, arrived on the island in an attempt to break the

³² Kavanagh, *The Vancouver Island Miners Strike*, 2-3.

³³ Phillips, *No Power Greater*, 56-8; Kavanagh, *The Vancouver Island Miners Strike*, 5.

³⁴ Kavanagh, *The Vancouver Island Strike*, 3-4.

³⁵ Phillips, *No Power Greater*, 57.

strike.³⁶ When Canadian Collieries Ltd. attempted to transport 30 strikebreakers from Vancouver to Cumberland aboard the steamer *Charmer* in July 1913, a group of miners accosted the workers when the ship stopped at the Nanaimo wharves, prompting police to intervene.³⁷

The miners' strike illuminated widely divergent perceptions of the employment relationship and the rights and obligations of workers. A correspondent to the *Nanaimo Free Press* accused the UMWA of inducing "the employees ... to break their contract, ... thus exposing them to the charge of being a body of men without business honour, devoid of regard for business obligations." The writer advocated "a legal punishment for the violation of a Dominion statute."³⁸ In contrast, UMWA official Frank Farrington, representing the international leadership, asked rhetorically: "Should the workers ... be compelled to accept without question the terms of employment offered by their employer? ... Crude experience is gradually forcing the workers to realize that without combination they are wretchedly helpless and utterly incapable of coping with the mighty powers of wealth."³⁹ The editor of the *Victoria Week* newspaper, meanwhile, suggested that the government should "not allow either employer or employee to ruin the country with their fractious disputes," and should therefore take over the operation of the island coal mines.⁴⁰

In July 1913, Canada's Conservative minister of labour, Thomas Crothers, arrived on Vancouver Island to investigate the strike. He had met briefly with labour officials and the Nanaimo MP in Vancouver before sailing to Victoria to meet with McBride and the

³⁶ Kavanagh, *The Vancouver Island Strike*, 3; Phillips, *No Power Greater*, 57.

³⁷ "Charmer Carried Mine Workers to Union Bay," *Nanaimo Free Press*, 8 July 1913.

³⁸ "Communication," *Nanaimo Free Press*, 9 July 1913.

³⁹ "Farrington and Trades Unionism," *Nanaimo Free Press*, 11 July 1913. See also "Communication," *Nanaimo Free Press*, 28 August 1913.

⁴⁰ "Should Government Work Our Mines," *Nanaimo Free Press*, 21 July 1913.

provincial cabinet, and then boarded a train for a week-long tour of the strike zone. Prior to the minister's arrival, the general manager of Canadian Collieries had issued a public statement announcing that the company would decline any offer for the Department of Labour to serve as mediator. In contrast, UMWA officials insisted that they had "made application for the assistance of the Department of Labor at the beginning of the trouble," a view countered by the minister, who expressed disapproval that the miners had gone on strike without invoking the aid of the Lemieux (IDI) Act.⁴¹ Embracing the language of master and servant, Crothers identified "two of the great causes of unrest" as "the selfish employer and, on the other hand, the indolent servant."⁴² But despite this ostensibly balanced stance, labour was strongly critical of Crothers' schedule during the trip. As Kavanagh noted, "During his tour of the mining camps the most notable feature was the scarcity of time at his disposal when being interviewed by the strikers, and an apparent conviction that all men were liars, particularly if they happened to be miners on strike."⁴³ Kavanagh estimated that the minister devoted 20 per cent of his time speaking with strikers and the remainder with mine managers and strike-breakers; at South Wellington, he spent two hours at the offices of Canadian Collieries Ltd, while the miners were allegedly refused a meeting (a claim contradicted by press reports).⁴⁴

Crothers left the island on 19 July, after giving a speech at a UMWA-sponsored concert where he declared that industrial war was "indefensible except in the last resort," and that the issues in the present strike "were local and the settlement must be left to

⁴¹ "Communication," *Nanaimo Free Press*, 10 July 1913; "Mining Notes," *Nanaimo Free Press*, 17 July 1913. See also "Letters between UMW of A and Labor Department," *Nanaimo Free Press*, 12 July 1913.

⁴² "Crothers a Man of the Moment," *Nanaimo Free Press*, 10 July 1913. See also "Mr. Crothers Interviewed on Mining Situation," *Nanaimo Free Press*, 15 July 1913.

⁴³ Kavanagh, *The Vancouver Island Strike*, 6. See also "Mr. F.H. Shepherd, MP, To Meet Minister Crothers," *Nanaimo Free Press*, 7 July 1913.

⁴⁴ "Mining Notes," *Nanaimo Free Press*, 17 July 1913.

Nanaimo.”⁴⁵ Premier McBride also waded into the fray, musing about summoning the companies and the union to a special conference in Victoria to settle the strike.⁴⁶ During his visit, Crothers had announced the appointment of Sam Price, his law partner and mining commissioner in Ontario (who joined Crothers on his island tour), as a royal commissioner to investigate the dispute and effect “an adjustment of the differences between the coal miners and the operators.”⁴⁷ Price remained on the island after Crothers had left, “ready at all times to offer his mediation.”⁴⁸ While not called upon due to company intransigence, Price’s written report provided “a charter of legitimate employer and union behaviour,” according to Fudge and Tucker, proposing an end to premature work “holidays” and use of the derogatory term “scab,” while giving legal effect to collective agreements and outlawing discrimination against workers for belonging to, or being active in, a union.⁴⁹ While Price’s report was never acted upon, this attempt at mediation by federal authorities can be distinguished from the more aggressive and openly partial intervention of the provincial government on behalf of mine operators during the strike.

Before the federal labour minister had left the island, the strike assumed more ominous tones. At Cumberland, a fight erupted on Dunsmuir Street on the night of 18 July between strikers and a group of strikebreakers led by a man named Cave. Police arrested several strikers while Cave was released, prompting an angry mob of strikers to

⁴⁵ “Minister Visits Union Concert,” *Nanaimo Free Press*, 19 July 1913.

⁴⁶ “Premier May Call Round Table Conference to Settle Strike,” *Nanaimo Free Press*, 19 July 1913. The *Nanaimo Free Press*, meanwhile, called on the premier to appoint a stand-alone Minister of Mines, transferring the portfolio from himself to a “thoroughly practical mining man.” “Minister of Mines,” *Nanaimo Free Press*, 19 July 1913.

⁴⁷ “Crothers a Man of the Moment,” *Nanaimo Free Press*, 10 July 1913.

⁴⁸ “Mr. Crothers’ Visit,” *Nanaimo Free Press*, 19 July 1913.

⁴⁹ Fudge and Tucker, *Labour Before the Law*, 75-76; “No discrimination for joining a union,” *Globe and Mail* (Toronto), 7 October 1913.

drive the strikebreakers out of the town and onto company property. In the wake of the incident, the leader of the UMWA's Cumberland local, British-born socialist Joe Naylor, was arrested along with several others for "unlawful assembly" and held without bail.⁵⁰ At Ladysmith, a striker was stabbed on 9 August, culminating in a mass meeting at the Union Hall where a resolution was passed stating: "That if the police do not extend to our members the protection of the law, we will be compelled to take measures to protect ourselves."⁵¹ The night of that meeting, 11 August, strikers surrounded Ladysmith's Temperance Hotel, where a dozen strikebreakers were lodged, bombarding the building with stones amid catcalls from the second-storey rooms. An explosion erupted outside the hotel when someone threw a stick of dynamite. A second explosion that night, in one of the cottages lodging strikebreakers, ripped the hand off Alex Mackinnon, a striker who had returned to work, badly burning his face and body.⁵² In Nanaimo, a group of 700 miners and their families converged on the pithead of No. 1 mine on 11 August urging strikebreakers to quit work before following a group to a home, which they pelted with rocks as the head of household brandished a shotgun.⁵³ Reports circulated that other strikebreakers were carrying arms, fuelling speculation among the miners that the province was surreptitiously supplying the arms. According to Jack Kavanagh, the coal companies were feeling the financial strain of the strike from the loss of profits and it

⁵⁰ "Skirmishes at Cumberland between Strikers and Others," *Nanaimo Free Press*, 21 July 1913; Kavanagh, *The Vancouver Island Strike*, 6-7; Bowen, *Boss Whistle*, 152-153. For a rigorous defence of Naylor, see a letter from Cumberland mayor Alexander Campbell to the press: "Communication," *Nanaimo Free Press*, 2 September 1913.

⁵¹ Kavanagh, *The Vancouver Island Strike*, 8. Four days after the Cumberland clash, reports surfaced of an attempt to blow up the Trent River bridge, ten kilometres outside the town. See Hinde, *When Coal Was King*, 176.

⁵² Kavanagh, *The Vancouver Island Strike*, 9.

⁵³ Kavanagh, *The Vancouver Island Strike*, 9.

appeared that “the executive of the BC Provincial legislature” was “conniving with the coal operators for the purpose of fomenting trouble in the mining camps.”⁵⁴

The situation was rapidly deteriorating. On 12 August, Nanaimo miners again staged a mass picket at No. 1 mine, refusing to allow fire bosses to enter the mine despite the intervention of local member of parliament Francis Shepherd, leading to flooding. At nearby South Wellington, a group of between 600 and 800 miners surrounded company housing, beating strikebreakers and driving them and their families into the bush.⁵⁵ The following day, mass picketing prevented 23 special police constables from disembarking at the Nanaimo wharf; one of the officers was forcibly disarmed and beaten when he drew a gun, as the ship sailed back to Vancouver.⁵⁶ At the mining camp of Extension to the south, miners set fire to strikebreakers’ lodgings at a place called the “bullpen” and drove the strikebreakers and their families into the mine shaft. The strikebreakers responded with a fusillade of bullet fire into the night; a bystander by the name of James Baxter was shot.⁵⁷ Women participated in these crowd actions and their participation, according to historian John Hinde, “was not a spasmodic act but a deliberate response to months of provocation, frustration, and growing anger that built upon a general consensus in the mining community.”⁵⁸ While none were arrested, these activists in the UMWA’s women’s auxiliary were among the most militant members of

⁵⁴ Kavanagh, *The Vancouver Island Strike*, 7-8.

⁵⁵ Hinde, *When Coal Was King*, 179-181.

⁵⁶ “Further Evidence of Cases Arising Out of Strike Disturbance,” *Nanaimo Free Press*, 28 August 1913; Kavanagh, *The Vancouver Island Strike*, 10; Phillips, *No Power Greater*, 58; Gregson, *A History of Victoria*, 145.

⁵⁷ Kavanagh, *The Vancouver Island Strike*, 9-10; Hinde, *When Coal Was King*, 183-5. The following morning, the Extension strikers burned the mine manager’s home to the ground, after members of the militia temporarily left the mining camp. Sixteen-year-old William Bowater Jr. was later charged for the arson. See Bowen, *Boss Whistle*, 181; Hinde, *When Coal Was King*, 190.

⁵⁸ Hinde, *When Coal Was King*, 199.

the mining community, with the *Nanaimo Free Press* reporting that: “At Ladysmith and at Extension a great deal of the damage done was the work of women sympathizers.”⁵⁹

The miners had wired BC’s Attorney General, William Bowser, offering to preserve the peace if the special police were withdrawn. Bowser (who was serving as acting premier, with McBride away on business in Europe), responded with an unequivocal message in the daily press: “When day breaks there will be nearly a thousand men in the strike zone wearing the uniform of His Majesty. This is my answer to the proposition of the strikers that they will preserve the peace if they are left unmolested by the special police.”⁶⁰ Invoking military aid to the civil power, the provincial cabinet met in special session to discuss the deployment, as Bowser strong-armed two prominent Nanaimo justices of the peace (one of whom was a former Dunsmuir employee, the other a former Mayor) to sign the special requisition for military aid as required under the provisions of the Militia Act.⁶¹ Before dawn on 15 August 1913, 250 citizen-soldiers from the 72nd Regiment, Seaforth Highlanders, landed at Union Bay from Vancouver, encamping at Cumberland. They were joined by approximately 700 other troops, who sailed from Victoria and Vancouver for Nanaimo and militiamen from the 88th Regiment Victoria Fusiliers who left Victoria by train on the Esquimalt & Nanaimo Railroad to occupy Ladysmith, Extension, and other points. The “Civil Aid Force in Nanaimo” was headed by Lieut.-Col. John A. Hall, a prominent Victoria businessman and founder of the Canadian Explosives Ltd. plant on James Island.⁶² Like

⁵⁹ “Incidents Concerning Local Deadlock,” *Nanaimo Free Press*, 2 September 1913.

⁶⁰ Kavanagh, *The Vancouver Island Strike*, 10.

⁶¹ “Mobs beat police forces in Nanaimo and Ladysmith,” *Globe and Mail* (Toronto), 14 August 1913; “Found That Bowser Called Out the Troops,” *Vancouver Sun*, 28 August 1913; Schade, “A Militia History of the Occupation of the Vancouver Island Coalfields,” 16-17; Militia Act, S.C. 1904 c. 23, sections 80-87.

⁶² Roy, “The Seaforths and the Strikers,” 81-85; Schade, “A Militia History of the Occupation of the Vancouver Island Coalfields,” 20-32; Douglas E. Harker, *The Dukes*, (Vancouver: British Columbia

other militia forces deployed in response to civil disturbances in Canada in the decades prior to the First World War, the force consisted primarily of “citizen-soldiers,” ordinary civilians who worked at various occupations and volunteered their time as members of local militias, commanded by a smattering of officers with some military experience.⁶³

The citizen-soldiers of the civil aid force fanned out across the strike zone, liberating strikebreakers who had been trapped in the pits, detaining perceived ringleaders, and establishing control of ports, railroad stations, and government telegraph offices. On 17 August, the district vice-president of the UMWA, J.J. Taylor, was arrested in Duncan by plainclothes detectives while en route to a meeting of the BC Federation of Labor executive in Victoria. The following day, 18 August, citizen-soldiers under the command of Lieutenant-Colonel Hall surrounded a mass meeting of nearly one thousand miners at the Nanaimo Athletic Club. A mounted machine gun was posted at the door and the entire group was marched out of the hall in groups of 10 and escorted at bayonet point to the local courthouse; a total of 773 miners were arrested and searched, with 43 detained for “unlawful assembly” and other charges. Among those arrested was Jack Place, the Socialist Party of Canada’s member of the legislature for Nanaimo, accused of disarming the policeman on the Nanaimo wharf.⁶⁴ In an apparent case of overkill, the soldiers destroyed the Athletic Hall’s hardwood floors, removing the planks under the pretence of searching for a cache of firearms.⁶⁵

Regiment (D.C.O.), 1973), 47. For biographical information on Hall, see J.F. Boshier, *Imperial Vancouver Island: Who Was Who, 1850-1950* (Woodstock, UK: J.F. Boshier in conjunction with Writersworld, 2012), 329-330.

⁶³ See James Wood, *Militia Myths: Ideas of the Canadian Citizen Soldier* (Vancouver: UBC Press, 2010).

⁶⁴ “John Place Charged,” *Nanaimo Free Press*, 27 August 1913; Harker, *The Dukes*, 48; Roy, “The Seaforths and the Strikers,” 85-86.

⁶⁵ Kavanagh, *The Vancouver Island Strike*, 11-12.

Hardware stores throughout the strike zone had their supplies of ammunition confiscated by military authorities, ostensibly to keep them out of strikers' hands. At Ladysmith, special police and militia raided private homes in the early hours of 19 August, arresting a number of miners including the president of the UMWA local Sam Guthrie, who Kavanagh described as "one of the greatest factors in keeping the peace in Ladysmith."⁶⁶ Kavanagh elaborated on the military operation of August 1913:

Martial law had not been proclaimed, yet Russia was never more militarized than was Vancouver Island. Soldiers armed with rifles and bayonets searched the trains, looked under all the seats, (presumably for machine guns) and subjected all passengers to an inquisition as to their business, etc. All persons travelling to Nanaimo by boat, had to pass an examination at the hand of special police, reinforced by a file of soldiers. It was impossible to send telephone or telegraph messages out of the city without the military knowing the text of such messages.⁶⁷

While a military official claimed in the *Nanaimo Free Press* that no censorship was exercised, Capt. William Rae, adjutant of the 72nd Seaforths, recalled that an officer was posted at the Government Telegraph Office "inspecting all messages sent and received."⁶⁸

In total, 213 miners were detained without bail pending preliminary hearings; 166 would ultimately be tried and 50 would serve prison sentences.⁶⁹ In contrast, two strikebreakers, Bill Rafter of Ladysmith and Cave of Cumberland, were charged with unlawful assembly.⁷⁰ With Nanaimo's jail filled beyond capacity, groups of prisoners were transported by train and ship to Victoria and New Westminster to await trial.⁷¹ The UMWA hired the law firms of Bird, Darling & Leighton and Killam & Farris to defend

⁶⁶ Kavanagh, *The Vancouver Island Strike*, 12.

⁶⁷ Kavanagh, *The Vancouver Island Strike*, 13.

⁶⁸ As quoted in Roy, "The Seaforths and the Strikers," 85.

⁶⁹ Bowen, *Boss Whistle*, 188.

⁷⁰ "Strikebreakers for Suquash," *Nanaimo Free Press*, 26 August 1913.

⁷¹ "Further Evidence of Cases Arising Out of Strike Disturbance," *Nanaimo Free Press*, 28 August 1913; Hinde, *When Coal Was King*, 193.

the miners, with prominent Vancouver lawyers Clarence Darling and John Wallace de Beque Farris (who would later serve as BC's first labour minister, then attorney general and senator) representing the accused. Nanaimo citizens formed their own "Miners' Defence Fund," bolstered by a \$2,000 contribution from a Mrs. Fiddicks of South Wellington, and hired Vancouver lawyer Israel Rubinowitz.⁷²

2.3 *The Trials*

Toward the end of August 1913, the arrested miners faced Police Magistrates James Henry Simpson in Nanaimo and John Stewart in Ladysmith. For years, Simpson had been a contentious figure in the local community, with Nanaimo City Council going so far as to petition (unsuccessfully) the premier and attorney general to abolish the position of police magistrate in 1898; a year later, Simpson was removed from the office but was later re-appointed.⁷³ The principal case against the strikers rested on sections 78 to 82 of the *Criminal Code*, which defined the offences of "unlawful assembly" and "rioting" and specified sentences of one- and two-years imprisonment, respectively.⁷⁴ However,

⁷² Kavanagh, *The Vancouver Island Strike*, 14. See also Janet Mary Nicol, "'Not to Be Bought, Nor for Sale': The Trials of Joseph Edward Bird," *Labour/ Le Travail*, 78 (Fall 2016): 225-226.

⁷³ Walter J. Meyer Zu Erpen, "Toward an Understanding of the Municipal Archives of Nineteenth-Century British Columbia: A Case Study of the Archives of the Corporation of the City of Nanaimo," (Masters thesis, UBC, 1985), 71, 223; Peterson, *Hub City*, 80.

⁷⁴ *Criminal Code, 1892*, SC c. 29, ss. 78, 79, 80, 81, 82, 520, 521 and 524; see also Desmond Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989). Other elements of the criminal law, notably sections 520, 521 and 524 of the Criminal Code of Canada, proscribing "combinations in restraint of trade," "criminal breach of contract," and "intimidation," had fallen into disuse in response to labour disputes by the time of the Vancouver Island miners' strike. Section 520 of the Code outlined the offence of "Combination in restraint of trade," punishable by two years imprisonment or a fine of between \$200 and \$4000, committed by anyone who "conspires, combines, agrees or arranges with any other person ... to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity [which may be a subject of trade or commerce]." Section 521 of the Criminal Code outlined the offence of "Criminal breach of contract," applying to any person who "wilfully breaks any contract made by him" with the effect of endangering human life, causing serious bodily injury, or "exposing valuable property ... to destruction or serious injury." Section 524 outlined the offence of "intimidation" in relation to labour disputes, making it an indictable offence punishable by two years imprisonment to "use any violence or threat of violence to any person, with a view to hinder him

notwithstanding this statutory basis, the older common law of master and servant could be discerned in the language and reasoning of Magistrates Simpson and Stewart, Judge Howay, and Crown attorneys who prosecuted the cases. Jack Kavanagh later opined that “the visitors in the court were treated to the edifying spectacle of Magistrate Simpson retiring to the judges room in company with Prosecuting Attorney Shoebottom, any time he happened to be in doubt as to what course to pursue.”⁷⁵

Beginning on 26 August, more than one hundred Nanaimo and Extension miners appeared before Magistrate Simpson for preliminary hearings, and following a formal complaint by defence counsel Clarence Darling that the prosecution had introduced new charges (substituting the more severe offence of “rioting” for “unlawful assembly”), the court heard witnesses who outlined the tumultuous events of the previous weeks. Police officers, bystanders, strikebreakers, and miners gave detailed evidence, which was reported prominently in the local press. Reflecting his views toward workers’ collective action, Crown prosecutor T.B. Shoebottom declared that it was a “disgrace” to think that people would take to the streets “to molest people going about their lawful employment, and no sympathy was deserving for those violating the law.”⁷⁶ Demonstrating a lack of compassion toward the accused, Magistrate Simpson refused to allow age to be a factor in the cases against a half-dozen youth, suggesting the “unseemly time” in which a disturbance occurred—around midnight—undermined the claim that they acted with a

from working or being employed” in pursuit of “any unlawful combination or conspiracy to raise the rate of wages... ”

⁷⁵ Kavanagh, *The Vancouver Island Strike*, 13.

⁷⁶ “Miners Elect for Steady Trial,” *Nanaimo Free Press*, 30 August 1918

peaceful purpose.⁷⁷ All but two dozen of the accused miners had their charges remitted for trial, with bail denied in the interim.⁷⁸

At Ladysmith, Police Magistrate John Stewart presided over “a strenuous session” in the cases of 64 miners accused of rioting. The preliminary hearings opened at the end of August in the unlikely setting of a “moving picture theatre without windows and with a very low ceiling,” with a “want of light and air” in the sweltering summer heat. W.H. Bullock-Webster prosecuted the case for the Crown, while local lawyers T.P. Elder and C.K. Kearns defended the miners—with the exception of David Williams, who was defended by his father Parker Williams, Socialist MLA for Newcastle (who narrowly escaped arrest himself on account of looking after his six children while his wife was in hospital).⁷⁹ Midway through the Ladysmith proceedings, the wife of Charles Axelton was called as a witness by the Crown prosecutor and asked whether she was the ringleader of the unlawful assembly. Mrs. Axelton, who the press described as “a veritable amazon, both in build, vigor and strength,” denied this but admitted she had joined in the singing of the “Strikers’ Rally,” battle song of the Ladysmith miners. “Would you oblige us with a verse or two of the song the strikers were singing?” the Crown attorney asked, and the woman proceeded to lead the courtroom in song. According to a contemporary observer:

She had a lovely trained voice and in a short time the whole large audience wholeheartedly joined in. The judge tried in every way to stop them and had great difficulty in restoring order to court. There were laughs and boos

⁷⁷ “Miners Elect for Steady Trial,” *Nanaimo Free Press*, 30 August 1918

⁷⁸ “30 Local Men Committed for Trial; Two of Accused Dismissed,” *Nanaimo Free Press*, 26 August 1913; “Strikebreakers for Suquash,” *Nanaimo Free Press*, 26 August 1913; “Evidence Against the Accused Men,” *Nanaimo Free Press*, 27 August 1913; “Further Evidence of Cases Arising Out of Strike Disturbance,” *Nanaimo Free Press*, 28 August 1913; “Magistrate Simpson Admonishes Youths,” *Nanaimo Free Press*, 29 August 1913; “Miners Elect for Steady Trial,” *Nanaimo Free Press*, 30 August 1918; “Important Cases Start Tomorrow Morning,” *Nanaimo Free Press*, 2 September 1913; “Seven of the Accused Were Released,” *Nanaimo Free Press*, 3 September 1913.

⁷⁹ “Incidents Concerning the Present Situation,” *Nanaimo Free Press*, 30 August 1913; Bowen, *Boss Whistle*, 180.

and the whole proceeding was turned into an empty farce. Prisoners, witnesses and spectators burst forth in round after round of applause.⁸⁰

The press reported that even the “threatening bayonet” of the soldier in the courtroom failed to quell the disturbance and it was “many minutes” before Magistrate Stewart resumed the “dismal, tedious proceedings” in the hot, dark movie theatre.⁸¹ After a week of hearings, Magistrate Stewart committed 52 of the 64 men to stand trial.⁸²

The preliminary hearings concluded in mid-September as the militia force in the strike zone was reduced from 1,000 to about 250 men. With the alleged ringleaders behind bars, the military presence in the coalfields was pared down, with Crown attorney Shoebottom believing that the remaining soldiers could be removed “without the slightest risk” (at the same time that work began to extend the Esquimalt & Nanaimo Railroad to the Comox valley, perhaps reflecting strategic considerations arising from the crisis).⁸³ The wives and family members sought to aid the imprisoned miners in material ways. When a group of miners was transported by train from Victoria to Nanaimo for preliminary hearings, their wives and daughters arrived at the train station attempting to hand them tobacco, food, and clean clothing. Soldiers prevented them from passing the packages, culminating in a tense confrontation at the court house and back at the station as the prisoners entrained for the return journey to Victoria.⁸⁴ Earlier, Crown prosecutor Shoebottom had informed the court that prisoners were receiving “goods from their friends,” in violation of the law, prompting Magistrate Simpson to warn that future

⁸⁰ “Incidents On the Strike,” *Nanaimo Free Press*, 3 September 1913; Lempi Guthrie, as quoted in Bowen, *Boss Whistle*, 182.

⁸¹ “Incidents On the Strike,” *Nanaimo Free Press*, 3 September 1913.

⁸² “Passing Notes on the Situation,” *Nanaimo Free Press*, 4 September 1913.

⁸³ “Crown Prosecutor’s View of the Situation,” *Nanaimo Free Press*, 5 September 1913; “Steel Bridges for E & N Railway,” *Nanaimo Free Press*, 27 August 1913; Roy, “The Seaforths and the Strikers,” 82; Bowen, *Boss Whistle*, 184.

⁸⁴ BC Archives, GR-0429, Box 19, Pinkerton Reports, 12 September 1913, as quoted in Hinde, *When Coal Was King*, 201. Conditions in the prison, including food and sanitation, are described in Bowen, *Boss Whistle*, 180-181.

offenders would be dealt with summarily.⁸⁵ When defence counsel Darling had asked that the miners be permitted to communicate with their wives to obtain clean linens, with some of the men not having had a change of clothes since their arrest, Shoebottom insisted the matter be left to jail wardens, so as to avoid turning the courthouse into “a washhouse.”⁸⁶

On 9 October, the trial of the Ladysmith miners opened at Nanaimo. Provincial Judge Frederic William Howay had been brought over from New Westminster to replace the local magistrate, which caused concern among counsel for the accused miners.⁸⁷ The circumstances surrounding Howay’s appointment to preside at the Nanaimo trials are murky. The county court judge and historian had graduated from law school with Premier McBride and Attorney General Bowser, ran unsuccessfully for the Liberal party in the 1907 provincial election, and, following his appointment to the County Court shortly after that election, hobnobbed with the local elite as a member of Vancouver’s Terminal City Club, Victoria’s Pacific Club, and the Freemason’s lodge.⁸⁸ Thirty-nine of the accused had agreed to an expedited trial without jury and, on the advice of their lawyers who intimated that a plea deal was in the works (and that they could therefore expect light sentences), the miners pleaded guilty to charges of unlawful assembly and rioting. A lawyer named Taylor served as Crown prosecutor, described in the press as standing “for

⁸⁵ “30 Local Men Committed for Trial,” *Nanaimo Free Press*, 26 August 1913.

⁸⁶ “Magistrate Simpson Admonishes Youths,” *Nanaimo Free Press*, 29 August 1913.

⁸⁷ Nicol, “Not to Be Bought, Nor for Sale,” 225; “Tools of Coal Barons Fail to Create Dissension Among Bowser’s Victims,” *BC Federationist*, 3 October 1913.

⁸⁸ Prior to his appointment to the county court, Howay had served as secretary of the New Westminster from 1891 to 1907. See W. Kaye Lamb, “Introduction: A Bibliography of the Printed Writings of Frederic William Howay,” *British Columbia Historical Quarterly*, 8, no. 1 (January 1944): 27-32; Elections British Columbia, *An Electoral History of British Columbia, 1871-1986* (Victoria: Elections British Columbia, 1988), 102; “Judge F.W. Howay,” F.W. Howay School website < <http://www.howay.ca/about-us/who-was-f-w-howay/> > (viewed 18 December 2017).

fair play,” reflecting “the best traditions of the English bar.”⁸⁹ However, Howay’s conduct during the trial and sentencing soon revealed that no such agreement existed. In an unusual statement prior to sentencing, the judge accused the miners of “terrorism” and described the disturbance at Extension as “no ordinary riot” but rather the product of “deliberate scheming and planning.”⁹⁰

Howay handed down sentences of between three months and two years imprisonment with hard labour (the maximum sentence for rioting in the Criminal Code); those receiving less than two years were fined on top of the prison sentences.⁹¹ The convicted Ladysmith miners included Sam Guthrie, president of the UMWA’s Ladysmith local, local secretary Joseph Taylor, and 21-year-old Joseph Mairs, who would die in prison a few months later (interestingly, Mairs’s father, who had also been arrested, was the one Ladysmith miner who refused the expedited trial, seeking a hearing before a jury of his peers). The decision of the Ladysmith miners to plead guilty in hope of reduced sentences was likely influenced by economic considerations. Production was slated to resume at Nanaimo’s Jingle Pot mine (where, according to the *Nanaimo Free Press*, an agreement had been reached between the owner and the company, demonstrating “harmony” between “employer and employee” which “all operators having the good will of their employees at heart might do well to study and emulate”).⁹² In his statement prior to sentencing, Howay described how the conduct of the miners’ wives influenced his decision in sentencing: “I was appealed to on behalf of your wives and children but what

⁸⁹ “Mr. Taylor Will Represent Crown,” *Nanaimo Free Press*, 5 September 1913.

⁹⁰ BC Archives, GR-1323, B2101, 7529-16-13, File 174, “Remarks of Judge Howay Relative to the Sentencing of Ladysmith Strikers,” as quoted in Hinde, *When Coal Was King*, 194; also *Ladysmith Chronicle*, 25 October 1913, as quoted in Stonebanks, *Fighting for Dignity*, 51. See also, “Ladysmith Riot (transcript re riot cases),” 1913, file 30-15, vol. 30, Frederic William Howay fonds, UBC Special Collections.

⁹¹ Hinde, *When Coal Was King*, 191-192.

⁹² “Editorial,” *Nanaimo Free Press*, 3 September 1913, p. 2; Kavanagh, *The Vancouver Island Strike*, 14.

do I find here? I find your women singing ‘Drive the Scabs Away’ and throwing rocks themselves and these actions take away very much of the strength of the appeal for mercy on your behalf, because of your women.”⁹³ The Crown prosecutor ended the proceedings expressing the hope that the harsh sentences would have a deterrent effect, leading to a “dissolution of the forces of agitation.”⁹⁴ However, the opposite may have in fact ensued, with Howay’s attempt to make an example of the miners strengthening their solidarity. As a Pinkerton spy reported to the government, “It is almost certain that not over two dozen men quitted the ranks of the union to resume work since the critical period which followed the passing of sentence here by Judge Howay ... The men are far from giving up the battle.”⁹⁵

The trials of the other miners moved from Nanaimo to New Westminster on the mainland and resulted in very different outcomes. In contrast to the 38 convictions decided by Howay at Nanaimo in the absence of a jury, only 12 of the 127 miners tried by jury at New Westminster would receive prison sentences.⁹⁶ In the intervening period, Howay was replaced by Justice Aulay Morrison as the presiding judge, after Howay made a public statement to the press vilifying the imprisoned miners.⁹⁷ In Kavanagh’s view, Howay’s statement was “calculated to influence the jury before whom the remainder of the prisoners would be tried ... ranchers ... men whose minds were first biased by the lying reports in the newspapers of Vancouver and the lower mainland, and

⁹³ As quoted in Bowen, *Boss Whistle*, 187. See also BC Archives, GR-1323, B2101, 7529-16-13, file 174, “Remarks of Judge Howay Relative to the Sentencing of Ladysmith Strikers.”

⁹⁴ Bowen, *Boss Whistle*, 187; “Strike History as Reviewed by the Miners’ Solicitors,” *BC Federationist* (Vancouver), 14 November 1913.

⁹⁵ BC Archives, GR-0068, vol. 2, Operative 29, 29 November 1913.

⁹⁶ Bowen, *Boss Whistle*, 188.

⁹⁷ “Strike History as Reviewed by the Miners’ Solicitors,” *BC Federationist*, 14 November 1913.

secondly by the interview given to the press by Judge Howay.”⁹⁸ The one case decided by Howay at New Westminster, that of miner Richard Goodwin for the disturbance at Cumberland on 19 July 1913, resulted in a sentence of nine months in prison for assaulting a policeman. The remaining trials of the Cumberland miners were delayed owing to a remark by one of the jurors (overheard by a reporter from the *Vancouver World* newspaper) indicating prejudice against the accused before any evidence had been adduced.⁹⁹ Justice Morrison, a former Liberal MP (and future chief justice of the BC Supreme Court), was promptly appointed to replace Howay as the presiding judge.¹⁰⁰

As the special assizes (“the Strikers’ Assizes”) opened at New Westminster in November 1913, organized labour intensified its campaign in support of the miners and amplified its critique of the judiciary, forming the Miners’ Liberation League (MLL) with representation from the BC Federation of Labor, the Vancouver Trades and Labor Council, the IWW, the Socialist Party of Canada, the Social Democratic Party of Canada, and the UMWA. The MLL organized large protest meetings in Vancouver’s Dominion Hall and in Victoria, Edmonton, and other points demanding the miners’ release. The league also raised funds for the miners’ legal defence and for their families through “tag days,” soliciting money from the public on downtown street corners.¹⁰¹ Perhaps reflecting agitation from the MLL, Judge Morrison granted bail to all but three of the miners awaiting trial—a demand that had previously been refused.¹⁰²

⁹⁸ Kavanagh, *The Vancouver Island Strike*, 14 and 16; also Bowen, *Boss Whistle*, 188-189; Hinde, *When Coal Was King*, 192,

⁹⁹ Kavanagh, *The Vancouver Island Strike*, 14.

¹⁰⁰ Bowen, *Boss Whistle*, 188; Hinde, *When Coal Was King*, 192. See also BC Archives, Aulay Morrison fonds, MS-2472.

¹⁰¹ Hinde, *When Coal Was King*, 204.

¹⁰² Kavanagh, *The Vancouver Island Strike*, 15.

In the first trial before the Strikers' Assizes at New Westminster on 14 November, miners accused of rioting at Cumberland were found "not guilty" by the jury. The same verdict was delivered in the trial of Thomas Cowler and other miners accused of rioting and assaulting police officer Harry Taylor at the Nanaimo wharf. The third trial, involving 14 miners accused of rioting at Ladysmith, was coloured by the earlier guilty plea of 38 accused in Nanaimo (including Guthrie, Taylor, and Mairs) and sharp instructions from Justice Morrison. The jury found 11 of the accused guilty. The final trial, which began on 15 December and extended into March, related to charges of rioting and property destruction at South Wellington, with the 33 accused strikers pleading guilty as part of an amnesty agreement that saw them sentenced to time already served and released.¹⁰³

2.4 Aftermath

Organized labour railed against the military occupation of the island coalfields and the judicial proceedings against the strikers. They pointed out that while a number of the miners were detained and charged on relatively minor infractions, not a single strikebreaker had been arrested for the gunplay at Extension in August 1913.¹⁰⁴

Shortly after the mass arrests, a group of "miners and other citizens" had petitioned acting premier Bowser, demanding

British fair play in the present crisis ... The law should be no respecter of persons; that if miners are to be lodged in jail for breaking the law, then

¹⁰³ Bowen, *Boss Whistle*, 188-189; Kavanagh, *The Vancouver Island Strike*, 15. Two other cases decided in November 1913 were: an appeal from UMWA organizer Chris Pattison to a sentence of three months' imprisonment for vagrancy handed down by Magistrate Simpson, with Justice Baker of Nanaimo dismissing the case and releasing Pattison. The second accused, George Pettigrew, who had been held for two months without bail (during which time his wife had given birth to a child) was tried, sentenced to time already served, and released.

¹⁰⁴ Hinde, *When Coal Was King*, 190.

inspectors, mine owners [who started] the present serious trouble and all persons responsible, who have broken the law should also be put in jail, they having set the example of lawlessness. Failing this, we demand the release of the imprisoned miners, in other words we demand British fair play.¹⁰⁵

Like other social-movement actors, the strikers appealed for the protection of the law, invoking the language of natural justice and “Britishness” as rhetorical tools in their battle for public opinion. The BC Federation of Labor contemplated a province-wide general strike in sympathy with the striking coal miners, but following a referendum vote of its affiliated members and protracted debate no action was taken.¹⁰⁶ Reflecting strong labour feeling against the deployment of the militia, the Seaforth Highlanders had faced “a good deal of hostility” while marching to the Vancouver wharf en route to the strike zone in August 1913.¹⁰⁷ Later, the BCFL and several unions would amend their constitutions to bar militiamen from their membership ranks.¹⁰⁸ Fissures within the armed forces were celebrated in the labour press, with the *Federationist* recounting the experience of a soldier who left the militia after being deployed on strike duty in Nanaimo, serving time in military prison for having the “moral courage to revolt.”¹⁰⁹ The UMWA’s BC representative, Frank Farrington, was a lonely voice when he publicly condemned the imprisoned miners as “fools who had not sense enough to keep their mouths shut.”¹¹⁰

¹⁰⁵ “Incidents Concerning Present Situation,” *Nanaimo Free Press*, 30.

¹⁰⁶ “Will Be No General Provincial Strike,” *Nanaimo Free Press*, 5 September 1913; Phillips, *No Power Greater*, 59-60; University of Victoria Special Collections, Victoria Labour Council Fonds, “Minutes,” 21 January 1914; Bent Gestur Sivertz, *The Sivertz Family, Book 1: Christian Sivertz* (Parksville, BC: Arrowmaker, 1984), 44; Stonebanks, *Fighting for Dignity*, 52; Bowen, *Boss Whistle*, 189-90.

¹⁰⁷ Roy, “The Seaforths and the Strikers,” 83.

¹⁰⁸ Phillips, *No Power Greater*, 60. Problems also arose for militiamen absent from work on account of serving strike duty, with employers in Victoria and Vancouver – including the Victoria School Board – threatening to dismiss the men. “Under Militia Act,” *Nanaimo Free Press*, 30 August 1913; Bowen, *Boss Whistle*, 184.

¹⁰⁹ “Ex-Soldier Relates His Experiences re Strike,” *BC Federationist*, 26 June 1914, 1.

¹¹⁰ As quoted in Hinde, *When Coal Was King*, 197.

Sympathy for the miners and questioning of legal legitimacy extended to other quarters. Reverend John Hedley, who ministered at a Methodist church in the south end of Nanaimo where many miners lived, said that: “As far as the miner can see the law and the administration of law exists solely for the protection and help of the mining companies. All loyalty to the state must vanish when it is recognized that the state does not stand for justice and fair play.”¹¹¹ The mayor of Cumberland, meanwhile, expressed the “sympathy of the constituted authorities in this city” with the miners, who had been subjected to the “most extreme provocation and insult” by the coal companies; the mayor, Alexander Campbell, described the “invasion” of Cumberland by special police, followed by more than three hundred militiamen, as “instances of imbecility not to say insanity that would be difficult to find paralleled in the history of the British Empire.”¹¹² This mirrored the pattern in other localities where elected officials, dependent on working-class votes and amenable to local sympathies, deplored the militia call. Another prominent figure, Vancouver lawyer and well-connected Liberal John Wallace de Beque Farris (who represented the miners and later served as BC’s first labour minister, then attorney general and senator), commented on the violent turn of the strike in a 1915 address at the Vancouver Labour Temple Forum: “human endurance could stand it no longer and they got mad.” A “bond of sympathy” between the coal companies and the provincial government constituted “a menace to the interests of labour, and a crime against the coal miners and their families.”¹¹³ Increasingly, sections of the Canadian elite were recognizing the benefits of a more regulated approach to labour disputes, with the

¹¹¹ “The Labor Trouble in Nanaimo District: An Address Given Before the Brotherhood of Haliburton Street Methodist Church,” (n.d. c. 1913), by Rev. John Hedley, BC Archives, NWp 971.7, H455, as quoted in Stonebanks, *Fighting for Dignity*, 51.

¹¹² “Communication,” *Nanaimo Free Press*, 2 September 1913.

¹¹³ “Farris Reveals Actual Cause of Vancouver Island Miners’ Strike,” *BC Federationist*, 21 January 1916, as quoted in Stonebanks, *Fighting for Dignity*, 51.

postwar Mathers Commission on industrial relations advocating for the recognition of unions, workers' right to organize, and collective bargaining.¹¹⁴

Fifty Vancouver Island miners spent the winter of 1913-14 at the Oakalla prison in Burnaby and other penal facilities, including 21-year-old Joseph Mairs of Ladysmith, who died of tuberculosis relating to a bowel infection on 20 January 1914. Parker Williams, Socialist MLA for Newcastle, expressed the indignation of labour when he rose in the legislature to accuse the premier, Judge Howay, and the province's prison system of Mairs's death.¹¹⁵ That spring, the provincial government granted a general amnesty to most of the imprisoned miners as discussions proceeded on ways to end the nearly two-year-long strike.¹¹⁶ They sailed home aboard the ship *SS Cowichan* to a heroes' welcome at the Nanaimo wharves, as the crowd sang the revolutionary anthem "La Marseillaise."¹¹⁷ In July 1914, as Canada and other states lurched toward world war, the UMWA suspended strike pay to the island miners, claiming that \$1-million had already been spent.¹¹⁸ Miners began drifting back to work on terms proposed in a letter from the premier: the companies agreed to a no-discrimination clause against the strikers but refused to recognize the UMWA. As Fudge and Tucker concluded in *Labour Before*

¹¹⁴ Canada, *Report of Royal Commission on Industrial Relations* (Ottawa: July 1919), 19.

¹¹⁵ "The Culprits Are Known," *BC Federationist*, 6 February 1914; "Death of Youthful Miner at Prison Farm," *BC Federationist*, 23 January 1914; "Ladysmith Prisoner Dies," *Daily Colonist* (Victoria), 21 January 1914; *Vancouver Daily Sun*, 21 January 1914; *Ladysmith Chronicle*, 27 Jan. 1914; "Joseph Mairs," *Dictionary of Canadian Biography Online* < <http://www.biographi.ca> > (viewed 20 December 2011).

¹¹⁶ Hinde, *When Coal Was King*, 192. The last convicted miner to be released was UMWA organizer Joe Angelo of Ohio, who received the harshest sentence – 4 years – and was promptly deported to the United States upon his release at the end of September 1914. Two other defendants, Mike Adams and William Jackson, were not covered by McBride's amnesty, and were later tried and imprisoned for dynamiting Alex Mackinnon's Ladysmith home. See Stonebanks, *Fighting for Dignity*, 49 and 54.

¹¹⁷ Bowen, *Boss Whistle*, 189.

¹¹⁸ "U.M.W. of A. decide to stop strike pay," *Nanaimo Free Press*, 21 July 1914. In 1913, the *Nanaimo Free Press* reported a weekly strike of payroll of \$16,000, while Crown prosecutor Shoebottom said the strikers were paid \$4 per week. "Strikebreakers for Suquash," *Nanaimo Free Press*, 26 August 1913; "Crown Prosecutor's View of the Situation," *Nanaimo Free Press*, 5 September 1913.

the Law, “Vancouver Island coal operators could thank the provincial government and the courts for their help in driving another union off the Island.”¹¹⁹

Working-class criticism of the role of the judiciary and other state actors was rampant in the wake of the strike. Albert “Ginger” Goodwin, an island coal miner who was blacklisted from the industry for his role in the strike (and who would die from a special federal policeman’s bullet before the close of the decade while evading the Military Service Act 1917), suggested that “the forces of government had been used to beat the miners into subjection” and that the “inhuman sentences” handed down by the courts would provide “invaluable material as propaganda for the workers’ movement.”¹²⁰ Goodwin offered a far-reaching critique of the role of the courts during the strike and workers’ perceptions of justice:

When we find the workers howling about ‘not getting justice’ and that it is ‘not right’ — that is proof that they do not understand the class nature of society. It has been in evidence during the coal strike that this sentiment is nothing but a sham, for those that have [been] brought up before the court and are strikers are given the maximum penalty, while those that are helping the masters to defeat the strikers are let off with the minimum penalty — showing conclusively that the courts are at the disposal of the master class.¹²¹

This view, that the courts were “at the disposal of the master class,” would be sustained in criticisms from labour and other social movement actors over the century that followed.

The response of an array of legal actors and institutions to working-class protests during the Vancouver Island miners’ strike of 1912-1914 occasioned a deep crisis of law’s legitimacy—a fundamental criticism of the law and judiciary among a substantial

¹¹⁹ Fudge and Tucker, *Labour Before the Law*, 76; also Hinde, *When Coal Was King*, 206.

¹²⁰ As quoted in Stonebanks, *Fighting for Dignity*, 47-48.

¹²¹ “Capitalism the Leveller,” *Western Clarion* (Vancouver), 10 August 1912, as quoted in Stonebanks, *Fighting for Dignity*, 45.

layer of BC workers—as the coal miners and their families asserted customary claims to challenge employers’ property rights, and the legal community responded with coercive violence to restore employer and state control over space, including military occupation, criminal charges, and imprisonment. According to this view, the courts, like the broader legal system and the state itself, was a class institution, with judges serving the narrow class interests of the economic elite, safeguarding private property rights to the detriment of the legitimate interests, aspirations, and customary rights of the working class.

Statements from Judge Howay conveyed in his reasons for sentencing and in public comments to the press appeared to confirm this view, disclosing attitudes and a bias that were favourable to employers and detrimental to working people. This mirrored Orth’s findings on development of labour’s approach to the law in Britain: “New legal doctrines ... struck practical workmen as betrayals of traditional fair play. Surpassing parliament as the chief threat to labour, the courts had to be sidelined if not defeated. The lesson labour learned from its history was to see the common law as inherently hostile to its organizational aspirations”¹²² Far from a neutral arbiter called upon to fairly adjudicate disputes in the employment relationship, judges such as Howay and Simpson drew from the common law of master and servant and from tort, contract, and the criminal law to re-establish workers’ subordinate position and restore the authority and spatial control of employers in the mining communities. The crisis of legal legitimacy occasioned by the Vancouver Island “war” had far-reaching effects, shaping the politics of protest and British Columbia workers’ attitudes and approach toward the judiciary and the state far into the twentieth century. These social relations of adjudication also helped

¹²² Orth, *Combination and Conspiracy*, 155.

lay the groundwork for the more regulated—if fractious—system of labour relations that emerged in BC and other jurisdictions after the Second World War.

Chapter 3.

“The Closeness of the Companies and the Courts”: Crafting Injunction Law in the Era of Industrial Legality

“[T]he judiciary, by its readiness to grant injunctions, aligns itself on the side of employers ... such judicial action inevitably leads to a loss of respect for the judiciary, and is bound just as inevitably to lead to defiance of the law.”¹

-Resolution adopted by Canadian Labour Congress, June 1966

In 1966, labour lawyer Tom Berger, citing Bora Laskin, declared that injunctions “place the judiciary, as far as the labourer is concerned, in the ranks of the employers.”² The future BC Supreme Court judge and social-democratic politician made this observation in a brief presented to a special conference on injunctions organized by the BC Federation of Labour, for which he served as counsel. The wider context for Berger’s report and the conference was a heightening of working-class anger against the use of injunctions in labour disputes, provoked by a tense strike involving 250 workers at the Lenkurt Electric Company plant in the Vancouver suburb of Burnaby. This action culminated in the arrest of 30 trade unionists, including the leaders of the Vancouver & District Labour Council and locals of the International Woodworkers of America, the Marine Workers and

¹ *Labour Gazette*, June 1966, p. 283, as cited in John Stanton, *Never Say Die! The Life and Times of John Stanton, a Pioneer Labour Lawyer* (Ottawa: Steel Rail, 1987), Appendix A, p. 243.

² Thomas R. Berger, “Report and Recommendations on the Use of Injunctions in Labour Disputes,” 30 Oct. 1966, in Berger, *Injunctions in British Columbia*, 10; Bora Laskin, “The Labour Injunctions in Canada: A Caveat,” *Canadian Bar Review* (1937), 271-4.

Boilermakers, and the striking International Brotherhood of Electrical Workers (IBEW). “Lenkurt sparked an all-out campaign by the labour movement against the use of injunctions, the jailing of labour leaders, and restrictive labour legislation,” historian Elaine Bernard noted.³

In the decade culminating in the Lenkurt strike, BC judges had received 224 applications for *ex parte* injunctions against picketing and had denied only two.⁴ This marked an increase of more than 300 per cent in the number of applications for injunctive relief received and granted by the courts, to uphold employers’ property rights in the face of customary working-class challenges.⁵ In a tangible way, the judiciary intervened to legally delineate the spaces around workplaces as employers’ property—demonstrating the contestation of space in relation to protest. In this era, employers turned from the Criminal Code proscriptions discussed in the previous chapter to the law of tort to “minimize risk” arising from labour disputes, combining civil claims against workers and unions for economic losses suffered in relation to “unlawful” picketing, with applications for the equitable remedy of the injunction to restrain the picketing, prevent the losses, and restore production. This shift from the criminal law to the law of tort continued to rely on the one non-statutory criminal offence that endured in Canada from the common law—the offence of criminal contempt of court, arising from the inherent jurisdiction of the

³ Elaine Bernard, *The Long Distance Feeling: A History of the Telecommunications Workers Union* (Vancouver: New Star, 1983), 130. The Lenkurt dispute resurfaced nearly two decades later, during the 1984 BC NDP leadership campaign, when opponents of leadership candidate (and former deputy attorney general) David Vickers circulated a newspaper column from the *Victoria Times Colonist* highlighting Vickers’ role as a company lawyer during the 1966 injunction and contempt litigation. See “Vickers link to union battle called a smear by backers,” *Globe and Mail* (Toronto), 2 April 1984.

⁴ Berger, *Injunctions in British Columbia*, 17.

⁵ A.W.R Carrothers, *The Labour Injunction in British Columbia: A Study of the Operation of the Injunction in Labour-Management Disputes in British Columbia, 1946-1955* (Toronto: CCH Canadian Ltd., 1956), 194; Thomas R. Berger, *Injunctions in British Columbia* (Vancouver: British Columbia Federation of Labour, c1966), 17. Between 1946 and 1955, the BC Supreme Court received 69 applications for injunctions relating to labour disputes and granted all but two.

judiciary to uphold its own authority, which, as the Supreme Court of Canada declared in the leading labour case of *Poje*, constituted a contempt that was sufficiently public so as to bring the administration of justice into disrepute.

By their very nature, *ex parte* (“for one party”) injunctions were lopsided and blunt legal tools, approved by judges on application of company lawyers with workers and their organizations denied notice and hearing. Critics viewed such injunctions as evidence of an unhealthy relationship between companies and courts, issued by the proverbial judge in a nightgown, awakened in the dead of night by a company lawyer to hastily scrawl a signature on a court order. “The closeness of the companies and the courts” was how labour journalist George North described the relationship in a 1959 newspaper editorial entitled “Injunctions Won’t Build Bridges or Catch Fish,” landing himself a month in prison for contempt.⁶ Such *ex parte* injunctions placed the full weight of the criminal law—authorized by judges and enforced by police—at the disposal of employers to restrain workers acting collectively, by removing pickets and restoring production, before the substantive issues behind the dispute had ever been heard. Indeed, with picket lines gone, the actual issues behind the underlying tort action often never returned to the court room. It was this lack of due process—and the lopsided nature in which the coercive power of the law was deployed—that inflamed organized workers, just as it would inflame social-movement actors in later decades when companies and governments initiated *ex parte* proceedings to curb indigenous, anti-abortion,

⁶ John Stanton, *Never Say Die! The Life and Times of John Stanton, a Pioneer Labour Lawyer* (Ottawa: Steel Rail, 1987), 124-131.

environmental, and poor peoples' protests. This feeling of outrage was reflected in the resolution adopted by the Canadian Labour Congress in the wake of the Lenkurt strike.⁷

This chapter explores the contested social relations of adjudication and crises of legal legitimacy surrounding the proliferation of injunctions granted by BC judges in response to working-class incursions on employers' private property rights in the decades that followed the Second World War. The law of injunctions and contempt was hotly contested during this era, and many of the practices, procedures, and precedents emerged at this time—establishing a line of jurisprudence that would be deployed in diverse social contexts in later decades as the locus of extra-legal protest shifted from organized workers to other social-movement actors. Focusing on key cases including *Poje*, *North*, and *Lenkurt*, the chapter examines the technical procedures deployed by companies, lawyers, and judges and the broader pattern of judicial reasoning that developed in response to labour disputes in the 1950s and 1960s. The chapter also demonstrates how the crises of legal legitimacy occasioned by judicial interventions against labour protests—specifically, working-class political mobilization against “the closeness of the companies and the courts”—prompted intervention by the provincial legislature and statutory law that sharply curbed the power of the judiciary to intervene in labour disputes.

3.1 Injunctions in the Era of “Free” Collective Bargaining

If the period before the Second World War can be described as the era of “labour before law,” then the years that followed represented the heyday of collective bargaining, a

⁷ *Labour Gazette*, June 1966, p. 283, as cited in John Stanton, *Never Say Die! The Life and Times of John Stanton, a Pioneer Labour Lawyer* (Ottawa: Steel Rail, 1987), Appendix A, p. 243.

high-water mark in the collective power of workers to shape conditions of work and capture a larger share of wealth. However, even in this period of postwar “industrial legality,” which coincided with the “long boom” of North American capitalism in the 1950s and 1960s, sharp constraints were imposed on the freedom of workers to act collectively, particularly to picket and to withdraw their labour. Challenging the image of a steady progression of worker rights, as envisioned by industrial pluralists and the myth of a hands-off, benevolent liberal democratic state, evidence from postwar BC points to a consistently high degree of state intervention. Intervention extended from giving shape and form to the statutory context within which collective bargaining occurred, to frequent legal intervention by judges who imposed injunctions, fines, and prison sentences to curb the collective power of workers when they threatened the property rights of employers. Rather than the state and judiciary stepping back to allow “free” collective bargaining to proceed, worker rights were constantly contested, shaped, and defined, with the law of injunctions and contempt standing out as a crucial site of social and legal contestation.

The law of injunctions had preceded the advent of twentieth-century collective bargaining. Indeed, it owed its origins to pre-modern times, as an ancient equitable remedy evolving from the Roman *interdict* and writs issued by the Court of Chancery in English law.⁸ However, it was in the twentieth century that injunctions moved from a fairly narrow application in commercial and other areas of law to become a central legal device wielded by employers to curb the collective power of unionized workers. As Tucker and Fudge demonstrate, the labour injunction first emerged in Canada in industrial Ontario prior to the First World War, as employers responded to metal

⁸ David W. Raack, “A History of Injunctions in England Before 1700,” *Indiana Law Journal*, 61, no. 4 (1986), 539-592.

workers' strikes by turning to a line of jurisprudence that had developed in England and the United States in the 1890s. In those countries, judges fashioned new economic torts to protect employers against harm caused by labour disputes. Moving beyond the criminal law (which we saw applied in the preceding chapter), Canadian employers sought to exploit the "more directly coercive possibilities" of the common law, especially the law of tort.⁹ With the "active support of judges," they brought actions for damages against unions and their officers, aimed to prohibit workers from inducing others to quit work or boycott products, and sought injunctions to "stop immediately the workers' offending behaviour." According to Tucker and Fudge, interlocutory injunctions could be obtained "whenever a *prima facie* case of illegality was made out and grave damage to the employer was threatened," resulting in expedited proceedings and contempt charges against offending workers.¹⁰ Unlike most areas of criminal law, defendants facing contempt proceedings for breaching injunctions were denied the right to a trial by jury—as the judiciary had jealously guarded its inherent jurisdiction to protect its own authority since *Almon's Case* in Britain in 1765.¹¹

In the era of "labour before the law," the procedural unfairness of the labour injunction provoked the ire of critical lawyers and legal scholars, including Felix Frankfurter, a Harvard professor and future US supreme court judge. Frankfurter co-authored (with Nathan Green) the 1930 book *The Labor Injunction*, documenting "beyond any reasonable doubt that the labour injunction was deployed abusively by an

⁹ Eric Tucker and Judy Fudge, "Forging Responsible Unions: Metal Workers and the Rise of the Labour Injunction in Canada," *Labour/Le Travail*, 37 (Spring 1996), 89 and 98.

¹⁰ Eric Tucker and Judy Fudge, "Forging Responsible Unions: Metal Workers and the Rise of the Labour Injunction in Canada," *Labour/Le Travail*, 37 (Spring 1996), 89.

¹¹ John Fox, *The History of Contempt of Court* (London: Professional Books, 1972); Ian Cram, ed., *Borrie and Lowe: The Law of Contempt*, 4th Edition (London: LexisNexis Butterworths, 2010).

anti-union judiciary to shore up the prerogatives of capital.”¹² Frankfurter was instrumental in persuading American legislators to sharply curb superior courts’ powers respecting labour injunctions with the passage of the *Norris–La Guardia Act* (1932).¹³ No similar law reform occurred in Canada. However, the American experience coloured the perspective of some Canadian legal practitioners and academics, including Bora Laskin, the labour lawyer and teacher turned Supreme Court judge, who had studied under Frankfurter at Harvard. In a 1937 article, Laskin noted that the labour injunction had been used only infrequently in Canada, but feared that a recent decision at the Ontario Court of Appeal (the *Bassel’s Lunch* case, where striking restaurant workers were jailed for ten days for defying a court injunction against picketing) indicated a widening ambit for this area of law. Anticipating the turbulent process that would unfold in BC, Laskin warned that “Canadian courts will find themselves similarly circumscribed by legislative enactments if they fail to infuse their equitable jurisdiction in labour injunction decrees and contempt, with a spirit of social understanding.”¹⁴ Prior to 1948, only three picketing cases reached the BC Court of Appeal, all of them in response to picketing in front of movie theatres, where strikers “targeted consumers as much as owners” and where the prerogatives of twentieth-century mass consumerism “required the creation of common orderly spaces where middle-class patrons could safely mix with working-class viewers.”

¹² Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: Osgoode Society for Canadian Legal History, 2005), 87-88; Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: Macmillan, 1930).

¹³ Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: Macmillan, 1930). See also Cleon Oliphant Swayze, *Contempt of Court in Labor Injunction Cases* (New York: Columbia, 1935).

¹⁴ Bora Laskin, “The Labour Injunctions in Canada: A Caveat,” *Canadian Bar Review* (1937), 272-4; see also Girard, *Bora Laskin*, 99; *Bassel’s Lunch Ltd. v. Kick et al.*, 1936 OR 445.

During that era, employers' preferred legal remedy to quash working-class protest was the criminal law, and, earlier, the common law of master and servant.¹⁵

The BC model of postwar industrial legality was marked by the ascendancy of the labour injunction, as Fudge and Tucker, Carrothers, Jamieson, and others have noted.¹⁶ In 1947, the Liberal-Conservative Coalition government had substantially amended the pre-war Industrial Conciliation and Arbitration Act (ICA Act), incorporating the collective bargaining provisions of the wartime federal Privy Council Order 1003 while imposing stiff penalties for illegal strikes and walkouts. The passage of Bill 39 "signified the defeat of reform liberalism in British Columbia," Paul Knox noted in a graduate thesis on the legislation.¹⁷ A year later, the province went further in response to employer lobbying and unsuccessful prosecutions against strikers, further amending the ICA Act to wrap unions "in a straitjacket of legality—any violation of the multitude of restrictions on collective action both threatened a union's legal status to insist on recognition and left it open to costly civil actions."¹⁸ Though less draconian than anti-Communist legislation adopted in Quebec, BC's amended ICA Act of 1948 placed much stronger restrictions on workers and unions than the more permissive legislation in place in Ontario and

¹⁵ Judy Fudge and Eric Tucker, "'Everybody Knows What a Picket Line Means': Picketing Before the British Columbia Court of Appeal," *BC Studies*, 162 (Summer 2009), 55-59.

¹⁶ Fudge and Tucker, *Labour Before the Law*, 297; A.W.R. Carrothers, *The Labour Injunction in British Columbia: A Study of the Operation of the Injunction in Labour-Management Disputes in British Columbia, 1946-1955 with Particular Reference to the Law of Picketing* (Toronto and Montreal: CCH Canadian, 1956); Stuart Marshall Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-1966* (Ottawa: Task Force on Labour Relations, 1968); Stuart Marshall Jamieson, "Regional Factors in Industrial Conflict: The Case of British Columbia," *Canadian Journal of Economics and Political Science*, 28:3 (August 1962), 405-16; Thomas R. Berger, *Injunctions in British Columbia* (Vancouver: British Columbia Federation of Labour, c. 1966).

¹⁷ Paul Graham Knox, "The Passage of Bill 39: Reform and Repression in British Columbia's Labour Policy," MA thesis, University of British Columbia, 1974.

¹⁸ Fudge and Tucker, *Labour Before the Law*, 296. PC 1003, the Wartime Labour Relations Regulations of 17 February 1944, required employers to recognize, and negotiate with, employee committees chosen by workers. It outlined a procedure for union certification and banned company unions. Wartime Labour Relations Regulations, Order in Council P.C. 1003, 17 Feb. 1944, *Labour Gazette*, 44:2 (Feb. 1944), 136-143.

Saskatchewan.¹⁹ Section 72 forbade workers from going on strike “contrary to any of the provisions of this Act,” under threat of union de-certification, while Sections 57, 62, 70, and 76 expanded the ambit for civil litigation against unions and reduced protections against unfair labour practices.²⁰

The legal constraints of this emerging era of industrial “legality” were demonstrated and contested in a strike of printers at the Vancouver *Daily Province* newspaper, which began in 1946 and dragged on for nearly three years. Early in the strike, the employer had attempted to resume production with the aid of strike-breakers but “the pickets chased these men away,” according to an RCMP Security Service officer.²¹ As members of other unions, including the Communist-led Canadian Seamen’s Union and Mine-Mill union, joined the picket lines of the striking International Typographical Union (ITU), the employer applied for and received an injunction to enjoin picketing. As Fudge and Tucker note, the *Province* strike was the “first major postwar injunction case in Canada.”²² Union officials were fined a total of \$10,000 in civil damages while twelve picketers were convicted of the Criminal Code offence of “watching and besetting.”²³ The printers’ strike was coloured by technological changes in the industry, toward more machine-intensive processes that reduced labour requirements

¹⁹ Industrial Conciliation and Arbitration Act (1947), S.B.C. 1947 c. 44; BC Department of Labour, *Annual Report* (1947), 36-38; Saskatchewan Trade Union Act (1944), S.S. 1944 c. 69; Ontario Labour Relations Act (1948), S.O. 1948 c. 51; Fudge and Tucker, *Labour Before the Law*, 295-296; Benjamin Isitt, *Militant Minority: British Columbia Workers and the Rise of a New Left, 1948-1972* (Toronto: University of Toronto Press, 2011), 20-23; Charles W. Smith, “The Politics of the Ontario Labour Relations Act: Business, Labour, and Government in the Consolidation of Post-War Industrial Relations, 1949–1961,” *Labour/Le Travail*, 62 (Fall 2008), 109–151.

²⁰ Industrial Conciliation and Arbitration Act Amendment Act (1948), S.B.C. 1948 c. 31. Another provision of benefit to employers was contained in Section 50, which empowered the Labour Relations Board to override unions and conduct a “final offer” vote on terms presented by employers.

²¹ “Strike – The Vancouver Daily Province,” 13 July 1946, file “Canadian Seamen’s Union – Vancouver, BC,” vol. 2285, series A, RCMP Security Service, RG 146, Canadian Security Intelligence Service records (hereafter cited as CSIS records), Library and Archives Canada (hereafter cited as LAC).

²² Fudge and Tucker, *Labour Before the Law*, 296.

²³ *Ibid.*

and weakened workers' bargaining power—reflecting the wider challenge posed by “automation” in the postwar era.²⁴

The anti-labour tone of postwar labour legislation and judicial pronouncements led a growing number of workers to question the legitimacy of the law and to openly defy the ICA Act provisions that restricted picketing and the timing of strikes. John Stanton, a labour lawyer who served as counsel for many BC unions in postwar injunction and contempt proceedings, raised a fundamental question underpinning the law of injunctions and contempt: “Should judges, like anyone else in society, have to earn and keep the respect of their fellow citizens and not try to impose it by harsh methods? Hadn't some judges created their own dilemma by allowing ‘closeness,’ real or perceived, to develop between themselves and employers?”²⁵ Examining working-class responses to injunctions in an earlier period, Tucker and Fudge suggest that judicial intervention encouraged workers to view themselves as “victims of a system that systematically favoured employers,” rather than engendering greater respect for the law.²⁶ Focusing on the postwar period in Ontario, labour historian Joan Sangster emphasized the labour movement's “deeply ambivalent attitudes towards the state,” with the pattern of strikes and judicial intervention disrupting “prevailing faith in industrial legality.” Lenkurt, like the Tilco strike the same year which Sangster examined, “exposed the extent to which the ‘free’ in collective bargaining was an ideological legitimization of capitalism rather than

²⁴ “Strike – The Vancouver Daily Province,” 13 July 1946, file “Canadian Seamen's Union – Vancouver, BC,” vol. 2285, series A, RCMP Security Service, RG 146, Canadian Security Intelligence Service records (hereafter cited as CSIS records), Library and Archives Canada (hereafter cited as LAC).

²⁵ Stanton, *Never Say Die!*, 130.

²⁶ Tucker and Fudge, “Forging Responsible Unions,” 117.

a reality of class relations, showing how injunctions could still be used ... to buttress the raw power of employers determined to bar unions from the workplace.”²⁷

3.2 Injunctions Won't Catch Fish Nor Build Bridges: From Poje to Lenkurt

In the summer of 1952, in the midst of a major strike of woodworkers against employers in the coastal forest-products sector, Tony Poje, vice-president of the International Woodworkers of America (IWA) local at the town of Duncan on Vancouver Island, led a group of picketers to the Nanaimo wharves, where lumber was being loaded onto the ship *MS Vedby*. Longshore workers refused to cross the woodworkers' picket line, resulting in work being halted on the wharf. The owner of the ship, Canadian Transport (U.K.) Ltd., applied for and received an injunction from BC Supreme Court Justice (and future Macmillan Bloedel Ltd. executive) John Clyne enjoining Poje and others from “watching and besetting” the ship and preventing or interfering with loading or access. When Poje refused to comply by persisting with the picketing, mobilizing 150 woodworkers to fortify the picket line at the wharf, he was later charged and convicted of criminal contempt of court at the initiative of the Chief Justice of BC Supreme Court, Wendell Farris, and sentenced to three months in prison and a \$3,000 fine.²⁸ The Court of Appeal and Supreme Court of Canada upheld this ruling, finding that “the large numbers of men involved and the public nature of the defiance of the order” rendered the conduct criminal

²⁷ Joan Sangster, “‘We No Longer Respect the Law’: The Tilco Strike, Labour Injunctions, and the State,” *Labour/Le Travail*, 53 (Spring 2004), 49. Injunctions are discussed further on pp. 49, 55-56, 75-77, 84-85. See also Jeremy Milloy, “Chrysler Pulled The Trigger’: Competing Understandings of Workplace Violence During the 1970s and Radical Legal Practice,” *Labour/Le Travail*, 74 (Fall 2014), 51-88.

²⁸ *Canadian Transport Co. (UK) Ltd. v. Alsbury*, 1952 BCSC, 6 W.W.R. (N.S.) 473; *Poje v. Attorney General for British Columbia*, 1953 1 SCR 516.; “Poje to stay in jail until next Thursday,” *Vancouver Sun*, 19 September 1952; Grant MacNeil, *The IWA in British Columbia* (Vancouver: Western Canadian Regional Council No. 1 IWA, 1971), 45; Carrothers, *Labour Injunction in BC*, 11-23. For biographical information on Justice Clyne, see “In Memoriam: John Valentine Clyne, 1902-1989,” Minutes of the Senate of the University of British Columbia, 13 September 1989, UBC Archives.

contempt of court.²⁹ The *Poje* case rested on a vital question in injunction law—whether any rules applied in contempt proceedings initiated by the court itself. The Court of Appeal had no hesitation accepting Chief Justice Farris’s decision, stating that “when a judge acts on his own motion, no rules apply,” while the Supreme Court of Canada wavered on this question, finding that the contempt was of sufficient magnitude to make it criminal, rendering “the rules of court ... inapplicable as they apply only in civil proceedings.”³⁰ The law remained unsettled on this question in light of the ambiguities in the Supreme Court’s decision, creating uncertainty in future labour cases. *Poje* would emerge as the leading case of criminal contempt in BC—establishing legal procedures and principles that were followed in subsequent decades. From its origins in the labour injunction, the principles and technology established in *Poje* would be applied by judges and other members of the legal community later in the twentieth century in response to protests by anti-abortionists, environmentalists, indigenous activists, and homeless people and their allies.³¹

In 1959, the labour injunction and legal principles contested in *Poje* were once again brought into the spotlight, during a periodic upturn in labour militancy that saw major strikes of fishers, woodworkers, and civil servants. This militancy influenced—and was influenced by—legislative changes introduced by the ruling Social Credit government, which further restricted labour rights and amplified the divide between organized workers and the state. As this author noted in a previous study,

Bill 43, which supplemented the Labour Relations Act (1954), restricted picketing and strikes and gave the LRB and government the power to issue injunctions. According to labour lawyer Harry Rankin, the legislation

²⁹ *Poje v. Attorney General for British Columbia*, 1953 1 SCR 516.

³⁰ Stanton, *Never Say Die!* 126.

³¹ *MacMillan Bloedel v. Brown*, 1994 BCCA 64; “65 told contempt could be criminal in injunction case,” *Times Colonist* (Victoria), 6 December 1994.

“allowed companies to obtain injunctions practically at will against striking unions.” The right to freely disseminate information during labour disputes, established in Supreme Court Justice Ivan Rand’s famous 1946 ruling, was set aside. Bill 43 also weakened workers’ bargaining power by prohibiting secondary picketing and confirmed unions’ status as legal entities that could be sued for damages. A second piece of legislation, Bill 128, outlawed civil-service strikes, amending BC’s Constitution Act to ensure “the continuation without interference or interruption of public services.”³²

In the wake of these legislative changes, labour opposition to injunctions was brought into sharp relief during a strike of ironworkers, employed on construction of the new bridge crossing over the Second Narrows of Burrard Inlet in Vancouver. A year earlier, the half-built bridge had collapsed, taking the lives of 18 iron workers. When the contract came up for negotiation and ironworkers walked off the job, Supreme Court judge Alex Manson granted an *ex parte* injunction requested by Dominion Bridge ordering the workers back to work. The union leadership of ironworkers’ Local 97 complied with the letter of Manson’s ruling, but noted they did so under compulsion and included legal advice (from Tom Berger) to the effect that the decision was bad and was under appeal. When the workers remained off the job, Manson promptly summoned 21 union members and officers into his courtroom and, following heated questioning, fined them \$19,000 (equivalent to the union’s total liquid assets).³³ While Berger succeeded in overturning

³² Isitt, *Militant Minority*, 149-150. See also BC Department of Labour, *Annual Report* (1959), 45; Constitution Act Amendment Act, S.B.C. 1959 c. 17; James Harding, “The New Left in British Columbia,” in *The New Left in Canada*, ed. Dimitrios I. Roussopolous (Montreal: Black Rose, c. 1970), 28; Rankin, *Rankin’s Law*, 137; “New Democratic Party Policy Statement” and “Report and Recommendations on the Use of Injunctions in Labour Disputes,” in Berger, *Injunctions in British Columbia*, 7, 13-14; Jamieson, *Times of Trouble*, 386; “Labor peace claimed due to Sacred legislation,” *Ubysey* (Vancouver), 28 September 1961. Bill 43 replaced the Trade-Unions Act (1902), which had relieved “unions and their members from liability in damages and to an injunction in respect of certain types of union activity.” According to Berger, this made Carrothers’ criticisms of the use of injunctions in labour disputes “carry more weight today than in the past.” Berger, “Report and Recommendations on the Use of Injunctions in Labour Disputes,” in Berger, *Injunctions in British Columbia*, 10; Carrothers, *The Labour Injunction in British Columbia*, xxiv; Lipton, *The Trade Union Movement in Canada: 1827-1959*, 315. Lipton described Bill 43 as “anti-labour legislation which facilitated injunctions against picketing.”

³³ Stanton, *Never Say Die!*, 124.

Manson's ruling on appeal, with the higher court noting the resentment felt by workers when "the person regarded as prosecutor acts as judge" and finding that no contempt existed (since the union had complied with the order), that was not the end of the story.³⁴

Before the appeal had been heard, labour journalist George North, editor of the *Fisherman* newspaper, had lambasted Manson's ruling in a newspaper editorial entitled "Injunctions Won't Build Bridges or Catch Fish."³⁵ The editorial favourably quoted an ironworkers' official to the effect that "A court order instructing men to return to work constitutes slavery" and suggested that "the answer given by the strikers" (in defying Manson's injunction) was providing "sensible leadership" to the rest of the labour movement. Referring to pending disputes of woodworkers and fishers, the editorial (presumably written by North, though this was never proved in court) declared that "united labour action" could win these strikes "despite the opposition of employers, governments, and courts. Injunctions can't catch fish, cut logs, nor in the case of the ironworkers' strike, can they build bridges."³⁶ Manson was outraged, responding by taking "notice in open court" of the editorial, which he claimed brought "the court into contempt" and "interfered with the administration of justice." He appointed lawyer J.A. Clark to act as prosecutor.³⁷

In July 1959, the North case came before Justice Norman Whitaker (a former Liberal speaker of the provincial legislature). North and the Fisherman's Publishing Society were represented by two lawyers, John Stanton and Harry Rankin. Stanton focused on procedural matters, pointing out that if the case had evolved from the original

³⁴ *Dominion Bridge v International Association of Bridge, Structural and Ornamental Ironworkers Local 97* (1959) 20 DKR 2d 621.

³⁵ "Injunctions Won't Build Bridges or Catch Fish," *The Fisherman* (Vancouver), 26 June 1959.

³⁶ "Injunctions Won't Build Bridges or Catch Fish," *The Fisherman* (Vancouver), 26 June 1959.

³⁷ Stanton, *Never Say Die!* 125.

civil lawsuit (brought by Dominion Bridge against the union) into a criminal proceeding, then North should be entitled to the ordinary protections afforded to anyone charged with a criminal offence, including the right to have the prosecution prove its case beyond a reasonable doubt and the right to be provided with particulars of any charges. The judge and prosecutor dodged both issues, guided by the view in *Poje* (which the appeal court had affirmed but on which the Supreme Court of Canada had wavered) that in contempt proceedings brought by a judge, no rules apply.³⁸ Turning to the substantial issues, Rankin read a statement from North into the record, which emphasized North's long-standing opposition to repressive labour laws and noted that "behind and above all this legislation stands that court injunction. ... Instead of the strike being the 'court of last resort,' the injunction has assumed that status." North suggested that courts, by "allowing themselves to become involved in industrial disputes" brought themselves into disrepute.³⁹ He repeated UBC law professor Fred Carrothers's caution against the injunction being used as a "sword of collective bargaining rather than a shield of legal rights." Rankin, in a submission for the defence, suggested that "Respect ... cannot be compelled."⁴⁰ Not persuaded by these arguments, Whitaker promptly found North guilty of contempt and sentenced him to 30 days in prison, which North served at Burnaby's Oakalla Prison after losing on appeal, while his employer, the Fisherman's Publishing Society, was fined \$3,000, a considerable sum for a non-profit organization in the currency of the day.⁴¹

³⁸ Stanton, *Never Say Die!* 125-126.

³⁹ As quoted in Stanton, *Never Say Die!*, 127.

⁴⁰ Carrothers, *The Labour Injunction in British Columbia*, xxiv

⁴¹ Stanton, *Never Say Die!*, 127-129.



Figure 1. George North, editor of the *Fisherman* newspaper, receives a hero's welcome after being released from Burnaby's Oakalla Prison in 1959, at the end of a 30-day sentence for criminal contempt of court. As lawyer John Stanton noted, "his challenge to the system of free-wheeling injunctions had made a considerable impression."

3.3 The Lenkurt Strike

Controversy over labour injunctions continued to swirl in the 1960s, as working-class militancy persisted against the backdrop of a wider current of social protest that enveloped BC, North America, and the world. This rebellious mood set the stage for the spring 1966 confrontation at the Lenkurt Electric Company plant in the Vancouver suburb of Burnaby. In the midst of contract negotiations, the parent International Brotherhood of Electrical Workers (IBEW) had agreed to allow management to increase the use of over time. Workers in the plant, members of a renegade union local with a long history of dissent against the parent union, walked out in protest at the end of April. The company responded by firing 257 workers.⁴² When other unions joined the dismissed

⁴² Ian MacDonald, "Class Conflict and Political Factionalism: A History of Local 213 of the International Brotherhood of Electrical Workers, 1901-1961," MA thesis, Simon Fraser University, 1986; Jack Scott, A

workers' picket line, the company successfully applied for an *ex parte* injunction, which the court granted at the beginning of May.⁴³

Vancouver's labour movement responded with the tactic of mass picketing under the aegis of a committee spearheaded by the BCFL, Vancouver and District Labour Council, and IBEW 213. Three hundred workers converged on the Lenkurt line at 7 a.m. on the morning of 12 May 1966, breaking through a cordon of three dozen RCMP officers to block a road leading into the plant. In the clashes that followed between strikers, sympathizers, RCMP officers, and replacement workers—and amid the singing of “Solidarity Forever” and “We Shall Overcome”—several picketers were hit by moving vehicles, police officers were assaulted, and nine people were arrested, including one woman, the *Globe and Mail* noted.⁴⁴ The violence prompted the provincial attorney general, Robert Bonner, to appoint Vancouver lawyer George Murray to investigate the dispute.⁴⁵ In total, 30 picketers were jailed or fined during the Lenkurt strike, including Vancouver Labour Council secretary Paddy Neale, Marine Workers & Boilermakers president Jeff Power, IWA Local 1-217 vice-president Tom Clarke, and IBEW Local 213 business agent Art O’Keefe—who received prison sentences of between three and six months. Another 26 activists were fined a total of \$3,100. Neale, who spent four and a half months in prison, declared defiantly: “We would act in the same manner if it became necessary.”⁴⁶

Communist Life: Jack Scott and the Canadian Workers Movement, 1927-1985, edited and introduced by Bryan D. Palmer, (St. John's: Canadian Committee on Labour History, 1988), 177-180.

⁴³ “Lawyer to probe BC dispute,” *Globe and Mail* (Toronto), 13 May 1966.

⁴⁴ “Lawyer to probe BC dispute,” *Globe and Mail* (Toronto), 13 May 1966.

⁴⁵ “Lawyer to probe BC dispute,” *Globe and Mail* (Toronto), 13 May 1966.

⁴⁶ Berger, *Injunctions in British Columbia*, 16; Rankin, *Rankin's Law*, 150. For greater detail on the Lenkurt strike, see UBC Special Collections (hereafter cited as UBCSC), International Brotherhood of Electric Workers Local 213 fonds (hereafter cited as IBEW 213 fonds), BC Federation of Labour fonds (hereafter BCFL fonds), boxes 5, 8 and 30. See also McMaster Archives and Research Collections (hereafter cited as MARC), “Appeal of Jeffrey James Power,” 3 November 1966.

The jailing of BC labour leaders in the Lenkurt strike focused attention on the labour injunction like never before, not only in BC but across Canada, where a similar case involving injunctions and mass arrests centred around women workers at the Tilco Paint plant in Peterborough, Ontario. In June 1966, delegates at the Canadian Labour Congress convention approved a resolution instructing officers to urge affiliated unions to “engage in a strong and militant campaign to eliminate the use of the injunction in labour disputes,” to “challenge injunctions wherever and whenever they are granted,” to materially support unions and workers affected by injunctions, and to take this campaign into the legislative and political fields. The readiness of the judiciary to grant injunctions aligned judges “on the side of employers,” the resolution declared, leading to a “loss of respect” for the judiciary and “defiance of the law” (see Appendix 3).⁴⁷ Provincially, the BCFL organized a special conference on injunctions in October 1966, distributed 100,000 copies of a pamphlet entitled *Guilty Until Proven Innocent*, fundraised for the families of the jailed labour leaders, and commissioned lawyer Tom Berger to prepare a report on the exercise of injunctions in labour disputes.⁴⁸ Political organizations of the left declared their sympathies with labour and called for reform to the law to remove judges’ power to issue injunctions during labour disputes. The social-democratic New Democratic Party, which counted Berger among its legislative caucus after the September 1966 provincial election (and which he would briefly lead in 1969), insisted that injunctions “must be completely eliminated.”⁴⁹ The more radical Communist Party of Canada, meanwhile, located the controversy surrounding injunctions in the context of the

⁴⁷ *Labour Gazette*, June 1966, p. 283, as cited in John Stanton, *Never Say Die! The Life and Times of John Stanton, a Pioneer Labour Lawyer* (Ottawa: Steel Rail, 1987), Appendix A, p. 243.

⁴⁸ ‘Injunctions in Labour Disputes,’ Box 64, BCFL records, UBCSC; Tom Berger, *Injunctions in British Columbia* (Vancouver: BC Federation of Labour, c.1966).

⁴⁹ Tom Berger, *Injunctions in British Columbia* (Vancouver: BC Federation of Labour, c.1966).

balance of class forces and social and political fault lines in the province: “Our labour leaders are willing to go to jail to defend their principles. On the other side the Socred government is pressing charges against the strikers and issuing injunctions to the monopolies.” According to the Communists, 1966 put “a stop to a lot of apathy.”⁵⁰

3.4 Contemptuous Fishermen

These fault lines were exposed a year later, when trawl fishers at Prince Rupert on BC’s north coast went on strike and shoreworkers refused to handle “hot” fish. Four days into the strike (which was coloured by a dispute among rival unions over jurisdiction in the industry), BC Supreme Court Justice Kirke Smith granted an *ex parte* injunction requested by several vessel owners, ordering the shoreworkers to handle the fish, to prevent it from spoiling.⁵¹ Reflecting the defiant spirit of BC’s labour movement, and the distinctly militant and democratic tradition of the United Fishermen and Allied Workers’ Union (UFAWU) (which represented most fishers and shoreworkers), union leaders Homer Stevens, Steve Stavenes, and Jack Nichol refused to communicate Smith’s order to the membership. Half a million pounds of fish subsequently rotted in the holds of five vessels as a result of the refusal of UFAWU members to handle the “hot” fish.⁵² When another Supreme Court judge, Thomas Dohm (who would soon leave the bench to

⁵⁰ ‘Report from Regional Committee of the Delta-New Westminster Region of the Communist Party of Canada,’ 22 Jan. 1967, file 23-30, ‘BC provincial series,’ reel H1592, CPC fonds, LAC. See also “Canadian Workers Demand Canadian Unions,” *Progressive Worker* (Vancouver), September 1966, in which the left-nationalist Progressive Worker Movement railed against the complicity of the international union and celebrated the local labour leadership, with IBEW 213 showing “real initiative.”

⁵¹ Order of Justice Kirke Smith, 22 March 1967, File 344-1 “Prince Rupert Trawlers Strike,” Box 344, UFAWU fonds, UBCRBSC; George Hewison, interviewed by Benjamin Isitt, Colwood, BC, 14 April 2013; North, *A Ripple, A Wave*, 30-42; Stanton, *Never Say Die!*, 133-148; Rankin, *Rankin’s Law*, 122-136. The genesis of the strike was a jurisdictional dispute between the UFAWU and the much smaller Deep Sea Fisherman’s Union (DSFU), which was exploited by the Prince Rupert Vessel Owners’ Association. In May 1967, the UFAWU called a strike of all Prince Rupert trawlers and shoreworkers to protect its jurisdiction.

⁵² “Union Fined, Three Executives in Jail,” *Brandon Sun*, 20 June 1967.

preside over the Vancouver Stock Exchange)⁵³ spelled out the specific action required of the union executive in a subsequent injunction issued in late April—to send a telegram informing “all members concerned in the...processing of ground-fish”—the UFAWU executive again refused to comply, and instead put the question of whether to send the telegram to a membership vote, receiving an 89% mandate against acting on the court order.⁵⁴ The union also filed an appeal against Dohm’s injunction, which it described as “bad” on several grounds, including depriving the union of its right to a fair hearing as provided for in the Canadian Bill of Rights and at common law, and for being contrary to public policy by relying on procedures that were discriminatory, directed primarily “against a certain class of persons, namely, Trade Unions and their officers.”⁵⁵ Dohm’s injunction was distinct from many court orders issued against striking unions around this time, due to its *mandatory* rather than *preventative* provisions, requiring the union to undertake a specific action, rather than merely restraining the union from interfering with employers’ operations or property. On 11 May 1967, Dohm issued another injunction, banning the UFAWU for declaring the Prince Rupert halibut fleet to be “hot” and from interfering with the lawful business of the vessel owners.⁵⁶

The result of the UFAWU’s defiance of the court orders was the stiffest criminal contempt sentences handed down in a labour case in BC’s postwar era—with Stevens and Stavenes ultimately serving eleven months of one-year prison sentences at the Mount Thurston Prison Camp in Chilliwack, and the union fined \$25,000 for defying the judges’

⁵³ Stanton, *Never Say Die!*, 137; “Dohm picked to head stock exchange,” *Vancouver Sun*, 23 December 1971; “Dohm forced to quit as exchange head,” *Vancouver Sun*, 9 November 1972; “Obituary: Honourable Thomas Anthony ‘Tom’ Dohm,” *Vancouver Sun*, 8 April 2009.

⁵⁴ “Notice of Appeal,” 10 May 1967, File 344-2 “Prince Rupert Trawlers Strike,” Box 344, UFAWU fonds, UBCRBSC.

⁵⁵ “Notice of Appeal,” 10 May 1967, File 344-2 “Prince Rupert Trawlers Strike,” Box 344, UFAWU fonds, UBCRBSC.

⁵⁶ “Unionists face court,” *Winnipeg Free Press*, 8 June 1967.

orders.⁵⁷ In the midst of the strike, the UFAWU's Central Council of Women's Auxiliaries defended the leadership and the rationale behind the strike: "Our Union is a democratically run organization—it works only for the benefit of its many members. Its members vote for strike action only after all other means of settling differences have been exhausted."⁵⁸

Earlier in the year, prior to the strike and the injunction and contempt proceedings, Stevens, Stavenes, and union business agent Jack Nichol had jointly written in their annual officers' report to the UFAWU convention that the preceding year had witnessed "an unprecedented use of court procedures to strengthen the employer's hand in negotiations." They cited the jailed longshore workers and leaders of several unions who remained in prison "for walking on a peaceful picket line" during the Lenkurt dispute, and also referred to the 26 imprisoned Tilco strikers in Ontario. Presciently, the UFAWU officers warned:

Our Union will undoubtedly face the same kind of challenge in event the operators choose to force a strike in 1967. We have faced injunctions before on the basis that "injunctions cannot catch fish." We cannot permit the courts to destroy our fundamental rights without rendering ourselves helpless before the attacks of the employers.⁵⁹

On 14 May 1967, the UFAWU's general executive board convened a marathon 13-hour joint meeting with the various negotiating committees involved in the dispute. The union's lawyer, John Stanton, discussed the details of Dohm's injunction issued three days earlier, walking the union leaders through the court order line by line and summarizing its effect: "The union is ordered to do nothing that will interfere with the normal operations

⁵⁷ George Hewison, interviewed by Benjamin Isitt, Colwood, BC, 14 April 2013; North, *A Ripple, A Wave*, 30-42; Stanton, *Never Say Die!*, 133-148; Rankin, *Rankin's Law*, 122-136; file 3041 'UFAWU Contempt, first appeal,' box 10; files 3055, 3075, 3076, 3138, box 11, John Stanton fonds, UBCSC.

⁵⁸ "W.A. Women Answer 'Marching Mothers,'" *Fisherman* (Vancouver), 9 June 1967.

⁵⁹ Officers' Report, 3 January 1967, File 392-18 "GEB – Minutes – Jan 4 – May 30, 1967," Box 392, UFAWU Fonds, UBCRBSC.

of the vessels engaged in the longline fishery or any other fishery.”⁶⁰ In effect, Justice Dohm and the BC Supreme Court had restrained the union from legally engaging in any actions that would strengthen its bargaining hand in the dispute with the vessel owners. The UFAWU leaders discussed their response to Dohm’s order, concluding with a motion—adopted with one opposing vote—endorsing the statement of the Prince Rupert bargaining committee to the effect that “‘all members should live by trade union principles and be guided by their conscience’ in the matter of the court order of May 11th, 1967.”⁶¹

In early June 1967, the state intervened in response to the UFAWU’s defiant stance, with RCMP officers arresting business agent Jack Nichol at his Prince Rupert hotel (and, later that day, near a shoreworkers’ picket line), as well as union secretary Homer Stevens and union organizers George Hewison and Joseph Verde prior to a union meeting. The police were armed with arrest warrants issued by the BC attorney general’s department, charging the union officers with failing to obey a lawful court order, in contravention of section 108 of the Criminal Code.⁶² In an emergency meeting convened the day following the arrests, available members of the UFAWU’s general executive board received a report from Stanton on the nature of the contempt proceedings and possible remedies. Stanton raised the prospect that the arrest of the union’s leaders could be a precursor for the state to “move against the rank and file,” a “tactic never before used in [the] history of BC” which should be of “deep concern to [the] whole labour

⁶⁰ Minutes, 14 May 1967, Joint Meeting of GEB and Committees, File 392-18 “GEB – Minutes – Jan 4 – May 30, 1967,” Box 392, UFAWU Fonds, UBCRBSC.

⁶¹ Minutes, 14 May 1967, Joint Meeting of GEB and Committees, File 392-18 “GEB – Minutes – Jan 4 – May 30, 1967,” Box 392, UFAWU Fonds, UBCRBSC.

⁶² “Union men arrested after court order,” *Ottawa Journal*, 8 June 1967; “Unionists face court,” *Winnipeg Free Press*, 8 June 1967; “Halibut boat owners on guard as five vessels are cut adrift,” *Nanaimo Daily News*, 10 June 1967; “Women marchers stay home at Rupert, not shoreworkers,” *Nanaimo Daily News*, 10 June 1967; Hewison interview, 14 April 2013.

movement.”⁶³ The board voted unanimously that “the balance of the emergency fund be thrown into the battle,” and approved a subsequent motion to assist Rose Nichol with travel arrangements to Prince Rupert if she so desired.⁶⁴ Two weeks later, on 19 June 1967, Dohm convicted Stevens, union president Steve Stavenes, and Nichol of criminal contempt of court, imposing one-year prison sentences, and fined the union \$25,000 for the UFAWU’s “planned flaunting of the court’s authority” (Nichol would later be acquitted on appeal).⁶⁵ To help cover legal costs, the union initiated a special levy of \$10 per member, while demanding that the imprisoned trade unionists be released on bail pending their appeal.⁶⁶

From prison, Homer Stevens maintained a voluminous correspondence with union officers, members, and allies in the labour movement, while receiving visitors including Coquitlam MLA (and future premier) Dave Barrett.⁶⁷ In September 1967, he informed UFAWU members that the BC Court of Appeal hearing into the convictions would take place in Victoria: “the effect is to make it difficult for members of our Union to attend,” Stevens wrote, encouraging locals in Vancouver, the Fraser Valley, and Vancouver Island

⁶³ Minutes, 8 June 1967, File 392-19 “GEB – Minutes – June 8 – Dec 29, 1967,” Box 392, UFAWU Fonds, UBCRBSC.

⁶⁴ Minutes, 11 June 1967, File 392-19 “GEB – Minutes – June 8 – Dec 29, 1967,” Box 392, UFAWU Fonds, UBCRBSC. Five days after his arrest, on 12 June 1967, Nichol was flown from Prince Rupert to Vancouver under RCMP guard, pending trial on the contempt charges. Unlike the other arrested UFAWU leaders, he was denied bail. “Demonstrators greet fishermen’s union agent,” *Nanaimo Daily News*, 13 June 1967; “Halibut boat owners on guard as five vessels are cut adrift,” *Nanaimo Daily News*, 10 June 1967.

⁶⁵ “Union Fined, Three Executives in Jail,” *Brandon Sun*, 20 June 1967; “Fishermen’s union pays \$25,000 contempt fine,” *Nanaimo Daily News*, 23 June 1967; File 377-8 “Various Trial Exhibits – 1965-1968,” Box 377, UFAWU fonds, UBCRBSC.

⁶⁶ “UFAWU Levies \$10 Head Tax to Pay Bills,” *Nanaimo Daily News*, 24 June 1967; “Stevens Moves From Jail to the Lawyers’ Table,” *Nanaimo Daily News*, 24 June 1967; “Bonner agrees to give unionists chance for bail,” *Nanaimo Daily News*, 24 June 1967. The UFAWU membership demanded that the union leaders be released on bail pending their appeal, and wired this request to attorney general Robert Bonner, but this request was denied. See Elgin Neish telegram to Robert Bonner, 22 June 1967, File 370-10 “Publicity – injunctions – jail –etc, 1967-1968,” Box 370, UFAWU fonds, UBCRBSC.

⁶⁷ Homer to Audrey, 22 January 1968, “file 390-10 ‘Homer and Steve’s letters while in prison, Dec 2, 1967-Jan 1968,’ box 390, UFAWU fonds, UBCRBSC; various correspondence, box 2 and box 6, “Camp Thurston Prison Camp Series,” Homer Stevens fonds, UBCRBSC.

to send representatives.⁶⁸ Over three days of hearings in mid-September, the Court of Appeal heard submissions from the accused and the ministry of attorney-general, with the three-member panel of judges sustaining the conviction and sentences against Stevens and Stavenes, while acquitting Nichol on a split 2-1 decision.⁶⁹ Stevens and Stavenes had been released on bail pending the decision in their appeal panel, so they returned to custody in November, serving the remainder of their sentence at the Mount Thurston prison camp near Chilliwack.⁷⁰

Disunity within labour's ranks prevented a planned appeal against the sentences to the Supreme Court of Canada, when prominent labour leaders bowed to anti-communist pressure and refused to sign affidavits in support of Stevens' and Stavenes' appeal. While Vancouver and District Labour Council secretary Paddy Neale had signed the affidavit, the UFAWU was informed by BC Federation of Labour secretary Ray Haynes that he had been instructed by the Canadian Labour Congress not to sign.⁷¹ This reflected deeply rooted anti-communist antipathies among sections of the Canadian labour movement toward the red-tinged UFAWU—notwithstanding the dangerous legal precedent established for all Canadian trade unionists if the jailing of Stevens and Stavenes and the fine against the union were allowed to stand.⁷² As the appeal stalled, the

⁶⁸ Stevens to All Locals and Women's Auxiliaries, 12 September 1967, File 392-19 "GEB – Minutes – June 8 – Dec 29, 1967," Box 392, UFAWU Fonds, UBCRBSC.

⁶⁹ "Contempt Appeal Before Court," *Nanaimo Daily News*, 19 September 1967; "Court fight funds sought," *Nanaimo Daily News*, 8 November 1967; "Union Officials Mark Time Before Bail Application Heard," *Nanaimo Daily News*, 23 November 1967. In the period between the appeal hearing in September and the release of the court's decision on 9 November 1967, the union leaders were released on bail. With the defeat of their appeal, Stevens and Stavenes returned to prison on 9 November 1967.

⁷⁰ "Christmas 'Break' For Pair?," *Brandon Sun*, 13 December 1967.

⁷¹ Minutes, 15 December 1967, File 392-19 "GEB – Minutes – June 8 – Dec 29, 1967," Box 392, UFAWU Fonds, UBCRBSC.

⁷² For a discussion of anti-communism within BC labour, see Isitt, *Militant Minority*, 44-83; Irving Abella, "Communism and Anti-Communism in the British Columbia Labour Movement, 1940-1948," in David Jay Bercuson, ed. *Western Perspectives 1: Papers of the Western Canadian Studies Conference, 1973* (Toronto and Montreal: Holt, Rinehart and Winston, 1974), 88-100. For a discussion of radical politics in the

imprisoned labour leaders, backed by the UFAWU, requested a Christmas amnesty, a request that BC's Social Credit solicitor general refused. Meanwhile, they successfully defeated an attempt to relocate them to remote Camp Snowden prison north of Campbell River on Vancouver Island, with the UFAWU placing itself on record against the transfer.⁷³ Reflecting the extraordinary situation in which the union found itself, the executive board drafted amendments to the UFAWU constitution to allow it to name temporary officers to perform the duties of properly titled officers who were indisposed on account of illness or imprisonment.⁷⁴ At the same time, the board pledged to “keep in close contact” with Stevens and Stavenes, supplying them with the minutes of meetings and labour publications, and keeping the membership informed of their wellbeing and location through the pages of *The Fisherman*.⁷⁵

With their union president and secretary detained at the Mount Thurston prison camp outside Chilliwack, the UFAWU ramped up its campaign against the labour injunction, holding a mass meeting at Vancouver's Pender Auditorium in conjunction with the union's annual convention in January 1968. More than 600 workers attended the meeting, the Vancouver local reported, and those in attendance “unanimously supported our Union in respect of injunctions and pledged support in the legal costs to get our jailed officers free.”⁷⁶ During the convention, which was attended by 130 delegates from up and down the coast—as well as one Atlantic Canadian delegate—the UFAWU endorsed a

UFAWU, see John Peter Frecker, “Militant and Radical Unionism in the British Columbia Fishing Industry,” (MA thesis, University of British Columbia, 1972).

⁷³ Minutes, 1 December 1967, File 392-19 “GEB – Minutes – June 8 – Dec 29, 1967,” Box 392, UFAWU Fonds, UBCRBSC; “Christmas ‘Break’ For Pair?,” *Brandon Sun*, 13 December 1967.

⁷⁴ Minutes, 1 December 1967, File 392-19 “GEB – Minutes – June 8 – Dec 29, 1967,” Box 392, UFAWU Fonds, UBCRBSC.

⁷⁵ Minutes, 1 December 1967, File 392-19 “GEB – Minutes – June 8 – Dec 29, 1967,” Box 392, UFAWU Fonds, UBCRBSC.

⁷⁶ Minutes, 8 February 1968, file 393-16 “Vancouver Fisherman's Local – Minutes – 1967-73,” Box 393, UFAWU Fonds, UBCRBSC.

report from the Fishermen’s Defence Committee, comprising workers from several unions. Delegates re-elected Stevens as secretary-treasurer and Stavenes as president.⁷⁷ The next month, several hundred fishers converged on the provincial legislature in Victoria for a lobby against injunctions. This marked a long-standing labour tradition of bringing concerns directly to government, but the 1968 lobby was imbued with a sense of urgency as the UFAWU officers languished at Mount Thurston. On 15 February 1968, the fishers and their allies marched on the provincial legislature.⁷⁸ In June 1968, Stevens and Stavenes applied for parole and the Parole Board granted the request, a decision approved by the province’s solicitor-general.⁷⁹



Figure 2. United Fishermen and Allied Workers’ Union (UFAWU) demonstration against injunctions at the BC legislature, 1968. Source: UBC Rare Books and Special Collections, UFAWU Fonds.

⁷⁷ Minutes, 8 February 1968, file 393-16 “Vancouver Fisherman’s Local – Minutes – 1967-73,” Box 393, UFAWU Fonds, UBCRBSC.

⁷⁸ A year earlier, “the jailing of trade union leaders” had been among the list of priority issues that the UFAWU pursued during its annual lobby to the legislature. See Minutes, 3 February 1967, File 392-18 “GEB Minutes – Jan 4 – May 3- 1967, Box 392, UFAWU Fonds, UBCRBSC; Minutes, 15 March 1968, file 393-16 “Vancouver Fisherman’s Local – Minutes – 1967-73,” Box 393, UFAWU Fonds, UBCRBSC.

⁷⁹ Minutes, 13 June 1968, file 393-16 “Vancouver Fisherman’s Local – Minutes – 1967-73,” Box 393, UFAWU Fonds, UBCRBSC.

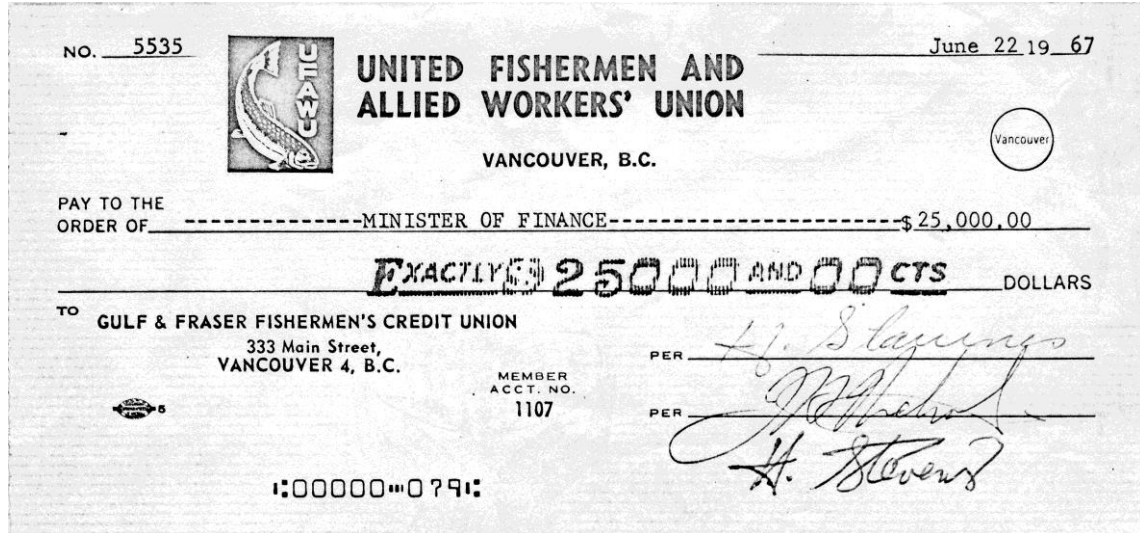


Figure 3. Copy of cheque issued by the United Fishermen and Allied Workers' Union (UFAWU) to pay the fine levied against the union by BC Justice Thomas Dohm during the 1967 trawlers' strike. Source: Neish Family Collection, Victoria, BC.

3.5 From the Courts to the Labour Board in the 1970s and Beyond

In the 1970s, opposition by BC workers and their organizations to judicial intervention in labour disputes bore legislative fruit. Criticism of injunctions was not confined to labour circles; indeed, Vancouver lawyer (and future BC Supreme Court and Court of Appeal Justice) Mary Southin, who had run for public office under the Progressive Conservative banner in two federal elections in the 1960s, discussed the functioning of injunctions in a 1970 article in *The Advocate* magazine:

There are some aspects of this whole problem which to my mind deserve some comment.

Ex parte injunctions or injunctions on such short notice that they are in reality *ex parte* injunctions are still being granted. If somebody is served at midnight to be in Court at 10.00 a.m. the next morning what real opportunity has his Counsel to prepare? Short notice where there is evidence of violence or apprehended violence or damage to property is one thing; short notice where the employer simply says he is losing money, even a lot of money, is another.

It should not be overlooked that when an injunction is granted on no notice or notice so short as to be derisory the men do not think they had a fair hearing and that reinforces their feelings of being victims of judicial bias. ...

Nor in my view should any *ex parte* injunction or injunction on short notice be granted with liberty to apply to set aside. All *ex parte* injunctions and if counsel requests, those granted on short notice should be to a day certain with liberty to the Plaintiff to move to continue. That puts the burden where it belongs: on the Plaintiff to show upon a full hearing that it is entitled to what it seeks.⁸⁰

Southin's comments reflected growing concern within the legal community that the indiscriminate use of injunctions against labour in British Columbia was undermining the rule of law, and that some corrective measures were overdue. This reinforced a message that labour had pursued throughout the postwar period.

Following the 1972 provincial general election, the provincial New Democratic Party (NDP) government led by social-worker David Barrett (who had himself been fired as a civil servant for political activity) embarked on far-reaching changes to BC's labour laws, including a provision in the *Labour Code of British Columbia Act (1973)* that transferred the power to grant injunctions out of the hands of judges and into the hands of a reformed Labour Relations Board (LRB). The legislation recognized the board's "exclusive jurisdiction" to consider "any application for the restraint or prohibition of any person or group of persons from:

- (i) ceasing or refusing to perform work ...;
- (ii) picketing, striking, or locking out; or
- (iii) communicating information or opinion in a labour dispute by speech, writing, or any other means of communication.

The legislation specifically stated that "no court has or shall exercise any jurisdiction" in respect of any of the Act's prohibitions against illegal strikes or picketing, while allowing a narrowing exemption for judicial intervention where necessary to avoid "an immediate

⁸⁰ Mary F. Southin, "The Courts and Labour Injunctions," *Advocate (BC)*, 28 (1970): 83-4.

and serious danger to life or health” (but even that power could not be exercised by way of an *ex parte* injunction).⁸¹

However, conflict between workers and employers continued, including tense strikes between public-sector workers and Barrett’s labour-aligned government, while the BC Court of Appeal sought to “whittle away” at the LRB’s statutory authority over picketing.⁸² In 1974, the BC Civil Liberties Association (BCCLA) lambasted courts’ interpretations of the Trade-Unions Act 1959, which substantially expanded “the power of management to obtain interim and *ex parte* injunctions against illegal picketing or illegal forms of picketing illegal strikes,” provoking “the kind of confrontation which occurred in cases like the Lenkurt Electric strike.”⁸³ Legal scholar Harry Arthurs noted shortly after the passage of the reformed labour legislation that despite the intentions of the drafters, the Labour Code’s reliance on the device of depriving the courts of jurisdiction, rather than removing causes of action available to employers or immunizing

⁸¹ Labour Code of British Columbia Act, SBC 1973 (2d Sess.), c. 122 (Bill 11, assented to 7 November 1973); Public Service Labour Relations Act, SBC 1973 c. 144; Hansard, *Official Report of the Debates of the Legislative Assembly*, 25 Oct. 1973, 951-974; H.W. Arthurs, “‘The Dullest Bill’: Reflections on the Labour Code of British Columbia,” *UBC Law Review*, 9 (1974): 280-340; BC Civil Liberties Association (hereafter cited as BCCLA), *New British Columbia Labour Legislation, Civil Liberties Issues* (Vancouver: BCCLA, May 1974); Alan F.J. Artibise, “‘A Worthy, if Unlikely, Enterprise’: The Labour Relations Board and the Evolution of Labour Policy and Practice in British Columbia, 1973-1980,” *BC Studies*, 56 (Winter 1982): 3-43; ‘BC Labor Minister’s Workload,’ *Cooperative Press Associates* (Ottawa), 29 Sept. 1972, file 436-26, CCF-NDP fonds; McLean, *A Union Amongst Government Employees*, 122-126; ‘Labor law change 1½-2 years away,’ *Sun*, 10 Nov. 1972. “The BC Mediation Commission will officially die Nov. 20,” the *Sun* reported. See also Lorne John Kavic and Gary Brian Nixon, *1200 Days: A Shattered Dream: Dave Barrett and the NDP in BC 1972-75* (Coquitlam, BC: Kaen, 1978), 145-164; Geoff Meggs and Rod Mickleburgh, *The Art of the Impossible: Dave Barrett and the NDP in Power, 1972-1975* (Madeira Park: Harbour, 2012), 162-164; Dave Barrett, interviewed by Benjamin Isitt, Esquimalt, BC, 24 April 2006.

⁸² Judy Fudge and Eric Tucker, “‘Everybody Knows What a Picket Line Means’: Picketing Before the British Columbia Court of Appeal,” *BC Studies*, 162 (Summer 2009), 68-70. For evidence of the courts’ ongoing role, see Janet Mary Nicol, “‘Unions Aren’t Native’: The Muckamuck Restaurant Labour Dispute, Vancouver, BC (1978-1983),” *Labour/Le Travail*, 40 (Fall 1997), 247.

⁸³ *New British Columbia Labour Legislation, Civil Liberties Issues*, Report prepared by BC Civil Liberties Association, May 1974, < <http://www.bccla.org/positions/admin/74labour.html> > (viewed 9 March 2012).

parties to their application, likely preserved a substantial residual role for the courts and the common law in labour disputes.⁸⁴

In the 1980s, major battles erupted between BC unions and the Social Credit governments of Bill Bennett and William Vander Zalm, giving rise to protest strikes and attempts by the provincial state to deploy the labour injunction in its bid to roll back welfare-state entitlements and curb the rights of public-sector workers.⁸⁵ When court employees represented by the BC Government Employees' Union (BCGEU) picketed the Vancouver Law Courts and other courthouses around the province on 1 November 1983 during a contract strike tied to the government's "restraint" agenda and labour's "Operation Solidarity" mobilization, BC Supreme Court Chief Justice Allan McEachern ordered by way of his own motion and in *ex parte* an injunction restraining all picketing in the vicinity of courthouses. Chief Justice McEachern's ruling was upheld by the Court of Appeal and, in the 1988 decision *BCGEU v BC (Attorney General)*, by the Supreme Court of Canada. Writing for the majority, Justice Dickson found that:

While the Labour Relations Board has jurisdiction in relation to what might be described as the labour relations aspect of picketing, the courts retain full authority to deal with violations of civil and criminal law arising from picketing. The order was issued in relation to a criminal contempt and therefore fell within the federal criminal law power and the inherent (or common law) jurisdiction of the courts to punish for contempt. Striking court employees must obey the law in relation to criminal contempt. The legality of all aspects of picketing was not put beyond the reach of the criminal law or criminal contempt simply because the strike was lawful and the Labour Code permitted picketing in the course of a lawful strike.⁸⁶

The Supreme Court of Canada accepted the union's claim that McEachern's ruling violated the s. 2 (b) *Charter* right of the BCGEU picketers to freedom of expression, but

⁸⁴ H.W. Arthurs, "The Dullest Bill": Reflections on the Labour Code of British Columbia," *UBC Law Review*, 9 (1974): 302-307.

⁸⁵ See Mark Thompson. "Restraint and Labour Relations: The Case of British Columbia," *Canadian Public Policy*, 11:2 (June 1985): 171-179.

⁸⁶ *BCGEU v BC (Attorney General)*, 1988 SCC 3.

held that this ruling was saved by s. 1, allowing for “reasonable limits ... demonstrably justified in a free and democratic society,” and was therefore constitutional. Applying the reasoning in *Poje*, the court agreed with McEachern that “the picketing of the court-houses of British Columbia constituted a criminal contempt”: “Conduct designed to interfere with the proper administration of justice constitutes contempt of court which is said to be ‘criminal’ in that it transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole.”⁸⁷

The legality of picketing was again considered by the courts in 1987 during a revived round of labour mobilization against provincial government “restraint.” On 1 June 1987, an estimated 250,000 workers participated in a one-day general strike against the Social Credit government, hoping to force a repeal of Bills 19 and 20, labour laws restricting the bargaining rights of teachers and other workers.⁸⁸ Attorney General Brian Smith responded to the strike by filing a writ for temporary and permanent injunctions prohibiting unions from using “force” (defined to include illegal work stoppages, picketing, and intimidation) to change the government or its policies.⁸⁹ With fiery rhetoric, the writ alluded to seditious libel and the use of intimidation by force or violence against the government. Labour hired an old stalwart as counsel, Tom Berger, a veteran of the 1960s battles who had served as leader of the Official Opposition and as a (controversial) provincial Supreme Court judge before returning to private practice. In his submission to Justice Kenneth Meredith on behalf of the Hospital Employees’ Union,

⁸⁷ *BCGEU v BC (Attorney General)*, 1988 SCC 3.

⁸⁸ See Industrial Relations Reform Act, S.B.C. 1987 c. 24; Jonathan Goldberg-Hiller, “The Boycott of the Law and the Law of Boycott: Law, Labour, and Politics in British Columbia,” *Law and Social Inquiry*, 21, no. 2 (April 1996): 313-351.

⁸⁹ “BC seeks injunction as 1-day strike hits province,” *Montreal Gazette*, 2 June 1987; “BC labour, NDP are outraged by injunction bid,” *Montreal Gazette*, 3 June 1987; “Berger set to fight bid for injunction,” *Vancouver Sun*, 5 June 1987; “Abridged text of statement of claim,” *Vancouver Sun*, 6 June 1987.

Berger described the government's injunction request as "an offence to free people and free institutions," invading the "jurisdiction of Parliament to define high crimes against the state." If granted, it would subject citizens to "arbitrary and erratic arrests, and no citizen would know where he stood with the law."⁹⁰ The BC Supreme Court appears to have been persuaded by the arguments of the former justice, with Meredith denying the government's application and suggesting that civil law was the wrong venue to deter offences of the magnitude of sedition and intimidation by force against the government. He ordered the government to pay a \$14,000 settlement as well as the unions' legal costs for frivolous litigation.⁹¹

3.6 Conclusion

Commenting on the Lenkurt dispute in his memoirs, labour lawyer and left-wing Vancouver alderman Harry Rankin suggested that until the right to strike and picket were recognized as unalienable, "the workers' battles will continue on the street *and in the courts*, if necessary."⁹² This chapter has examined the social relations of adjudication surrounding the use of the labour injunction in postwar British Columbia—challenging the notion of an era of "free" collective bargaining where the state accepted a hands-off role in relations between workers and employers. As evidence suggests, state intervention was the norm rather than the exception, from legislative action regulating picketing and

⁹⁰ "Strike down injunction bid, Berger asks Supreme Court," *Vancouver Sun*, 8 June 1987.

⁹¹ *AG (BC) v Georgetti*, 1987 BCSC; "Socreds lose injunction bid as BC court quashes writ," *Globe and Mail*, 11 June 1987; "Resign over writ defeat, labour, NDP tell Smith," *Vancouver Sun*, 11 June 1987; Goldberg-Hiller, "The Boycott of the Law and the Law of Boycott," 329; John Mackie Shields, "British Columbia's New Reality: The Politics of Neo-Conservatism and Defensive Defiance," (PhD dissertation, University of British Columbia, 1989), 505-509. For a more recent contempt case arising from a labour injunction, as well as a historical discussion on this area of law, see "65 told contempt could be criminal in injunction case," *Times Colonist* (Victoria), 6 December 1994.

⁹² Rankin, *Rankin's Law*, 150.

strikes, to judicial intervention in the form of injunctions, contempt convictions, fines, and prison sentences against working-class leaders and their organizations, who engaged in militant occupations of space to challenge employers' property interests and assert customary and working-class claims to property. The frequency and lopsided nature of this judicial intervention—from *Poje* through *North* to *Lenkurt*, *UFAWU* and other cases—provoked crises of legal legitimacy involving a wide layer of working people, who perceived an unhealthy and close relationship between companies and the courts. These crises of legal legitimacy occasioned contempt for the rule of law and a widespread belief that it was ethically sound to defy the court's authority.

The judiciary, for its part, insisted that firm action was necessary to maintain the legal fabric of society, uphold the rule of law, and prevent anarchy from taking hold. Chief Justice Wendell Farris, who had developed close affinities with employers' interests while practicing as a corporate lawyer and serving as a corporate director prior to his appointment to the bench, provided a robust defence of the role of the courts as guardians of freedom, democracy, and public order in the 1952 BC Supreme Court decision in the *Poje* case (*Canadian Transport Co. Ltd. v. Alsbury*):

Once our laws are flouted and orders of our courts treated with contempt the whole fabric of our freedom is destroyed. We can then only revert to conditions of the dark ages when the only law recognized was that of might. One law broken and the breach thereof ignored, is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.⁹³

This formulation, of the courts as the last line of defence for social order, would be invoked regularly by judges in other high-profile injunction and contempt proceedings in the decades that followed.

⁹³ *Canadian Transport Co. Ltd. v. Alsbury*, 1952 BCSC 473.

These social relations of adjudication and the legal technology of coercion developed in response to working-class challenges to private property interests in the postwar collective bargaining context—notably, procedures governing injunctions and contempt proceedings—would be carried into other social contexts later in the twentieth century, as the locus of political protest shifted from labour to other social movements. This line of jurisprudence was acknowledged in 1994, in the case of *MacMillan Bloedel v. Brown*, an environmental case where the judge noted the origins of modern contempt law in the labour case of *Poje*—“one of the leading authorities” establishing the principle that “[t]he courts, particularly the judges of the Supreme Court of British Columbia, have the original responsibility to maintain the Rule of Law.” After citing *Lenkurt*, appeal court Chief Justice Allan McEachern noted that “more recently ... most protests have related to differences between citizens and between citizens and government on social, environmental and aboriginal issues.”⁹⁴ The corresponding social critique of law’s legitimacy, arising in the 1960s in response to criminalization of working-class protest by the courts, and reflected in legislative reforms that sharply curbed the jurisdiction of courts to issue injunctions during labour disputes, would be sustained by other social-movement actors as conflicts between private property and customary property claims persisted into the twenty-first century. It is to these new social movements and their challenges to private property rights and resulting legal responses that the dissertation now turns.

⁹⁴ *MacMillan Bloedel v. Brown*, 1994 BCCA 64.

Chapter 4.

Breaching the Bubble Law: Spatial and Legal Battles over Reproductive Choice

On 27 June 1995, the legislative assembly of British Columbia voted 49-9 to approve a piece of legislation called the Access to Abortion Services Act. Passage of the legislation followed a week of rigorous debate, in which the governing New Democratic Party had hoped to exploit divisions within the opposition BC Liberal caucus over the controversial issue of reproductive choice. Sidestepping this political strategy, most Liberals backed the government bill, distancing themselves from socially conservative caucus members while reaching out to moderate and centrist elements of public opinion.¹ This legislation was the first of its kind in Canada. The bill included among its provisions a restriction on a range of activities in the vicinity of “access zones.” These included: engaging in a “sidewalk interference,” protesting, besetting, and physically interfering with or intimidating medical practitioners or patients. The legislation also included a restriction

¹ “Abortion protest bill approve,” *Vancouver Sun*, 28 June 1995; Hansard, *Report of Debates of the Legislative Assembly of British Columbia*, 27 June 1995.

on photographing, videotaping, sketching, or otherwise graphically recording medical practitioners or patients for the purpose of dissuading them from providing or accessing abortion services.² “Access zones,” also known as “bubble zones,” were defined as including the parcel of land on which medical facilities providing abortion services were located, as well as an area extending up to 50 metres from the boundary of the parcel, determined by the lieutenant-governor-in-council by regulation. Reflecting the physical threat of violence to doctors and other service providers, “access zones” were defined as including doctors’ offices as well as doctors’ homes and an area extending 160 metres from these private residences.

Legal protection for the Bubble Zones in the form of a permanent “legislative injunction” reflected the contested social relations of adjudication that had emerged in British Columbia in the preceding years over the issue of reproductive choice—as control over women’s bodies and the spaces surrounding abortion clinics and doctors’ homes and offices stood out (spatially and temporally) as “a moment in the intersection of configured social relations,” to deploy Doreen Massey’s terminology, “as a kind of ‘power-geometry.’”³ Passage of the legislation was viewed as a major victory by feminists, abortion service providers, and other progressive forces in British Columbia and beyond, who had advocated and agitated for freedom of reproductive choice for decades. Harassment, intimidation, and outright violence against medical practitioners and patients had accompanied the legalization of abortion services in the United States

² *Access to Abortion Services Act*, SBC 1996, c. 1.

³ Doreen Massey, *Space, Place, and Gender* (Minneapolis: University of Minnesota Press, 1994), 265; also Doreen Massey, “Power-Geometry and a Progressive Sense of Place,” in *Mapping the Futures: Local Cultures, Global Change*, ed. Jon Bird, Barry Curtis, Tim Putnam, George Robertson and Lisa Tickner (London, Routledge, 1993), 59-69. See also Brenna Bhandar, “Disassembling Legal Form: Ownership and the Racial Body,” in *New Critical Legal Thinking: Law and the Political*, eds. Matthew Stone, Illan Wall, and Costas Douzinas (Abingdon: Birkbeck Law Press, 2012), 112-127.

and Canada in the 1970s and 1980s and into the 1990s. Abortion clinics that opened in Vancouver and other cities in the wake of the 1988 *Morgentaler* decision, which struck down Criminal Code restrictions on abortion as unconstitutional for violating women's right to security of the person, were besieged by chronic (usually male) protesters aligned with Christian organizations, prompting a wave of injunctions and a declaration by Court of Appeal Justice Mary Southin that the legislature rather than the courts was the appropriate venue to determine the reasonable limits of protest. The New Democratic Party-controlled legislature elected in 1991 was more receptive to the feminist perspective than previous governments in BC and those in other jurisdictions, and responded to Justice Southin's direction and ongoing concern over anti-abortion protests and the health and safety of women and medical practitioners by introducing the Access to Abortion Services Act—which imposed the permanent “legislative injunction” against protests in the vicinity of abortion clinics and doctors' offices and homes.

Conversely, the Bubble Law was viewed as a major defeat by opponents of legal abortion services, who described themselves as “pro-life” and who feminists and abortion services providers labelled “anti-choice.” The legislation was also lambasted by some civil liberties advocates, who viewed it as an unreasonable incursion on rights to freedom of expression, assembly, conscience and religion protected in the *Canadian Charter of Rights and Freedoms*. Abortion was a hotly contested and controversial social and political issue, striking at the root of the personal health, autonomy, and wellbeing of individual women, while clashing against the spiritual values of some members of religious communities. BC's Bubble Law explicitly embraced the pro-choice perspective and imposed a substantial legal barrier in the way of the pro-life movement, which had embraced the picketing of abortion clinics and the harassment of practitioners as core

tactics in its campaign seeking the repeal of legal access to abortion services, or, if this failed, to at least directly discourage women from accessing these services or alternately, to cut off the supply of practitioners willing and able to perform these services.

Beyond the particular issue of abortion services, BC's Bubble Law represented a far-reaching infringement on political freedoms of expression and assembly, restricting certain forms of speech and activity on public sidewalks and road rights-of-way in the vicinity of clinics, offices, and homes. In the view of a majority of members of the legislative assembly and the government that proposed the legislation, as well as their supporters among service providers and feminist groups, and judges on the BC Supreme Court and Court of Appeal who upheld the constitutionality of the law, this represented a reasonable infringement on civil liberties, one that was necessary to safeguard access to abortion services, protect the dignity of women at a potentially very vulnerable time in their lives, and ensure the safety and supply of health practitioners. In attempting to strike a balance over competing rights and competing claims to public property and public space, the Bubble Law and the wider legal technology deployed by lawyers, police, judges, and legislators demonstrated continuity with earlier responses to social-movement protest in British Columbia, while also demonstrating a robust example of intervention by the legislature into the legal arena governing protest and uses of public property.

This chapter explores the legal politics of abortion in British Columbia, where the locus of social movement organizing and criminalization shifted from women accessing abortion services and doctors performing the service, to citizens opposed to the right of women to terminate a pregnancy. Highlighting the contested politics of freedom of choice, as well as debates over the appropriate limits of lawful protest, this chapter draws from court decisions, newspaper coverage, and institutional records of pro-choice and

anti-abortion advocacy organizations, building on studies by Thomson, Wasserlein, Sethna and Hewitt, Johnstone, and Mitchell.⁴ In the process, it provides an original window into an atypical social movement and its clashes with authority, highlighting wider themes of how legal legitimacy has been constructed and contested in modern British Columbia. The chapter is distinct from other case studies in this dissertation with its focus on a conservative social movement, and its emphasis on a non-economic arena of social movement mobilization and social contestation.

4.1 Mobilizing for Choice

The legal politics of abortion, and social movement organizing on issues of reproductive rights, underwent fundamental change in BC and Canada in the closing decades of the twentieth century—with the locus of legal legitimacy and social movement organizing decisively shifting from the criminalization of women who accessed the service and doctors who performed the procedure, to the criminalization of protesters who interfered with access to this health service. This change occurred in British Columbia in a short time span of seven years—beginning with a robust judicial intervention in the form of the Supreme Court of Canada’s decision in the case of *R. v. Morgentaler* (1988), and culminating in intervention by the BC legislature with the adoption of the Access to

⁴ Ann Thomson, *Winning Choice on Abortion: How British Columbia and Canadian Feminists Won the Battles of the 1970s and 1980s* (Vancouver: Trafford, 2005); Frances Wasserlein, “‘An Arrow Aimed at the Heart’: The Vancouver Women’s Caucus and the Abortion Campaign 1969-1971,” MA thesis, Simon Fraser University, 1990; Christabelle Sethna and Steve Hewitt, “Clandestine Operations: The Vancouver Women’s Caucus, the Abortion Caravan, and the RCMP,” *Canadian Historical Review*, 90, no. 3 (September 2009): 463-496; Rachael Johnstone, *After Morgentaler: The Politics of Abortion in Canada* (Vancouver: UBC Press, 2017); Don Mitchell, “The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the Rise of the ‘Purely Atomic’ Individual,” *Political Geography*, 24, no. 1 (January 2005): 77-100.

Abortion Services Act in 1995 (and subsequent court decisions upholding the constitutionality of the legislation).

In the 1970s, feminists associated with the Women's Liberation movement were the most visible social movement actors engaging on issues relating to reproductive rights. At the time, a woman required the approval of a three-member hospital committee of doctors attesting that the procedure was necessary to safeguard her physical, mental, or emotional health. While this represented a more permissive approach than Criminal Code provisions in place prior to 1969, which had made all abortions criminal unless the woman's life was at risk, it fell far short of the aspiration of the women's liberation movement for "free abortion on demand." Moreover, hospitals were left to decide whether to establish Therapeutic Abortion Committees; only about one third of hospitals in Canada did so, meaning that women in many parts of the country had no access to legal abortion services. Parliament and the Liberal government of the day had instituted the 1969 Criminal Code reform, and accompanying legislation legalizing contraceptives including condoms and the birth-control pill, in the face of fierce opposition from the Catholic Church and other conservative forces in the country.⁵ However, the emerging Women's Liberation movement demanded that Parliament go further and remove remaining legal barriers to a woman's right to choose.

In April 1970, a group of 17 women in the Vancouver Women's Caucus including Ellen Woodsworth (niece of parliamentarians J.S. Woodsworth and Grace McInnis, and a future Vancouver City Council member) embarked on an "Abortion Caravan" to Ottawa, demanding repeal of the Criminal Code offense of providing abortion services for non-medical reasons. The activists had declared in a strongly-worded letter to Prime Minister

⁵ *Criminal Law Amendment Act, 1968-69*, SC 1968-69, c. 38.

Pierre Elliot Trudeau and his ministers of health and justice that “the government of Canada is in a state of war with the women of Canada.”⁶ The Caravan gathered support as it travelled through cities across western Canada, led by a vehicle bearing a coffin full of coat-hangers to symbolize the death of women from botched abortions, converging on Parliament Hill on Mother’s Day weekend 1970. More than 400 women and supporters marched on Parliament, packing into the Railway Committee Room, where they heard from speakers including Dr. Henry Morgentaler and MP Grace McInnis (both of whom were booed, the former for being a man and the latter for being too politically moderate), followed by an impromptu march to the Prime Minister’s residence where protesters breached the grounds of 24 Sussex Drive. The following day, 37 women chained themselves to the wooden rails in the visitors’ gallery above the chamber of the House of Commons, forcing adjournment.⁷ As Christabelle Sethna and Steve Hewitt have noted, the Royal Canadian Mounted Police (RCMP) Security Service took a keen interest in the Abortion Caravan as it travelled eastward, with informants reporting to Ottawa on the composition of the audiences at local events and the anti-capitalist tone of the speakers, reflecting the wider pattern of state surveillance of left-wing radicalism in Canada in the Cold War period.⁸ Judy Rebick suggests that the battle for reproductive choice and the

⁶ Christabelle Sethna and Steve Hewitt, “Clandestine Operations: The Vancouver Women’s Caucus, the Abortion Caravan, and the RCMP,” *Canadian Historical Review*, 90, no. 3 (September 2009): 473.

⁷ See “Abortion, Free and On Demand, Abortion,” *Waffle News* (Toronto), May 1970, file 446-18, CCF-NDP fonds, LAC; “Abortion Caravan Scrapbook,” n.d. [1970], Marge Hollibaugh Women’s Movement Collection, F-73, Simon Fraser University Archives; Frances Wasserlein, ““An Arrow Aimed at the Heart’: The Vancouver Women’s Caucus and the Abortion Campaign 1969-1971,” MA thesis, Simon Fraser University, 1990.

⁸ Christabelle Sethna and Steve Hewitt, “Clandestine Operations: The Vancouver Women’s Caucus, the Abortion Caravan, and the RCMP,” *Canadian Historical Review*, 90, no. 3 (September 2009): 463-496. See also “Abortion, Free and On Demand, Abortion,” *Waffle News* (Toronto), May 1970, file 446-18, CCF-NDP fonds, LAC; “Abortion Caravan Scrapbook,” n.d. [1970], Marge Hollibaugh Women’s Movement Collection, F-73, Simon Fraser University Archives; Frances Wasserlein, ““An Arrow Aimed at the Heart’: The Vancouver Women’s Caucus and the Abortion Campaign 1969-1971,” MA thesis, Simon Fraser

Abortion Caravan were integral to the emergence of the “second-wave” feminist movement in Canada.⁹

Back in Vancouver, the Vancouver Women’s Caucus and other successor feminist groups continued to organize visible and vocal demonstrations throughout the 1970s in support of abortion providers and in pursuit of the goal of legal access to abortion services. Several of the organization’s members had formed an Abortion Information Service (later, renamed the Abortion Referral and Counselling Service) in December 1969, shortly after the Criminal Code reform came into effect, to provide women with confidential information on medical practitioners inside and outside Canada who would provide abortions without approval from the legally mandated hospital committee. The Vancouver Women’s Caucus rallied around Dr. Robert Makaroff, a Vancouver doctor who was arrested by an undercover police officer in the spring of 1970 and criminally convicted for performing abortions without the necessary approval of a hospital committee, and incarcerated for three months in Burnaby’s Oakalla Penitentiary. When Makaroff faced disciplinary proceedings before the BC College of Physicians, the Vancouver Women’s Caucus organized a demonstration outside the building where the hearing was being conducted. When the activists learned that women were experiencing bureaucratic road blocks in having their cases considered by the Therapeutic Abortion Committee (TAC) at Vancouver General Hospital, which reviewed applications in accordance with the 1969 Criminal Code provisions, the women occupied the

University, 1990; Ann Thomson, *Winning Choice on Abortion: How British Columbia and Canadian Feminists Won the Battles of the 1970s and 1980s* (Vancouver: Trafford, 2005).

⁹ Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto: Penguin Canada, 2005), 35.

psychiatrists' offices at the hospital, leading to improved TAC procedures and expedited scheduling of abortions approved by the TAC.¹⁰

Pro-choice organizing gained momentum in Vancouver and other Canadian cities throughout the 1970s and into 1980s, and increasingly focused on the defence of Dr. Henry Morgentaler, a Montreal-based doctor and Holocaust survivor who, like Makaroff, provided abortion services without the approval of a hospital committee. Morgentaler was convicted under s. 251 of the Criminal Code and incarcerated for 10 months in a Quebec prison, emerging as the figurehead of the growing national “Pro-Choice” movement, demanding repeal of the Criminal Code restrictions on access to abortion services. The doctor had been acquitted in three separate jury trials, successfully pleading the defence of necessity, but in an extraordinary move the Quebec Court of Appeal had overturned the jury acquittal and substituted a conviction and 18-month prison sentence, a decision upheld by the Supreme Court of Canada. Following the election of the Parti Quebecois provincial government in 1976, additional charges against Morgentaler were dropped, with the government describing the federal abortion law as “inapplicable” in Quebec in light of the refusal of juries to convict and announcing that it would pursue no further prosecutions relating to clinic abortions performed by qualified medical practitioners. Charges against several other doctors and a nurse were also dropped. The federal minister of justice described Quebec’s decision to abandon the prosecutions as fair, just, and properly within provincial jurisdiction, while refusing to comment on

¹⁰ Wasserlein, ““An Arrow Aimed at the Heart,”” 107-108.

Quebec's request that the abortion law be reformed. Morgentaler re-opened his Montreal-area clinic.¹¹

Following the adoption of the *Canadian Charter of Rights and Freedoms* in the 1982 *Constitution Act*, and changing public attitudes that suggested more than 70 percent of Canadians supported a woman's "right to choose" whether or not to have an abortion, Morgentaler announced in 1983 that he would expand his services and advocacy efforts to other parts of Canada, opening clinics in Toronto and Winnipeg.¹² Mirroring the earlier pattern in Quebec, police raided the Toronto clinic. Morgentaler and two colleagues were charged with providing illegal miscarriages, but were acquitted in a jury trial based on the defence of necessity. As in Quebec, the Ontario Court of Appeal overturned the acquittal and substituted a conviction, but when the case reached the Supreme Court of Canada, Morgentaler successfully invoked the *Charter* argument that s. 251 of the Criminal Code was unconstitutional, as it violated a woman's right to life, liberty, and security of the person under s. 7, and was not saved by s. 1. The Supreme Court of Canada's 5-2 ruling in *R. v. Morgentaler*, released on 28 January 1988, struck down the Criminal Code restrictions on abortions, with Chief Justice Robert Dickson and Justice Antonio Lamer finding in the majority decision that: "Forcing a woman, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of her

¹¹ "Abortionist won against the odds," *Globe and Mail*, 11 December 1976; "Quebec Halts Trial of Abortion Doctor," *New York Times*, 12 December 1976; *Morgentaler v. The Queen*, 1976 1 SCR 616; Rachael Johnstone, *After Morgentaler: The Politics of Abortion in Canada* (Vancouver: UBC Press, 2017), 96-98.

¹² "Ready to start illegal abortion clinics across Canada, Morgentaler states," *Globe and Mail*, 26 April 1982; "Angry man attacks Morgentaler, but demonstrators support clinic," *Globe and Mail*, 16 June 1983.

security of the person.”¹³ Since the 1988 *Morgentaler* decision, Canada has had no law governing the termination of pregnancy.

4.2 Legal Abortion and Anti-Abortion Protest at the Everywoman’s Health Centre

The Supreme Court of Canada’s 1988 ruling in *Morgentaler* that struck down the Criminal Code sanction against abortion services introduced a whole new set of challenges and reoriented the legal landscape on the abortion issue. The pro-choice movement and practitioners moved from advocacy and grassroots mobilization to the operation and practice of providing this newly legalized health service, while opponents of abortion turned to social-movement organizing and direct action in a bid to prevent women from accessing the service and to convince legislators to restore statutory restrictions on abortion services.

The Everywoman’s Health Centre, founded on East 44th Avenue in East Vancouver in November 1988 shortly after the *Morgentaler* decision, emerged as a key site of social contestation, as opponents of abortion, many of whom were aligned with Christian organizations affiliated with a United States-based anti-abortion initiative known as “Operation Rescue,” embraced the old labour tactic of the picket line, brandishing picket signs and offering unsolicited “sidewalk counselling” and more intimidating forms of communication aimed at preventing women from accessing abortion services. The seeds of this direct-action campaign by anti-abortionists could be found even prior to *Morgentaler*. In 1986, Jim Demers, a 29-year-old carpenter from the

¹³ *R. v. Morgentaler*, 1988 1 SCR 30. It should be noted that a majority of Supreme Court of Canada justices objected to s. 251 of the Criminal Code on somewhat narrow procedural grounds. Only one judge – Justice Bertha Wilson – recognized a constitutional right of a woman “to decide for herself whether or not to terminate her pregnancy.” Wilson found that s. 251 infringed this s. 7 right because it “takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman’s constitutionally protected right under s. 7, not merely a limitation on it.”

town of Nelson, BC had been convicted for theft, possession of stolen property, and mischief after stealing and damaging a vacuum aspirator used to perform abortions at the Kootenay Regional General Hospital (abortions at the hospital were authorized at the time by a three-member hospital committee under the 1969 provisions of the Criminal Code). Demers raised the defence of necessity, stating the belief that the hospital committee rubber-stamped therapeutic abortions and that his actions were therefore justified to protect the life of the unborn child and prevent the commission of an offence, but the BC Court of Appeal rejected this argument and upheld Demers's conviction.¹⁴

The Everywoman's Health Centre emerged as the primary target for the anti-abortion movement in British Columbia in the aftermath of *Morgentaler*, as the first stand-alone abortion clinic in the province (it would be followed in 1991 by the Elizabeth Bagshaw Clinic, also in Vancouver, and over time, by other stand-alone clinics in communities including Victoria, Kelowna, Cranbrook, and Trail, as well as hospital units that extended access to abortion services to approximately 40 communities). In the initial period following *Morgentaler*, the Everywoman's clinic operated on a shoe-string budget of approximately \$3,000 per month, relying on charitable donations and user fees from patients who could afford to pay, with the Provincial Medical Services Plan initially refusing to cover the costs of the medical service. The clinic performed approximately 100 abortions in its first three months of operation, while serving as a lightning rod for anti-abortion protest.¹⁵ Within weeks of its opening in November 1988, activists aligned with Operation Rescue, including Jim Demers, established a physical presence on the municipal sidewalks in front of the East Vancouver clinic in a bid to obstruct access and

¹⁴ "BC appeal court upholds conviction of anti-abortionist," *Globe and Mail*, 4 September 1986; "Abortion foe loses," *Montreal Gazette*, 4 September 1986.

¹⁵ "Abortion clinic sending women to US," *Vancouver Sun*, 27 January 1989.

raise the public profile of their campaign against legal abortions. Alongside picketing and “sidewalk counseling,” activists with Operation Rescue chained themselves to the doors of the clinic, forcing it to close on several occasions, and vandalized the building, including damaging locks, defacing the exterior with graffiti, and breaking into the clinic and destroying equipment.¹⁶ According to an affidavit filed in the subsequent litigation, picketing at the Everywoman’s clinic began within three weeks of the clinic’s opening, “on or about November 24, 1988” and “continued with increasing frequency and severity.”¹⁷ On 15 December 1988, approximately 150 protesters aligned with Christian organizations from across the Lower Mainland converged on the site, blocking access to the doors; 69 were physically removed by Vancouver Police and taken into custody but released without charges.¹⁸ The leniency demonstrated by police and prosecutors toward the anti-abortion protesters in this early phase can be contrasted with more robust legal responses to labour, environmental, and indigenous protests during this period, revealing partiality in the deployment of coercive legal power.

Faced with large, aggressive, and growing protests in front of the clinic, the Everywoman’s Health Centre, supported by feminist organizations, turned to the old legal remedy of civil action and a court injunction to protect the right of women to access abortion services by restraining the picketing. This litigation against the “pro-life” picketers represented a new twist in long-standing legal battles over competing claims to public space in British Columbia, in this incidence the municipal sidewalks in the front of the Everywoman’s Health Centre (and, later, other abortion clinics that opened across the province in the years following *Morgentaler*.) The litigation surrounding anti-abortion

¹⁶ Janet Epp Buckingham, *Fighting Over God: A Legal and Political History of Religious Freedom in Canada* (Montreal and Kingston: McGill-Queen’s University Press, 2014), 115.

¹⁷ *Everywoman’s Health Centre Society v. Bridges*, 1990 BCCA 5409.

¹⁸ *Everywoman’s Health Centre Society v. Bridges*, 1990 BCCA 5409.

picketing at the Everywoman's Health Centre culminated in arrests and criminal contempt of court convictions, and ultimately, in the 1990 Court of Appeal ruling in *Everywoman's Health Centre v. Bridges*, which set the stage for legislative action to protect the right of women to access abortion services and restrain protests.

On Saturday, 21 January 1989, two and a half months after the Everywoman's Health Centre opened, "Operation Rescue" organized another convergence to disrupt the operations of the clinic. Approximately 150 protesters converged on the clinic at seven o'clock in the morning, blocking all entrances and denying access to patients and staff, preventing the clinic from operating for the next 14 hours. Lawyers for the clinic responded with an emergency application in front of BC Supreme Court Justice Lloyd McKenzie, who issued an interlocutory injunction following an extraordinary three-hour Saturday morning hearing that restrained picketing, watching and besetting, obstructing operations, and intimidating forms of communication in the vicinity of the clinic.¹⁹ However, the crowd disregarded the judge's order and did not disperse until 8:45 pm, when Vancouver Police arrived with a second court order from Justice McKenzie, issued following another brief hearing at the Vancouver Courthouse and mandating that named and unnamed protesters appear before the judge on possible contempt of court charges. Hilda Thomas, a Vancouver feminist and spokesperson for the Everywoman's Health Centre, speculated that if the disruption continued without satisfactory police intervention, the clinic would have to consider calling on its supporters in the future to physically prevent protesters from obstructing access to the clinic. Vancouver Mayor (and future Premier) Gordon Campbell advised caution, expressing concern over the

¹⁹ *Everywoman's Health Centre Society v. Bridges*, 1990 BCCA 5409.

suggestion that the clinic would take the law into its own hands, and instead counselled the clinic to talk to police and “deal with it positively.”²⁰

Protests and legal wrangling over access to the Everywoman’s Health Centre continued throughout the early months of 1989, with the clinic expressing concern that the judge had refused to issue an enforcement order, which would have mandated that police remove any person who breached the initial order from obstructing the sidewalk.²¹ Questions also arose over the response of the BC government, and the BC Ministry of Attorney General in particular, to the growing protest movement, in light of the stated sympathies of Social Credit Premier William Vander Zalm and leading members of his cabinet for the anti-abortion cause and their strong ties to evangelical Christianity. As the *Vancouver Sun* noted in an editorial, Attorney General Bud Smith’s “first duty is to the law, not to politics or religion or even government policy. ... Confronted with evidence of contempt of court on a large scale, the attorney-general has a clear obligation to take matters into his own hands to prevent the administration of justice from falling into disrepute.”²² Opposition leader Mike Harcourt called for the attorney general to “initiate criminal proceedings” against the picketers and also called for the provincial government to fund the Everywoman’s clinic.²³ On 28 January 1989, an estimated 600 anti-abortion protesters gathered in front of the Everywoman’s clinic, marching two-to-four abreast in a rally that coincided with national demonstrations on the one-year anniversary of the *Morgentaler* decision. In anticipation of the protest, and given the legal ambiguity over enforcement provisions of the court order, the clinic decided not to schedule any

²⁰ “Abortion clinic backers ponder counter-protest,” *Vancouver Sun*, 23 January 1989. See also “Abortion frustration,” *Vancouver Sun*, 24 January 1989; “Neighbours seek end to abortion protests,” *Vancouver Sun*, 31 January 1989; “Police to determine abortion protest stand,” *Vancouver Sun*, 23 January 1989.

²¹ “Requests for enforcement order ignored,” *Vancouver Sun*, 30 January 1989.

²² “A-G must police contempt at clinic,” *Vancouver Sun*, 10 February 1989.

²³ “New abortion legislation felt answer to protests,” *Vancouver Sun*, 13 February 1989.

abortions on that day. “If we’d wanted to bring in a patient, she would have probably found it very stressful,” Hilda Thomas said.²⁴

The anti-abortion protests at the Everywoman’s Health Centre reached an apex on 7 February 1989, when 105 people were arrested for picketing in front of the clinic, blocking all three entrances and preventing patients and staff from accessing the building. A spokesperson for the protesters, identified only as Baby Doe 240, stated: “We don’t want to obstruct anything. We just want to prevent the killings.”²⁵ The protest, which converged on the clinic before 8:00 am, coincided with hearings at the Vancouver Courthouse where Justice McKenzie was considering submissions from defense counsel to alter or withdraw the original injunction. Upon learning of the protest, the judge issued an order directing police to immediately arrest the protesters and bring them to the courthouse, describing their actions as “a blatant defiance of the injunction.”

Deliberations on the procedural application were overshadowed by the contempt proceedings for the 105 arrested protesters: “You decided while the court was making its determination ... to stage another demonstration and to display by your actions your apparent total defiance of the court,” Justice McKenzie told the arrested protesters when they appeared in his courtroom, ordering them detained overnight.²⁶ The following day, 42 of the demonstrators elected to remain in prison pending trial on the contempt charge, rather than sign an undertaking agreeing not to re-attend at the clinic. The male protesters were detained at Oakalla prison in Burnaby, while the women were detained at the Lakeside corrections centre, also in Burnaby, pending trial, amid accusations they

²⁴ “Rally marks court ruling on abortion,” *Vancouver Sun*, 30 January 1989.

²⁵ “Abortion protesters mount another blockade at clinic,” *Vancouver Sun*, 7 February 1989.

²⁶ “‘Defiant’ protesters jailed,” *Vancouver Sun*, 8 February 1989; “Abortion protesters head back to court,” *Vancouver Sun*, 8 February 1989; “Hymns, prayers mark jail time for blockaders,” *Vancouver Sun*, 9 February 1989.

received favourable treatment.²⁷ The week of legal proceedings culminated with a sentencing decision arising from the original 21 January protest, as Justice McKenzie found 13 defendants guilty of civil contempt, imposing sentences of between 15 and 24 days imprisonment, to be served on weekends, as well as ordering the defendants to pay the health clinic's legal costs. The judge was not persuaded by arguments from defence counsel that the protesters "were compelled by the righteous motive of rescuing unborn babies from death ... according to the will of God, whose laws supersede the laws of man."²⁸

Legal proceedings arising from the 7 February protest continued through February and March 1989, with Justice Josiah Wood ruling on 23 February that the contempt committed at the 7 February protest had been criminal rather than civil in nature, prompting the BC attorney general to assume responsibility for the conduct of the prosecution. On 28 February, defence counsel Paul Formby invoked the defence of necessity, suggesting the defendants were justified in breaching the injunction in order to prevent the commission of an offence (the killing of unborn children), a line of argument rigorously opposed by Crown counsel Joseph Arvay.²⁹ On 6 March, Justice Wood issued his ruling against all 102 defendants (two additional defendants were convicted the following day, while charges against one of the accused, who suffered from Alzheimer's disease, had been dropped prior to the trial), rejecting the defence of necessity on the grounds that it had no parallels in any established legal authorities:

²⁷ "Inmates slam abortion foes," *Vancouver Sun*, 14 February 1989; "Lakeside conflict resolved over anti-abortion prisoners," *Vancouver Sun*, 15 February 1989; "Women anti-abortionists held apart from other prisoners," *Vancouver Sun*, 25 February 1989.

²⁸ "12 jailed anti-abortionists offered review for remorse," *Vancouver Sun*, 10 February 1989. See also "Oakalla fails to deter," *Vancouver Sun*, 20 February 1989; "Protesters get terms suspended," *Vancouver Sun*, 6 March 1990.

²⁹ "Defence of necessity pushed," *Vancouver Sun*, 28 February 1989.

Thus it can be seen that the defence of necessity which the defendants seek to raise rests on the footing that disobedience of the order of this court was necessary in order to avoid the imminent peril of harm resulting from the conduct of the plaintiff's clinic which conduct was, and is in fact, lawful. This novel approach to necessity defies any description of the defence which I have been able to find in any recognized authority on the subject. On that basis alone, I must reject the notion that the defence of necessity can have any role to play in these proceedings.³⁰

Justice Wood described the actions of the accused at the 7 February protest as a “classic example of organized lawlessness,” part of “a detailed and premeditated strategy,” with the public nature of the contempt leading members of the public to conclude “that the very existence of law and order in this community was at risk.” Moreover, the scheduling of the mass picket line—at the moment the court was considering an application to have the injunction set aside—indicated that the defendants “had clearly abandoned any resort to legal process.” The judge said it was not the proper role of the court to decide on the morality of abortion, and that the court applied the law as established by the legislature and by previous court decisions, rather than the law of God as the defendants proposed.³¹

In his sentencing decision, Justice Wood shocked the assembled 102 defendants and their supporters by imposing sentences of 3 months imprisonment for criminal contempt of court, which he agreed to suspend for a period of 12 months, provided each defendant abided by orders of the court and kept the peace. Wood described the court as “that institution which alone stands between the rule of law and anarchy,” stating that sentencing decisions in contempt cases aimed at preserving the rule of law through deterrence, rather than “preserving judicial vanity.” Wood imposed the same sentence on all 102 defendants, including the 42 protesters who had remained in prison after the original breach rather than signing the undertaking. He imposed no additional penalty on

³⁰ *R. v. Bridges*, 1989 BCSC 2851.

³¹ *R. v. Bridges*, 1989 BCSC 2851.

Demers and Kathryn Davies, who the prosecution had identified as organizers of the protest, stating that the case against them had not been established beyond a reasonable doubt, but made it clear that any person proven to be a leader would have been “singled out for special punishment.”³² When three of the convicted protesters—Vancouver businessman James Hanlon, his wife, Karen, a Catholic school teacher, and David Forsyth of Port Moody, a church worker—broke the terms of their sentence by blockading the clinic the day after Wood handed down his ruling—they were promptly arrested and brought back in front of the judge, who imposed sentences of three months’ imprisonment. Their lawyer, Robert Culos, said outside the courtroom that his clients had “very strongly and sincerely held beliefs that the taking of pre-born human life is wrong” and that they were “prepared to pay the price.”³³ Additional arrests took place in the days and weeks that followed as protesters broke the terms of probation and received three-month prison terms.³⁴

Contempt of court convictions against anti-abortion picketers slowed but did not halt protests at the Everywoman’s Health Centre, as counsel for the defendants in *Bridges* applied for leave to appeal against the decision to the BC Court of Appeal.³⁵ However, the legal action appears to have had the impact of halting large-scale obstruction of the operations at the medical clinic. As the legal politics of abortion played out on the streets of East Vancouver and at the Vancouver Courthouse, the Parliament of Canada weighed into the abortion debate, with the House of Commons voting in favour of a Criminal Code amendment in May 1990 to prohibit abortions unless a doctor considered the pregnancy to be a threat to a woman’s “physical, mental, or psychological health”;

³² *R. v. Bridges*, 1989 BCSC 2851; “Protesters get terms suspended,” *Vancouver Sun*, 6 March 1990.

³³ “Protesters jailed for violation,” *Vancouver Sun*, 7 March 1990.

³⁴ “More abortion foes expected to face jail time,” *Vancouver Sun*, 8 March 1989.

³⁵ “Anti-abortionists appeal convictions,” *Vancouver Sun*, 11 March 1989.

however, the Senate of Canada narrowly defeated the proposed amendment on a tie vote, leaving Canada's statutory criminal law silent on abortion.³⁶ Meanwhile, a vandal broke into the Everywoman's Health Centre in February 1990, destroying an ultrasound machine and an aspirator with a crowbar. An anti-abortion activist named Lane Walker, who had been convicted of criminal contempt and sentenced to three months in prison in the original litigation in the *Bridges* case, would later turn himself into Vancouver Police, receiving a sentence of one day imprisonment and a \$10,000 fine.³⁷ Later that year, in October 1990, veteran anti-abortionist Jim Demers sat in the doorway of the clinic and was arrested for obstructing access. When Demers challenged the authority of Supreme Court Justice Sherman Hood at a preliminary hearing, refusing to stay away from the clinic until a bail hearing and attempting to walk out of the courtroom, he was physically restrained by sheriffs and incurred the additional legal liability of criminal contempt.³⁸ Demers's conviction was upheld by the BC Court of Appeal, with Chief Justice McEachern dismissing Demers's claim that the *Charter* provided the right to a jury trial, citing favourably from the Ontario Court of Appeal decision in *R. v. Cohn* (1985).³⁹

In December 1990, BC Court of Appeal Justice Mary Southin upheld the Supreme Court ruling against the 117 anti-abortion protesters convicted of contempt of court in *Everywoman's Health Centre v. Bridges*, but sought to shift the onus of decision-

³⁶ Karine Richer, *Abortion in Canada: 20 Years After Morgentaler* (Ottawa: Parliamentary Information and Research Service, Library of Parliament, 2008). See also Mollie Dunsmuir, *Abortion: Constitutional and Legal Development* (Ottawa: Parliamentary Information and Research Service, Library of Parliament, 1998). In February 1989, in the midst of the Everywoman's Health Centre protests, BC Premier Bill Vander Zalm had called on the Government of Canada to introduce legislation relating to abortion, which he stated would address some of the concerns of people picketing outside the clinic. See "New abortion legislation felt answer to protests," *Vancouver Sun*, 13 February 1989.

³⁷ "Abortion clinic vandalized," *Vancouver Sun*, 26 February 1990; Abortion Rights Coalition of Canada, *Position Paper #73: Anti-Choice Violence and Harassment* (Vancouver: September 2006) < <http://www.arcc-cdac.ca> > (viewed 16 May 2016); "Laying freedom on the line," *Vancouver Province*, 22 May 1990.

³⁸ "Abortion protester questions authority," *Vancouver Province*, 11 October 1990.

³⁹ *R. v. Demers*, 1992 BCCA 625. See also *R. v. Cohn*, 1985 OCA 13 DLR (4th) 680.

making from the courts to the legislature. Southin expressed concern over the ongoing operation of court injunctions in response to social movement protest, providing a brief historical summary of the relationship between injunctions and protests, and questioning the appropriateness of restraining picketing through injunctions and contempt proceedings, rather than through the criminal law:

Today, the citizenry take to the streets over many social issues. Once upon a time, the citizenry rarely took to the streets save in labour disputes ... I think it is not unfair or unkind to say that by the 1950s, the courts of British Columbia were thought by some to be anti-labour because of the number of injunctions granted in labour disputes.

Ultimately, to the relief of most, if not all, judges, the jurisdiction to deal with what is commonly called picketing was, in large measure, placed in the hands of what is now the Industrial Relations Council.

There is today the grave question of whether public order should be maintained by the granting of an injunction, which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the Criminal Code.⁴⁰

Southin upheld the convictions against the anti-abortion protesters, since neither the protesters nor their legal counsel had mounted a “sustained attack” against the appropriateness of responding to protests through interlocutory injunctions. But Southin expressed concern that counsel for property owners and courts adhered to a pattern established in labour disputes, rather than fashioning responses based on specific circumstances:

It is obvious to me that the terms of this order were taken from precedents developed during the course of labour disputes. There is much to be said for the proposition that such precedents should be put permanently away and the court should give, in these cases where the citizens take to the streets and an injunction is sought, a fresh consideration to the extent to which the court should go. That

⁴⁰ *Everywoman's Health Centre Society v. Bridges*, 1990 BCCA 5409. The *Globe and Mail* newspaper cited Southin's ruling in providing commentary during the Clayoquot Sound trials in 1993: “Clayoquot: The danger of using injunctions,” *Globe and Mail*, 5 November 1993.

consideration should, in every case, depend on the precise nature of the dispute, the precise conduct in issue and so on.⁴¹

4.3 The Bubble Law and the Balancing of Conflicting Rights

Litigation surrounding anti-abortion picketing at BC abortion clinics in the wake of *Morgentaler*, and growing violence against abortion-services providers in BC and across North America, prompted action by the Government of British Columbia and the legislative assembly in the form of a permanent “legislative injunction” restraining anti-abortion picketing—the *Access to Abortion Service Act* (1995). In November 1994, Dr. Garson Romalis, a gynecologist who performed abortions at Vancouver’s Elizabeth Bagshaw Clinic and an outspoken advocate for access to legal abortion services, was shot while eating breakfast in his Kerrisdale home. Romalis nearly bled to death when a bullet fired from a military-style assault rifle by an assailant outside his home shattered his femur and severed his femoral artery. The doctor saved his own life by slowing the bleeding with a make-shift tourniquet fashioned from his bathrobe (the lead suspect in the shooting would later been convicted for the murder of New York abortion doctor Barnett Slepian, though charges were never pursued in Canada for the Romalis shooting nor attacks on two other Canadian doctors).⁴² The Vancouver shooting was preceded by two high-profile killings of abortion doctors in Florida and was followed a few months later by the killing of two women outside a Boston-area abortion clinic in December 1994.

⁴¹ *Everywoman’s Health Centre Society v. Bridges*, 1990 BCCA 5409.

⁴² “The Shooting of Dr. Romalis,” *Globe and Mail* (Toronto), 10 November 1994. An American, James Charles Kopp, is the lead suspect in Romalis’s shooting, as well as several other shootings of abortion providers in Canada and the United States, including one for which he is currently serving a life sentence in a US federal prison. “Fugitive anti-abortion activist sought for questioning in connection with three related shootings in Canada,” *Saskatoon Star-Phoenix*, 7 May 1999; “US fugitive chief suspect in Canadian abortion shootings,” *Toronto Star*, 25 June 1999; “Manhunt ends in France,” *Vancouver Sun*, 30 March 2001; “Abortion sniper suspect arrested,” *Calgary Herald*, 30 March 2001; “Abortion doctor’s murderer gets life sentence,” *Times Colonist*, 20 June 2007; “Abortion foe suspected in shootings finally to face Canadian questions,” *Vancouver Sun*, 20 June 2007; “Conviction, but no reward,” *Winnipeg Free Press*, 28 November 2009.

Hilda Thomas, a Vancouver feminist and social justice activist who helped found the Everywoman's Health Clinic, attributed the violence to "a very small, frantic but sad [and] pathetic minority wanting to prevent women from getting access to safe medical abortions [who] have resorted to violence because, in essence, they have lost." The spokesperson for the BC Coalition for Abortion Clinics called on the BC Attorney General and law enforcement agencies to enforce civil injunctions against watching, besetting, or picketing abortion clinics.⁴³ In October 1994, anti-abortion protester Gordon Watson had been convicted of criminal contempt of court and sentenced to 21 days imprisonment for intimidating members of the public and interfering with access to, and the operations of, the Everywoman's Health Centre in contravention of Justice McKenzie's court order (with the sentence later reduced to 10 days on appeal).⁴⁴

The shooting of Dr. Romalis and intensification of violence against abortion providers and women accessing abortion services lent urgency to a process underway to provide legislative protection to abortion services.⁴⁵ The British Columbia government, led by the leftist New Democratic Party after the 1991 provincial election, had responded to the Court of Appeal decision in *Bridges* by establishing a Task Force on Contraceptive and Abortion Services in 1992. The task force released a report in 1994 entitled *Realizing Choices*, which included among its recommendations proposed legislated protection for

⁴³ "Vancouver clinic wants anti-protest orders enforced," *Ottawa Citizen*, 31 December 1994. See also "Pro-choicers demand laws against foes," *Vancouver Province*, 22 April 1993.

⁴⁴ *R. v. Watson*, 2006 BCCA 217; *R. v. Watson*, 2006 BCCA 367; "Abortion foe loses bid to overturn conviction," *Vancouver Sun*, 11 April 1996. See also "Abortion protest trio will remain in jail," *Vancouver Sun*, 22 April 1993; "Anti-abortionists guilty of contempt," *Vancouver Province*, 5 May 1993.

⁴⁵ "Abortion militants rarer in Canada" *Vancouver Sun*, 31 December 1994. In contrast to the calming tone conveyed by the *Vancouver Sun* headline, the *Kingston Whig-Standard* ran the same article under the headline, "Is Anti-Abortion Extremism Spreading in Canada?" *Kingston Whig-Standard*, 31 December 1994.

access zones around abortion clinics and doctors' offices and homes.⁴⁶ Following the Boston shootings, the government announced that it was considering a ban on protests in the vicinity of abortion clinics, as 60 anti-abortion activists gathered outside the Everywoman's Health Clinic for a weekly "prayer meeting," with a spokesperson for the Campaign Life Coalition of BC suggesting that freedom of expression should not be curbed because of the actions of a "twisted lunatic."⁴⁷ By the spring of 1995, the government announced that legislation was being prepared to replace the current system, which placed the onus on abortion providers to obtain civil injunctions to prevent "harassment" of women and doctors. "I'm very concerned about the safety of health workers, of medical specialists, of women who are seeking services," Premier Mike Harcourt said, contrasting his party's official pro-choice stance with sharp debates over abortion policy in the opposition BC Liberal party.⁴⁸

BC's NDP government introduced the Access to Abortion Services Bill in the Legislature on 19 June 1995 and the bill was adopted less than two weeks later following rigorous debate inside and outside the legislative assembly. In introducing the legislation, Health Minister Paul Ramsey stated that:

This bill ensures that women have access to reproductive health services in an atmosphere of privacy and dignity ... Abortion is a legal medical service, and access to medical services is one of the foundations of medicare. We do not tolerate disruption of access in any sphere of the health care system, and we will not tolerate it here. ... Our intention is to protect access to this legal medical service and ensure that health care providers work and live in a respectful atmosphere.⁴⁹

⁴⁶ Janet Epp Buckingham, *Fighting Over God: A Legal and Political History of Religious Freedom in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2014), 115.

⁴⁷ "Abortion foes face ban," *Vancouver Province*, 2 January 1995.

⁴⁸ "Buffer zones on way for abortion clinics, MDs," *Vancouver Sun*, 11 May 1995.

⁴⁹ Hansard, *Report of Debates of the Legislative Assembly of British Columbia*, 19 June 1995.

Social Services Minister Joy McPhail said the government was responding to “an orchestrated, organizational exercise in limiting access to health care” by anti-abortion groups. McPhail elaborated on the government’s reasons for proceeding with the legislation to restrain the picketing, highlighting the violent methods of the North American anti-abortion movement:

There are manuals on protest on this continent, perpetuated by organizations that are anti-choice and that would deny women their right to reproductive health care. Those manuals advocate violence and denigration of women. We’re not doing this for some glib, high-profile reason. We’re doing it because we need to stop the concerted impediment⁵⁰

In an opinion article in the *Vancouver Sun*, University of British Columbia law professor Joel Bakan suggested the legislation was likely constitutional and consistent with the *Charter*, since the Supreme Court of Canada had “strongly and consistently” found that governments and legislatures could limit expression so long as they did so in a “carefully tailored” way to serve some “pressing and substantial” objective.”⁵¹

As mentioned in the introduction to this chapter, the legislation restricted a range of activities in the vicinity of “access zones.” These included: engaging in a “sidewalk interference,” protesting, besetting, and physically interfering with or intimidating medical practitioners or patients. The legislation also included a restriction on photographing, videotaping, sketching, or otherwise graphically recording medical practitioners or patients for the purpose of dissuading them from providing or accessing abortion services.⁵² “Access zones,” also known as “bubble zones,” were defined as

⁵⁰ Hansard, *Report of Debates of the Legislative Assembly of British Columbia*, 22 June 1995. McPhail suggested: “There are manuals on protest on this continent, perpetuated by organizations that are anti-choice and that would deny women their right to reproductive health care. Those manuals advocate violence and denigration of women. We’re not doing this for some glib, high-profile reason. We’re doing it because we need to stop the concerted impediment”

⁵¹ “BC abortion-protest limits will likely endure,” *Vancouver Sun*, 21 June 1995.

⁵² *Access to Abortion Services Act*, RSBC 1996, c. 1.

including the parcel of land on which medical facilities providing abortion services were located, as well as an area extending up to 50 metres from the boundary of the parcel, determined by the lieutenant-governor-in-council by regulation. Reflecting the physical threat of violence to doctors and other service providers, “access zones” were defined as including doctors’ offices as well as doctors’ homes and an area extending 160 metres from these private residences. The legislation provided for “quasi-criminal” sanctions of up to six month imprisonment and fines of up to \$5,000 in accordance with the Offence Act.⁵³

Notwithstanding vocal opposition from “pro-life” organizations and socially conservative members of the legislative assembly, the Access to Abortion Services Bill passed third reading on 27 June 1995 on a vote of 49-9, with both the government and official opposition caucuses officially supporting the legislation.⁵⁴ BC Reform Party leader Jack Weisgerber, who was among the MLAs voting against legislation, sidestepped the abortion issue during debate on the bill, attacking the legislation on the grounds that he was “fundamentally opposed to bubble-zone injunctions in any form,” and suggesting that the court system provided sufficient opportunities for parties to seek injunctive relief. He also took a jab at the NDP government’s record with public protest, questioning why “a government beset with problems of protests, blockades and interference” would focus on the specific issue of access to abortion services.⁵⁵

The law came into effect on 18 September 1995—initiating a period of uncertainty and legal contestation as anti-abortion groups challenged the constitutionality of the act for violating freedom of religious expression. Pursuant to the power to enact

⁵³ *Access to Abortion Services Act*, RSBC 1996, c. 1; *Offence Act*, RSBC 1996, c. 338; Hansard, *Report of Debates of the Legislative Assembly of British Columbia*, 26 June 1995.

⁵⁴ Hansard, *Report of Debates of the Legislative Assembly of British Columbia*, 27 June 1995.

⁵⁵ Hansard, *Report of Debates of the Legislative Assembly of British Columbia*, 22 June 1995.

regulations, the Minister of Health immediately designated the first “access zone” or bubble zone around the Everywoman’s Health Clinic on Victoria Drive in East Vancouver. Maurice Lewis, an anti-abortion activist who had regularly protested outside the clinic on previous occasions, intentionally breached the access zone on 22 September 1995, while wearing a sandwich board that included an image of the Christian icon Our Lady of Guadalupe and the statement: “Stop Abortion.” Lewis was arrested by Vancouver Police for breaching the provisions of the act prohibiting sidewalk interference and protest in the access zone, and jailed for three months for refusing to sign an undertaking agreeing not to re-attend at the clinic. Lewis admitted the facts at trial before Provincial Court Judge E.J. Cronin. The contested issue was the constitutional question of whether the new law violated the *Charter* rights of the accused, with Lewis claiming he was continuing to offer “sidewalk counselling” to women in a peaceful manner.

In a decision rendered in January 1996, Judge Cronin declared that s.2(1)(a) and s.2(1)(b) of the act, which prohibited sidewalk interference and protesting within the access zone, were unconstitutional, in that they violated freedom of expression, freedom of association, and freedom of conscience and religion, and were not saved by s. 1. Cronin based this ruling on the grounds that the law did not allow any exception: “It eliminates all peaceful protests and any form of communication or attempted communication regarding abortion within the access zone.”⁵⁶ The BC Cabinet immediately met and Attorney General Ujjal Dosanjh announced the following day that the Crown would appeal against the trial judge’s decision. Organizations on both sides of the abortion debate made submissions as intervenors in the case. In a submission to the

⁵⁶ *R. v Lewis*, 1996 BCSC 1383; “Why we need Maurice Lewis,” *Vancouver Sun*, 27 January 1996.

BC Supreme Court in support of the Crown’s appeal, a coalition of five women’s health organizations—including the Everywoman’s Health Clinic, other abortion services providers, and women’s advocacy groups—asserted that “Legislative action is especially appropriate where, as here, there is evidence to show that injunctive relief has not adequately addressed the problem.” The intervening coalition cited the Supreme Court of Canada’s finding in the *Keegstra* case that the equality guarantee in s. 15 of the *Charter* “is the broadest of all guarantees.”⁵⁷

In a decision issued in October 1996, eight months after the trial judge’s ruling had struck down those sections of the act, BC Supreme Court Justice Mary Saunders overturned the trial judge’s decision and convicted Lewis for breaching the bubble zone and violating the Access to Abortion Services Act.⁵⁸ Saunders conceded that Lewis’s beliefs were sincerely held and motivated by his religion, and that the act infringed upon freedom of expression and freedom of conscience and religion under s. 2 of the *Charter*. But she pointed to the Supreme Court of Canada’s finding in *Morgentaler* that impediments to access to abortion infringed a woman’s right to security of person under s. 7 of the *Charter*, and concluded that: “Health care has fundamental value in our society. A woman’s right to access health care without unnecessary loss of privacy and dignity is no more than the right of every Canadian to access health care.” The appeal was allowed “because the objective of the legislation outweighs the infringement of section 2 of the Charter ... and is demonstrably justified in a free and democratic society.” The case was remitted to the trial judge for sentencing.⁵⁹

⁵⁷ “Factum of the Intervenor,” Elizabeth Bagshaw Society et al., in *Crown Appeal Against Acquittal in R. v. Lewis* [1995] BCSC.

⁵⁸ “Court restores abortion clinic buffer-zone law,” *Times Colonist*, 9 October 1996; “Sidewalks made safe from stress again,” *Vancouver Province*, 15 October 1996.

⁵⁹ *R v. Lewis*, 1996 BCSC 1383.

However, notwithstanding this favourable ruling at the BC Supreme Court, the constitutionality of BC's "bubble law" remained unsettled for more than a decade. This reflected an unfortunate turn of events, after Maurice Lewis, who had appealed against his conviction by the BC Supreme Court (suspending the sentencing decision), was found dead in a car north of Wawa, Ontario in September 1997, before his case was heard before the BC Court of Appeal. The RCMP attributed the death to "natural causes."⁶⁰ This left the constitutional question outstanding, with two separate cases involving three anti-abortion picketers winding their ways through the courts over the decade that followed. In December 1996, Jim Demers had wilfully violated sections of the Access to Abortion Services Act restricting sidewalk interference, protesting, and besetting in an access zone. Like Lewis, he admitted the facts of the case. Unlike Lewis, Demers's central argument that was s. 7 of the *Charter* included the right to life of the unborn foetus, and that s. 2(b) of the Access to Abortion Service Act was therefore unconstitutional. Following the Supreme Court of Canada's reasoning in *Morgentaler*, the BC Court of Appeal rejected Demers's argument, finding that "the current law of this country supports the position of the Crown ... that a foetus is not included in the word 'everyone' in s. 7 of the *Charter*." As a result, Demers's appeal was dismissed and his conviction was upheld in 2003.⁶¹

As Demers's case unfolded, two other well-known anti-abortion protesters, Gordon Watson and Donald Spratt, publicly defied the Access to Abortion Services Act in December 1998, engaging in "sidewalk interference" in front of the Everywoman's Health Clinic in Vancouver. They were convicted of the "quasi-criminal" charges

⁶⁰ "Abortion bubble-zone foe found dead in Ontario," *Saskatoon Star-Phoenix*, 6 September 1997.

⁶¹ *R. v. Demers*, 2003 BCCA 28; "'Bubble zone' challenge dismissed," *Vancouver Province*, 26 September 2003; "Abortion-protest law upheld," *Edmonton Journal*, 6 August 1999. See also *Tremblay v. Daigle*, 1989 2 SCR 530; *Winnipeg Child and Family Services v. D.F.G.*, 1997 3 SCR 925.

following a lengthy trial in August 2000 and the convictions were upheld by the BC Supreme Court in 2002. In the intervening period, Dr. Garson Romalis, who had recovered from the 1994 shooting to the point where he was able to continue performing abortions (though not live births), was stabbed in the back in July 2000 at the Seymour Medical Clinic in Vancouver. The assailant escaped, while Romalis was treated for a non-life-threatening wound to the rib cage.⁶² BC Premier Ujjal Dosanjh responded to the attack by calling for a Criminal Code amendment to strengthen sentencing provisions against persons convicted of attacking abortion doctors (a suggestion that was not acted upon, reflecting wide variations in public opinion on the abortion issue in different parts of the country.)⁶³ In the United States, Colorado adopted its own “bubble law,” informed by the BC legislation, and including a provision for an eight-foot buffer or “floating bubble” surrounding a person accessing an abortion facility, which could not be “pierced for the purposes of politically charged conversation, leafleting, ‘education,’ and so forth,” as geographer Don Mitchell noted—in a study of a growing legal “right to be left alone,” which blurs lines between the “public” and “private” spheres.⁶⁴

Meanwhile, the BC Court of Appeal agreed to hear Watson and Spratt’s appeal against their conviction in 2004, with coalitions on both sides of the abortion issue intervening as they had done in the *Lewis* case.⁶⁵ Counsel for the Access Coalition, representing the abortion clinics and women’s groups, argued that the Access to Abortion

⁶² “Second attempt made to kill Vancouver abortion doctor,” *Edmonton Journal*, 12 July 2000.

⁶³ “Dosanjh faces difficulty finding common ground on abortion,” *Saint John Telegraph-Journal*, 31 July 2004.

⁶⁴ Don Mitchell, “The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the Rise of the ‘Purely Atomic’ Individual,” *Political Geography*, 24, no. 1 (January 2005): 77-100.

⁶⁵ “Factum of the Intervenor The Access Coalition,” 8 September 2006, in *R v. Watson, Spratt*, BCCA < <http://www.westcoastleaf.org> > (viewed 10 May 2016); “Factum of the Canadian Religious Freedom Alliance,” 8 September 2006, in *R. v. Watson, Spratt*, BCCA < <http://www.evangelicalfellowship.ca/> > (viewed 10 May 2016).

Services Act had been “carefully tailored to address a pressing legislative objective” and that the impugned sections were therefore constitutional.⁶⁶ Counsel for the Canadian Religious Freedom Alliance, representing three Christian organizations, claimed the legislated prohibition on picketing was not “rationally connected to the objective of reasonable and secure access,” and that the impairment of expression was neither minimal nor proportional, and therefore was not saved by s. 1 of the *Charter*.⁶⁷ In 2008, the BC Court of Appeal issued its decision in this complex case, upholding the constitutionality of the “bubble law.” On the secondary issue raised by Watson and Spratt, of whether the size of the access zones was disproportionate and larger than necessary to satisfy the stated purpose of ensuring safe access, the court similarly found that the extent of the zone (30 metres at its widest point) was reasonable and did not constitute a “constitutional impairment.” Writing for the appellate panel, Justice Catherine Ryan found that: “The objective of the Act justifies the limited infringement of freedom of expression in the circumstances.”⁶⁸

4.5 Conclusion

The Access to Abortion Services Act remains on the statute books in British Columbia, prohibiting protest in the vicinity of abortion clinics and the homes and offices of abortion providers, while providing a legal basis for quasi-criminal prosecution against anti-abortion protesters. This legislation has superseded the traditional legal remedy of a

⁶⁶ “Factum of the Intervenor The Access Coalition,” 8 September 2006, in *R v. Watson, Spratt*, BCCA < <http://www.westcoastleaf.org> > (viewed 10 May 2016).

⁶⁷ “Factum of the Canadian Religious Freedom Alliance,” 8 September 2006, in *R. v. Watson, Spratt*, BCCA < <http://www.evangelicalfellowship.ca/> > (viewed 10 May 2016). The Alliance consisted of the Catholic Civil Rights League (CCRL), the Evangelical Fellowship of Canada (EFC), and the Christian Legal Fellowship.

⁶⁸ *R. v. Spratt and Watson*, 2008 BCCA 340; “BC court upholds abortion bubble-zone law,” *Globe and Mail* (Toronto), 4 September 2008.

civil injunction in relation to anti-abortion protests, providing a permanent “legislative injunction” that relieves abortion providers of the requirement to initiate a civil action and apply for an injunction to defend their property interests against social-movement challenges. With this legislation, the state has assumed responsibility for the prosecution of anti-abortion protests on a permanent basis. Despite periodic challenges by the “pro-life” movement, including the cases of *R. v. Demers* (2003) and *R. v. Spratt and Watson* (2007) and *R. v. Spratt* (2011), the courts have upheld the provisions of the act that restrain freedom of expression and freedom of conscience and religion, suggesting this infringement is reasonable and justified in order to safeguard conflicting *Charter* rights relating to security of the person and equality.⁶⁹

Jurisprudence surrounding abortion rights and anti-abortion protests demonstrates the growing phenomenon of *rights litigation* in Canada, as parties have engaged in protracted campaigns inside and outside the legal arena to assert rights claims, particularly since the passage of the *Canadian Charter of Rights of Freedoms* in the *Constitution Act* of 1982. The cases examined in this chapter demonstrate the complexity of rights litigation, where competing rights claims come into conflict and judges and other members of the legal community are called upon to decide where the balance of rights should be drawn and which interests should prevail.⁷⁰ With the adoption of the Bubble Law in 1995, the British Columbia Legislature ultimately became the arbiter of these competing rights claims—intervening with legislation that regulated and restricted social movement protest, restraining claims to public space and infringing upon political

⁶⁹ See *R. v. Demers*, 2003 BCCA 28; *R. v. Spratt and Watson*, 2008 BCCA 340; *R. v. Spratt*, 2011 BCSC 1747. See also “BC a base for abortion battlers trying new tactics,” *The Tyee* (Vancouver), 3 January 2013. < <http://thetyee.ca/News/2013/01/03/BC-Anti-Choice/> > (viewed 11 May 2016).

⁷⁰ For an American study of judicial restraint of freedom of expression in the vicinity of abortion clinics, see Don Mitchell, “The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the Rise of the ‘Purely Atomic’ Individual,” *Political Geography*, 24, no. 1 (January 2005): 77-100.

expression and constitutionally protected rights in the interests of protecting access to another constitutionally protected right—a controversial health service that rival social movements had agitated for and against for decades. This chapter has illuminated the history of access to abortion services in British Columbia, and contested social relations of adjudication and crises of legal legitimacy surrounding access to these services. The case study highlights shifting strength among the rival “pro-choice” and “pro-life” movements, as well as changing legal technologies deployed by judges, legislatures, and other legal actors in response to social-movement protest over the control of women’s bodies and spaces in the vicinity of abortion clinics.

The emergence of the Bubble Law, and the legal politics of abortion in the period since *Morgentaler*, highlights the activity of the atypical “pro-life” social movement, an outlier in the legal history of clashes between social movements, property interests, and members of the legal community in BC. Usually, social-movement actors are of the left or aligned with it: picketing workers on strike and facing criminal charges, injunctions, and prison terms for challenging employers’ power; environmental or indigenous road blockaders impeding access to natural resources in defiance of licenses held by private companies; urban anti-poverty activists and poor people occupying public spaces with tent cities to assert a “right to sleep” and advocate for a radical rebalancing of power relations. The Bubble Law case study tells us a different story and highlights distinct social tensions and political debates based on a distinct alignment of forces: a social movement rooted in the Christian Right and a conservative world view, challenging the property interests of health service providers oriented toward the not-for-profit sector and the feminist movement. Both the social movement protesters, as well as the conventional property interests seeking recourse in the legal arena, are outliers in this respect. The

experiences of these rival social movements in challenging the status quo and asserting competing rights claims through the control and appropriation of space since the 1970s demonstrates continuity and change in the legal technology of coercion deployed in response to protest in BC's legal history.

Chapter 5.

Legal Wars in the Woods: The Making of a Thousand Criminals at Clayoquot Sound

In the summer of 1993, more than 900 people were arrested on a logging road in the vicinity of the Kennedy River Bridge on Vancouver Island, charged with criminal contempt of court for defying BC Supreme Court injunctions prohibiting interference with logging operations by license-holder MacMillan Bloedel Ltd. on Crown land in the old-growth rainforests of Clayoquot Sound. This represented the largest incidence of mass arrests and convictions arising from non-violent civil disobedience in Canadian history up to that point in time. The debates swirling around Vancouver Island and British Columbia during the Clayoquot protests and mass trials signified the contested social relations of the law and a substantial crisis of law's legitimacy—a fundamental questioning of the neutrality of the provincial state and judiciary, and the fairness of adjudicative procedures as they relate to environmental policy and social movement protest. This crisis also raised a fundamental question of jurisdiction—who has authority

to define and authorize “legitimate” uses of public land (a theme that will be pursued in more depth in the next chapter on indigenous protest). Similar to the pattern arising in relation to labour protests earlier in the twentieth century, the crisis of legal legitimacy and social relations of adjudication at Clayoquot Sound were influenced by close economic relationships linking the provincial government, judges, and logging companies, fueling claims of partiality against a government that simultaneously sold timber licenses (and owned shares in the logging company) while assuming responsibility for the conduct of criminal prosecution against environmentalists challenging those permits. Customary assertions of rights to protect the ecological values on Crown forest lands propelled the environmentalists on a collision course with an economically, legally, and politically powerful constellation of interests—exposing the contested legal, social, and spatial construction of “legitimate” uses of Clayoquot Sound. What conditions impelled a wide layer of ordinarily-law abiding citizens to converge on a remote logging road and defy judges’ authority, attracting criminal liability for contempt?

5.1 Blockades

Divergent visions for the proper management of British Columbia’s natural resource wealth can be traced back for decades, to the period prior to the advent of the modern environmental movement.¹ By the 1970s, the fault lines were becoming increasingly clearly drawn, with growing numbers of citizens embracing an ecological viewpoint and gravitating toward environmental campaigns and organizations that advocated for the conservation of resources and protection of biological diversity to sustain non-human

¹ See Eryk Martin, “When Red Meets Green: Perceptions of Environmental Change in the BC Communist Left, 1937-1978,” MA thesis, University of Victoria, 2008.

plant and animal species. As Jeremy Wilson has argued, environmental politics in British Columbia came to increasingly focus on forest resources, and particularly the old-growth rainforests of Vancouver Island. In part, this reflected the pattern of economic development in the province, which had sidestepped some of the controversies that were prevalent elsewhere (for example, over waste management and hydro-electric, nuclear, and coal power). The emerging environmental movement's focus on forest resources also reflected the emotional impact of images of mountainsides and valleys denuded by clearcuts, the preferred method of corporate industrial logging by the late twentieth century.² According to geographer Roger Hayter, globalization intensified conflict over the province's forest resources, as bottom-line considerations of global shareholders drove increased extraction for commodity exports and declining government regulation, notwithstanding mounting public concern for ecological conservation.³

Throughout the 1980s, environmental consciousness increased in British Columbia, fueling expressions of direct action where protesters blocked logging roads and otherwise interfered with logging operations in a bid to protect remaining stands of old-growth rainforest. Public ownership of forest lands imbued these resource conflict with strong symbolic value, providing rhetorical weight to environmentalists' arguments that remaining stands of old-growth rainforests should be protected for ecological and recreational purposes, rather than liquidated to satisfy the bottom-line profit

² Jeremy Wilson, *Talk and Log: Wilderness Politics in British Columbia* (Vancouver: UBC Press, 1998), 48-49. See also Jeremy Wilson, "Forest Conservation in British Columbia, 1935-85: Reflections on a Barren Political Debate," *BC Studies*, 76 (Winter 1987-88): 3-32. See also John-Henry Harter, "Environmental Justice for Whom? Class, New Social Movements, and the Environment: A Case Study of Greenpeace Canada, 1971-2000," *Labour/Le Travail*, 54 (Fall 2004): 83-119.

³ Roger Hayter, "'The War in the Woods': Post-Fordist Restructuring, Globalization, and the Contested Remapping of British Columbia's Forest Economy," *Annals of the Association of American Geographers*, 93, no. 3 (September 2003): 706-729. See also Trevor J. Barnes and Roger Hayter, eds. *Troubles in the Rainforest: British Columbia's Forest Economy in Transition: Canadian Western Geographical Series Vol. 33*. (Victoria: Western Geographical Press, 1997).

considerations of corporate license holders such as MacMillan Bloedel, Western Forest Products, and Fletcher Challenge. At Meares Island and Sulphur Passage in Clayoquot Sound and the Tsitika River Valley on north-eastern Vancouver Island, environmental activists aligned with Greenpeace, Friends of Clayoquot Sound, the Western Canada Wilderness Committee, and the Sierra Club of Western Canada joined forces with local First Nations and developed tactics that would later be deployed on a “mass” scale during the road blockade at the Kennedy River Bridge in the summer of 1993.⁴ Mirroring earlier clashes between social movement actors and private property interests, counsel for the logging companies would appeal to judges, police, and other members of the legal community for injunctions to restrain the protests and allow the companies to exercise their rights to harvest timber from the Crown forest lands, which had never been ceded by First Nations through conquest or treaty.

The Clayoquot Sound defenders objected to what they considered to be an unhealthy close relationship between the judiciary, the provincial government, and the logging companies; at the time, the Government of British Columbia owned about four per cent of the shares in MacMillan Bloedel Ltd., the province’s largest forestry corporation and primary license holder of the Crown forest lands in Clayoquot Sound, and therefore the plaintiff in the civil litigation that gave rise to the criminal contempt proceedings.⁵ Maurice Gibbons, a professor emeritus at Simon Fraser University who, along with his wife, plead guilty to criminal contempt of court and was fined \$1,250, described the view of many of

⁴ Michael Mullin, interviewed by Benjamin Isitt, Tofino, BC, 24 May 2013. See also “Court clears way for Tsitika logging,” *Vancouver Sun*, 2 November 1990.

⁵ “NDP stake in MB rattles industry,” *Vancouver Sun*, 25 March 1993. See also “Sale brings MB reins back to BC,” *Vancouver Sun*, 10 February 1993.

the defendants: “These are the strangest criminals I have ever met, committing a crime so strange it is difficult to distinguish from an act of citizenship or public service.”⁶

In 1990, the BC government responded to mounting environmental protest on Vancouver Island by issuing a policy directive to Crown prosecutors and police, which stated: “On occasion those involved in public demonstrations come into conflict with the law and obstruct or interfere with the rights of others. The use of criminal sanctions in these situations is generally not appropriate.” The directive suggested that individuals and other parties whose interests were affected by civil disobedience “should generally be encouraged to apply for a civil injunction to stop the disobedience” and “proceed with civil contempt proceedings” should the civil disobedience continue after the injunction was issued.⁷

Conflict over the future of Clayoquot Sound intensified in the summer of 1991, when forestry giant MacMillan Bloedel announced plans to log 2.5-million cubic metres of old-growth rainforest in the watershed. The company, BC’s largest forestry corporation at the time with one-third of the total allowable annual cut (AAC) within Tree Farm Licenses (TFLs) in the province, had held logging rights to public land in TFL 44 (originally, Timber Management Licenses 20 and 21) since 1955.⁸ However, growing numbers of environmentally conscious citizens disagreed with the premise of corporate control of public forest lands, and clear-cut logging of old-growth rainforest in particular,

⁶ Maurice Gibbons, “The Clayoquot Papers,” in *Clayoquot & Dissent*, ed. Ronald B. Hatch (Vancouver: Ronsdale, 1995), 95; “Clayoquot protesters fines,” *Times Colonist*, 9 December 1993.

⁷ “Policy – Civil Disobedience,” as cited in Amir Attaran, “*Mandamus* in the Enforcement of the Criminal Law: Ending the Anti-Protest Injunction Habit—Issues Arising from *MacMillan Bloedel v. Simpson*,” *UBC Law Review*, 33, no. 1 (1999): 182.

⁸ “Tree Farm License #44 Management Plan #5,” June 2010. Western Forest Products < cdn.westernforest.com > (viewed 2 May 2016); Forest Planning Canada, “The Current State of Forest Licenses in British Columbia,” (Victoria, BC, 1990), < <http://www.bctwa.org/TFL-14.pdf> > (viewed 9 January 2018).

and therefore launched a campaign of civil disobedience in a bid to prevent the company from pursuing its harvesting plans in the sound. Like the anti-abortion protesters a few years earlier, the environmentalists who blocked logging roads in Clayoquot Sound invoked allegiance to a higher law in rejecting the authority of harvesting permits issued by the provincial government. In September 1991, this conflict between the company and environmental activists entered the legal arena, when lawyers representing MacMillan Bloedel applied for and received an injunction from BC Supreme Court Justice John Spencer against three named defendants and an unspecified number of Jane and John Does from obstructing or impeding its logging operations in Clayoquot Sound.⁹ Three days after the initial order, on 21 September 1991, Justice Spencer issued a subsequent enforcement order, authorizing peace officers to arrest any person who they believed on reasonable and probable grounds had disobeyed the injunction. These initial injunctions were followed by subsequent court orders, naming additional defendants as they became known to the Court and expanding the geographic scope of the earlier orders: from Justices Bouck (on 25 September 1991), Hamilton (30 June 1992), Holmes (13 July 1992), Tysoe (17 July 1992 and 20 July 1992), Esson (16 July 1993), and Hall (26 August 1993). The first convictions for contempt of court were issued on 9 December 1991, when Justice Dennis Sheppard found six Tofino residents guilty of breaching Justice Spencer's order of September by blocking the MacMillan Bloedel logging road leading into the Bolson Creek watershed; Sheppard imposed sentences ranging from \$500 fines to six months in prison, which were suspended on the condition that the protesters remained in good behaviour and complied with the injunction, refraining from interfering with future logging operations. "In a democracy, there are ways and means of

⁹ *MacMillan Bloedel v. Brown*, 1994 BCCA 64.

changing laws and procedures . . . by changing the minds of government or changing the government,” Justice Sheppard said.¹⁰

A change in government in British Columbia following the October 1991 elections—from the corporate-aligned, right-of-centre Social Credit government led by Rita Johnson to the social movement-aligned, left-of-centre New Democratic Party (NDP) government led by public-interest lawyer Mike Harcourt—failed to produce a significant change in the province’s forest policy. The new government initiated a process that sought to reconcile working-class and ecological claims to forest resources—responding to two integral constituencies of the party’s political base with legislation in 1992 that aimed to address land use and resource conflicts through interest-based negotiation. However, the Commission on Resources and Environment (CORE) Act auspiciously excluded Clayoquot Sound from the mandate of the multi-stakeholder commission.¹¹

The temperature of the mounting social and legal battle over Clayoquot Sound heated up in the summer of 1992, when Justice Ian Drost responded to the widening civil disobedience campaign by declaring that, henceforth, “these contempt proceedings be continued as criminal contempt proceedings,” with harsher penalties including the possibility of imprisonment. Following the practice established in the *Everywoman’s Health Clinic* proceedings, the court also requested that the BC Attorney General assume responsibility for the conduct of the contempt proceedings, a request that the Attorney General acceded to. This would later prompt accusations from counsel for the protesters that the court was creating “private criminal law”—protecting the interests of the logging

¹⁰ “Judge warns six anti-logging protesters courts must curb refusal to abide by law,” *Vancouver Sun*, 11 December 1991; see also *MacMillan Bloedel v. Brown*, 1994 BCCA 64.

¹¹ See Commission on Resources and Environment Act, SBC, Chapter 34; Benjamin Cashore et al., eds., *In Search of Sustainability: Forest Policy in British Columbia in the 1990s* (Vancouver: UBC Press, 2000).

company, MacMillan Bloedel, while denying the defendants access to trial by jury and other procedural safeguards ordinary available to people facing criminal charges.¹²

A number of factors coalesced in the early 1990s to convince a substantial layer of otherwise law-abiding citizens to make a stand at Clayoquot Sound and attract criminal liability for contempt of court by challenging the property rights of the corporate license-holder. These factors included failed attempts to defeat or alter MacMillan Bloedel's logging plans in the courts and growing frustration over the "talk and log" strategy favoured by government and industry—engaging the public in a dialogue on how forest resources should be managed, while at the same time ensuring that logging of old-growth rainforest continued unabated.¹³ In 1991, the Sierra Club of Western Canada and the Western Canada Wilderness Committee had jointly applied to the BC Supreme Court to have logging and road permits in Vancouver Island's Walbran Valley set aside, arguing that the province's Chief Forester had improperly extended logging company Fletcher Challenge's license to TFL 46 in the absence of public consultation, and that the logging and road permits issued by the district forester were therefore invalid. The trial judge and appeal court dismissed the environmental groups' claims, with Justice Victor Curtis declaring that the provincial foresters had acted in accordance with the legislation: "The essence of the Petitioners' predicament is not that the law has been broken but rather that they have as yet been unable to convince those duly empowered to set and implement forest policy to accept their views concerning logging in the lower Walbran."¹⁴

¹² "MacBlo's 'private criminal law' will come under fire by lawyer," *Vancouver Sun*, 27 July 1993.

¹³ Karena Shaw, "Encountering Clayoquot, Reading the Political," in *A Political Space: Reading the Global through Clayoquot Sound*, ed. Warren Magnusson and Karena Shaw (Montreal and Kingston: McGill-Queen's University Press, 2002), 32.

¹⁴ *Sierra Club of Western Canada v. British Columbia (Attorney General)*, 1991 BCSC 1086; *Sierra Club of Western Canada v. British Columbia (Attorney General)*, 1992 BCCA 330.

Lack of confidence in the BC judiciary to provide an adequate remedy to environmental concerns was amplified in 1993 when the Court of Appeal upheld decisions by the BC Chief Forester's Appeal Board and the Supreme Court, increasing MacMillan Bloedel's allowable annual cut in TFL 44 from 2.42-million cubic metres of wood to 2.68-million. MacMillan Bloedel had initiated the appeal after the province's Chief Forester established the lower cutting volume. The Sierra Club had intervened in the case against the company's application, arguing the Appeal Board had applied an incorrect interpretation of the meaning of word "sustained" in the Forestry Act, resulting in harvesting levels that far exceeded the rate of regeneration of timber in the area.¹⁵ The environmental advocacy organization's case hinged on a narrow question of legal standing, including the status of non-human parties in disputes before the courts. This question—whether a natural object such as an old-growth tree has legal standing, and whether a person or organization could initiate legal action to assert rights held by non-human species—had been a locus for advocacy and policy development in environmental law circles for several decades. Leaders of the growing movement to protect Clayoquot Sound ascribed strongly to this conception of how the law must develop. "As values and perceptions change, the law must be recast to reflect new realities," Tzeporah Berman asserted.^{16 17}

¹⁵ "MacBlo beats off challenge to Island cut," *Times Colonist*, 24 December 1993; *Sierra Club of Western Canada v. British Columbia (Forester Appeal Board)*, 1995 BCCA 359.

¹⁶ Tzeporah Berman, "Takin' it Back," in *Clayoquot & Dissent*, ed. Ronald B. Hatch (Vancouver: Ronsdale Press, 1995), 2. See also Christopher Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects," *Southern California Law Review*, 45, (1972), 450-501; Christopher Tribe, "Ways Not to Think About Plastic Trees: New Foundations in Environmental Law," *Yale Law Journal*, 83, no. 7 (1974), 1315-1345; Christopher P. Rodgers, "Agenda 2000, Land Use, and the Environment: Towards a Theory of 'Environmental' Property Rights?," in *Law and Geography*, ed. Jane Holder and Carolyn Harrison: 239-258 (New York: Oxford, 2003).

5.2 *The Hot Summer of '93*

The stage was set for the unprecedented blockades and legal proceedings of the “hot summer” of 1993. That spring, the government of BC announced its Clayoquot Land Use Decision, approving logging by MacMillan Bloedel in TFL 44, which included about two-thirds of the land base in Clayoquot Sound.¹⁸ On 5 July 1993, following a pre-arranged plan, a group of a dozen protesters that included Member of Parliament Svend Robinson from Burnaby linked arms across the road at the Kennedy River Bridge, where a Peace Camp had been established by environmental activists, preventing a MacMillan Bloedel truck from proceeding into the sound. A process server read out the order of Justice Tysoe and stuffed a paper copy under the arms of each participant in the human chain, asking if they would abide by the order, to which none responded in the affirmative. However, with no RCMP officers present to enforce the court order, the MacMillan Bloedel work crew turned around, under the glare of television cameras and to the applause of hundreds of supporters who lined the road. Beginning the following day, 6 July 1993 (with MP Robinson no longer present), RCMP accompanied the logging crew and proceeded to arrest any person who violated the order to clear the road.¹⁹

By the end of July 1993, nearly 100 people had been arrested for blocking the logging road at the Kennedy River Bridge. This included Sheila Simpson, who had been

¹⁷ For a discussion of “environmental property rights,” see Christopher P. Rodgers, “Agenda 2000, Land Use, and the Environment: Towards a Theory of ‘Environmental’ Property Rights?,” in *Law and Geography*, ed. Jane Holder and Carolyn Harrison: 239-258 (New York: Oxford, 2003).

¹⁸ Gordon Brent Ingram, “Ecology of a Conflict,” in *Clayoquot & Dissent*, ed. Ronald B. Hatch (Vancouver: Ronsdale Press, 1995), 9-70; also Berman, “Takin’ it Back,” 3.

¹⁹ For the events culminating in the road blockade of the summer of 1993, see Pierre Walter, “Adult Learning in New Social Movements: Environmental Protest and the Struggle for the Clayoquot Sound Rainforest,” *Adult Education Quarterly*, 57, no. 3 (May 2007): 248-263. See also *MacMillan Bloedel v. Simpson*, 1993 BCCA 530.

the first named defendant in the civil action initiated by MacMillan Bloedel the previous summer and had two previous convictions for civil contempt of court relating to logging protests in 1991 and 1992. BC Supreme Court Justice Kenneth Meredith sentenced Simpson to six months imprisonment for her repeated contempt, a sentence that the Court of Appeal later deemed “excessive,” longer than any previous sentence imposed for breach of a court order relating to logging operations in BC; the appeal court reduced Simpson’s sentence to four months (with the remaining time to be served via electronic monitoring, followed by two years’ probation with community service).²⁰ The other arrested Clayoquot blockaders were released from RCMP cells on their own recognisance and promise to appear, while those who refused to sign the undertaking were held in custody pending trial. On 16 July 1993, a fresh injunction by Justice William Esson replaced the original order of Justice Tysoe, which had been set to expire the following day. Esson maintained the terms of the original order and added a clause specifically aimed at curbing the road blockade at the Kennedy River Bridge:

any persons attending at or near the Kennedy River Bridge during working hours of the Plaintiff and while vehicles are travelling along the travelled roadway in such area shall situate themselves off that roadway and shall not attend within fifteen feet of that roadway.²¹

Before the end of July, a special assizes was scheduled beginning 30 August to try those charged with criminal contempt, as arrests on the Kennedy River Bridge continued on a daily basis. The Peace Camp flourished, attracting an estimated 10,000 people from across the province and beyond during the summer of 1993, reflecting a strong and

²⁰ *MacMillan Bloedel v. Simpson*, 1993 BCCA 530; “Protester gets 6 months,” *Vancouver Province*, 16 July 1993.

²¹ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

diverse foundation established in the preceding years and months, and an effective, inviting organizational structure grounded in feminist organizing principles.²²

On 6 August, Esson, who served as Chief Justice of the BC Supreme Court (and was therefore responsible for the administration of the contempt proceedings against the protesters), met informally with defence counsel, lamenting that another “100 will go and get arrested” next week, and that: “The element of deliberation is almost without precedent. Although I agree that it’s not violent it is perhaps ritualistic in that manner, but the setting the authority of the court at naught is what lies at the root of it.”²³ Defiance of the court’s authority, and the perceived threat to the rule of law, was at the heart of the judge’s objection to the conduct of the environmental protesters—mirroring language invoked in other instances of social movement challenges to injunctions and private property rights. Esson announced that Justice John Bouck had been named as trial judge, that a pre-trial conference would take place on 18 August, and that the commencement date for the trial would not be adjusted. On 26 August, Justice John Hall dismissed an application from Valerie Langer and Greenpeace Canada attempting to have the injunctions set aside.²⁴

5.3 The Trials

On 30 August 1993, a special assize opened at Victoria. The special trial had been ordered by the chief justice of BC earlier in the summer, as the civil disobedience campaign intensified and the number of arrests at the Kennedy River Bridge mounted.

This harked back to the “strikers’ assizes” of 1913, when the arrested Nanaimo coal

²² See Pierre Walter, “Adult Learning in New Social Movements: Environmental Protest and the Struggle for the Clayoquot Sound Rainforest,” *Adult Education Quarterly*, 57, no. 3 (May 2007): 248-263.

²³ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

²⁴ *Greenpeace Canada v. MacMillan Bloedel*, 1994 BCCA 943.

miners faced a special sitting of the BC Supreme Court during an earlier legal battle involving social movement protest. As the appeal court would later conclude, lumping all the defendants together into a single trial was justified in light of the heavy burden on court resources. Trying each of the initial 44 accused individually, with two days allocated for each trial, “would require 88 court days, or 17 weeks,” Justice Allan McEachern wrote. Moreover, it was “a matter of historical fact that larger groups of alleged contemnors have been tried together without difficulty in this province even before the advent of videotaped evidence.”²⁵

At the outset of the Clayoquot trial, Justice John Bouck rejected an application from defence counsel and a number of the accused to adjourn the proceedings for a month to allow time to schedule and prepare their defence, but agreed to a two-day adjournment to allow the accused a final opportunity to obtain alternate counsel. The trial resumed in earnest on 1 September, and unfolded over the next six weeks. As the appeal court would later acknowledge, “the trial was a most difficult one,” attributing the problems to defendants and their supporters behaving “very badly,” making “insulting comments to and about the judge,” and making “frivolous motions.”²⁶ McEachern elaborated on the dynamic between the largely unrepresented defendants and the trial judge Bouck:

Some of the Defendants obviously attempted to use the trial as a platform to continue their objection to logging in the Clayoquot area. The circumstances required the judge to attempt to “run a tight ship.” If he had not, it is obvious that the trial, which went on far too long, would have gone on much longer.²⁷

²⁵ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

²⁶ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

²⁷ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

A year earlier, the Supreme Court of Canada had established the distinction between civil and criminal contempt proceedings in the case of *United Nurses of Alberta v. Alberta (Attorney General)* (1992), stating that wilful knowledge that a breach of a court order would be public provided sufficient *mens rea* of bringing the court's authority into contempt.²⁸

Over six weeks, the trials of the initial 44 Clayoquot defenders proceeded before Justice Bouck at Victoria. Some of the accused attempted to justify their actions on the logging road with reference to s. 27 of the *Criminal Code*, which allows a person to use as much force as necessary to prevent the commission of an offence, alleging that the logging activities threatened fish-bearing habitat in contravention of s. 34 of the *Fisheries Act*. Bouck initially attempted to prevent defence council Bob Moore-Stewart from calling Merv Wilkinson, a professional forester, to the stand as an expert witness on the defence of necessity. Following an adjournment and submissions from several of the accused, Bouck relented and allowed Wilkinson to give evidence as an expert on forestry, who attempted "to show that the actual or proposed logging operations of MacMillan Bloedel Limited was so dangerous to the life system of the Clayoquot area" that the accused had no choice but to disobey the court order.²⁹ However, during Moore-Stewart's direct examination of Wilkinson, the Crown objected to further expert evidence relating to the defence of necessity, asserting the test established by the Supreme Court of Canada in the *Perka* case had not been satisfied, and that the defence was therefore unavailable to the accused. Moore-Stewart replied citing case law in *Operation Dismantle* (1985) and

²⁸ *United Nurses of Alberta v. Alberta (Attorney General)*, 1992 SCC 99.

²⁹ *MacMillan Bloedel v. Krawczyk*, 1994 BCCA 188.

Morgantaler v. The Queen (1976), but Bouck accepted the Crown’s position and ended further examination of Wilkinson.³⁰

The Court of Appeal would later uphold Bouck’s ruling that the defence of necessity was unavailable to the accused, agreeing that the test established in *Perka*—serious emergent circumstances that left the defendant with no alternative but to disobey the law—was not satisfied. In that case, Justice Dickson had offered a robust (if circumscribed) justification for civil disobedience in certain circumstances: “a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience.” However, Dickson was clear that such disobedience “must be premised on a right or duty recognized by law,” which specifically “excludes conduct attempted to be justified on the ground of an ethical duty internal to the conscience of the accused as well as conduct sought to be justified on the basis of a perceived maximization of social utility resulting from it.” Moreover, if “a reasonable legal alternative to disobeying the law [existed], then the decision to disobey becomes a voluntary one.”³¹ Since none of the accused had applied to the Court to have Bouck’s initial order set aside (as Langer and Greenpeace Canada later did), they could not claim they had no choice but to disobey the order to prevent the perceived peril from the logging operations.³² The appeal court went so far as to assert that “the defence of necessity can never be available to avoid a perceived peril that is lawfully authorized,” citing the BC Supreme Court decision in *Everywoman’s Health Centre v. Bridges* (1989)

³⁰ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187. See also *Operation Dismantle*, [1985] 1 S.C.R. 441; *Morgantaler v. The Queen*, [1976] 1 S.C.R. 616.

³¹ *Perka v. The Queen*, [1984] 2 SCR 232; *MacMillan Bloedel v. Krawczyk*, 1994 BCCA 188.

³² *MacMillan Bloedel v. Krawczyk*, 1994 BCCA 188.

and stating that the impugned logging was conducted with valid permits and licenses issued by the Government of BC, and was therefore legally authorized.

In another colourful chapter of the trial, defendant Darrin Mortson took the stand to make his submissions. He began by declaring that he was legally illiterate and “as much in need of assistance as a person of foreign tongue or a deaf and dumb person,” and then promptly proceeded to read the Dr. Seuss children’s book *The Lorax* in full, comprising 9 pages of court transcript, before vacating the stand. This reflected the “frustration” of the unrepresented defendants, one lawyer claimed, an explanation with which the appeal court concurred, though it was of no legal consequence.³³

Perception of an unhealthy relationship between the court and the logging company was fuelled throughout the trial, particularly when Bouck disallowed defendants’ questions relating to the activities of MacMillan-Bloedel’s public relations department. This occurred first during cross-examination of a Crown witness who had introduced newspaper articles to prove the public nature of the contempt. It occurred a second time when defendant Margaret Ormond was cross-examining a MacMillan-Bloedel employee and asked what the “MacMillan Bloedel budget is for advertising and how much has been spent for TV and newspaper advertising about the Clayoquot decision?” The Court of Appeal would likewise find that Bouck “rightly stopped” the question in the first instance and similarly “was right” to disallow the question to the company employee.³⁴

In the end, Bouck found 42 of the accused guilty of criminal contempt of court, while the two other defendants in the case had pleaded guilty during the trial. The judge

³³ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

³⁴ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

imposed sentences of between 45 and 60 days imprisonment and fines ranging from \$1,000 to \$2,000, depending on the number of offences and the defendant's conduct during the trial. He described Andrew Swain, a Victoria teenager who was arrested by sheriffs at his high school for failure to appear in court, as "an insolent young man who has little respect for the institutions that give him the right to peacefully protest," sentencing Swain to 45 days in jail and a \$1,500 fine. In his reasons for sentencing, Bouck offered a spirited defence of the rule of law, which he said was integral to the proper functioning of a democracy. He reminded the accused and observers that democracies had failed and that without the rule of law, anarchy and mob rule would prevail.³⁵ On appeal, the prison sentences against all 44 defendants were affirmed (with Justice Lambert dissenting) while the fines were set aside.³⁶

One of the accused, 17-year-old Jonathan Pulker, had applied to have his trial transferred to the youth court, as provided for in the Young Offenders Act, federal legislation that invested the youth court with "exclusive jurisdiction in respect of every contempt of court" committed by a young person "against any other court otherwise than in the face of that court." However, Judge Bouck denied this application, and tried and sentenced Bulker along with the other defendants. The BC Court of Appeal would later uphold this ruling on the grounds that superior courts maintained "a core jurisdiction that is beyond the reach of either Parliament or the Legislatures acting other than by way of a constitutional amendment."³⁷ Concurring with BC Supreme Court Justice B.D.

MacDonald's decision in *Wallace*, McEachern found that "the inherent powers of a

³⁵ "Reasons for Sentencing," Bouck J., 6 Oct. 1993, Andrew Swain Papers (in possession of author); *MacMillan Bloedel v. Simpson*, 1993 BCSC 1295. See also Andrew Swain, interviewed by Benjamin Isitt, Victoria, BC, 16 April 2013.

³⁶ *MacMillan Bloedel v. Brown*, 1994 BCCA 64; *Macmillan Bloedel v. Simpson*, 1994 BCCA 187.

³⁷ *Macmillan Bloedel v. Simpson*, 1994 BCCA 187.

superior court to use its contempt powers to enforce its orders, and to maintain its authority, was beyond the reach of Parliament.”³⁸ He therefore dismissed this ground of appeal and deemed section 47 (2) of the Young Offenders Act to be unconstitutional (a decision with which the Supreme Court of Canada agreed).³⁹ With language of escalating puffery, McEachern opined that:

the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance.⁴⁰

Following Bouck’s conviction of the initial 44 defendants, a succession of BC Supreme Court judges found most of the remaining arrested Clayoquot blockaders guilty of criminal contempt of court in more than a dozen trials that extended throughout the autumn and winter of 1993-1994. More than 860 people were tried, while charges against several dozen of the arrested protesters were dropped. In total, 626 people were convicted of criminal contempt of court and sanctioned by fines of up to \$3,000 and jail terms of up to 60 days for their actions on the Kennedy River Bridge, the largest incidence of mass arrests and convictions arising from social movement protest in Canadian history up to that point in time.⁴¹

³⁸ *Macmillan Bloedel v. Simpson*, 1994 BCCA 187. See also *Reference Re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252; *Wallace (SCC)*; Sir Jack Jacob Q.C. in *The Inherent Jurisdiction of the Court*(1970) 23 *Curr. Legal Probs* 23 at 27-28.

³⁹ *Macmillan Bloedel v. Simpson*, 1994 BCCA 187; *MacMillan Bloedel v. Simpson*, 1995 4 SCR 725.

⁴⁰ *Macmillan Bloedel v. Simpson*, 1994 BCCA 187.

⁴¹ See Clayoquot Resource Centre Fonds, AR031, University of Victoria Archives; *MacMillan Bloedel v. Simpson*, 1993 BCSC 1431, 1432, 1457, 1467, 1582, 1809; 1994 BCSC 30, 354, 384, 416, 427, 604, 808, 1045, 1285; 1995 2 SCR 1048; Ronald B. Hatch, “The Clayoquot Show Trials,” in *Clayoquot & Dissent*, ed. Ronald B. Hatch (Vancouver: Ronsdale, 1995), 105-153; Ronald MacIsaac and Anne Champagne, eds., *Clayoquot Mass Trials: Defending the Rainforest* (Gabriola Island: New Society, 1994); Ronald B. Hatch, “The Clayoquot Protests: Taking Stock One Year Later,” in *Clayoquot & Dissent*, ed. Ronald B. Hatch (Vancouver: Ronsdale, 1995), 199-208. For data on the number of people tried and convicted, see *MacMillan Bloedel v. Simpson*, 1995 2 SCR 1048, and Hatch, “The Clayoquot Show Trials,” 107.

5.4 Reaction

In an opinion-editorial piece in the *Globe and Mail*, University of Victoria law professors Hamar Foster and John McLaren argued forcefully that criminal contempt was a legal anachronism in Canada, the “only non-statutory crime known to Canadian law.” For contempt committed outside the courtroom, it seemed a stretch to view acts of non-violent civil disobedience as perilous to social order, particularly when ordinary legal remedies against mischief and other Criminal Code offenses remained at the disposal of the Attorney General and the police who were responsible for enforcing the criminal law. Foster and McLaren argued that “eight hundred prosecutions for criminal contempt” amounted to the unrestrained exercise of the peculiar legal device, threatening the perception of the courts as “impartial arbiters.”⁴²

The *Victoria Times Colonist* newspaper, which at that time sided more often than not with status quo forces rather than insurgent social movements, also condemned the criminal convictions: “To brand as criminal many of our best and most conscientious idealists, can only increase the distance between people of conscience and the state. That would be very bad for our future.”⁴³ In a similar vein, *Vancouver Sun* columnist Frances Bula highlighted the irony of how criminal contempt of court proceedings, aimed at engendering respect for the judiciary, often had the opposite effect in the court of public opinion:

Criminal contempt cases are never much fun for the court system. They usually arise out of the most contentious issues in turbulent times. They become a rallying point for activist groups, to whom the convicting judge becomes, in turn, an anti-union, pro-management toady; a conscienceless person in favor of killing babies; or a cruel represser of people trying save the planet.

⁴² “Clayoquot: The danger of using injunctions,” *Globe and Mail*, 5 November 1993.

⁴³ Editorial, *Times Colonist* (Victoria), 20 October 1993, as cited in Berman, “Takin’ it Back,” 1.

As one Canadian law-reform commission noted, the problem with contempt is that it ends up working against itself. “We are therefore faced with a disturbing paradox: contempt was developed mainly to enhance the image of the judicial system but its most publicized forms do just the opposite.”⁴⁴

5.5 Appeal

“The die seems to have been cast when the trial judge decided to proceed with the trial on September 1, 1993 with many of the Defendants still unrepresented by counsel,” Chief Justice Allan McEachern wrote in the appeal to the *Simpson* case in 1994.⁴⁵ However, McEachern and the two other members of the appellate panel, Justices Macfarlane and Wood, found that Bouck had acted “judicially” and in accordance with “proper principles” of natural justice in refusing to grant the defendants’ application for an adjournment. “It still appears that the Defendants really had no valid defence to the charge that they had committed criminal contempts of the court.”⁴⁶

Striking at the root of the legal principle governing injunction and contempt proceedings, the appeal court attributed the drawn-out, unruly trial to the refusal of the defendants and their legal counsel to accept the supremacy of the court’s authority:

On the theory that an order of a Superior Court must be obeyed until it is set aside, it was not open to these Defendants to question its validity either by their blockades, or by a collateral attack during contempt proceedings. The refusal of the Defendants and some of their counsel to accept this legal truism was one of the reasons why the trial of these matters was so unduly delayed.⁴⁷

McEachern and the appeal court focused on the defendants’ failure to exhaust available legal remedies—specifically, applying to have the interlocutory order set aside—prior to committing the breach. In the court’s judgement, this made the defence of necessity

⁴⁴ “Contempt a problem for courts,” *Vancouver Sun*, 20 October 1993.

⁴⁵ *Macmillan Bloedel v. Simpson*, 1994 BCCA 187.

⁴⁶ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

⁴⁷ *Macmillan Bloedel v. Simpson*, 1994 BCCA 187.

unavailable to the accused. Moreover, McEachern found that the defence of necessity could not operate “to avoid a peril that is lawfully authorized by the law,” such as MacMillan Bloedel’s right to access stands of timber for lawful harvesting.⁴⁸

The appeal court also rejected the defendants’ claim that the denial of trial by jury was unlawful in the *Charter* era, notwithstanding Section 11 provisions for jury trials for offences where the maximum penalty was five years imprisonment or more. Citing legal texts by Fox and Borrie and Lowe on the law of contempt, as well as case law in the labour cases of *Poje* (1953), *Tilco Plastics* (1967), *UFAWU* (1967) and *BCGEU* (1988), the anti-abortion cases of *Everywoman’s Health Centre Society* (1990) and *R. v. Demers* (1992), and an Ontario appeal court decision in the case of *R. v. Cohn* (1984), the BC Court of Appeal found that judges could deal summarily with contempt proceedings provided the sentence did not exceed five years (the statutory threshold for the right to a jury trial in the *Criminal Code*).⁴⁹ McEachern declared confidently that it was “a matter of indisputable record” that prompt judicial action in response to breaches of court orders in “emotional, high-profile disputes” had “preserved the rule of law in this province.” Notwithstanding the provisions of the *Charter*, “The wisdom of history is that the courts must be free to deal directly and decisively with any contempt against its process. So well established is this principle that I would not depart from it.”⁵⁰

In one small concession to the defence (which did not alter the trial judge’s final ruling), the Court of Appeal found that “it might have been better if the witness had been

⁴⁸ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

⁴⁹ John Fox, *The History of Contempt of Court* (London: Professional Books, 1972); Ian Cram, ed., *Borrie and Lowe: The Law of Contempt*, 4th Edition (London: LexisNexis Butterworths, 2010); *Poje v. Attorney General of British Columbia*, [1953] 1 S.C.R. 516; *Tilco Plastics Ltd. v. Skurjat*, [1967] 1 C.C.C. 131 at 147 (Ont. H.C.); *B.C.G.E.U. v. A.G. of British Columbia*, [1988] 2 S.C.R. 214; *R. v. U.F.A.W.U.*(1967), [1968] 2 C.C.C. 257 at 271 ff. (B.C.C.A.).

⁵⁰ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

allowed to say whatever he knew about that question,” after Bouck had refused to allow defendant Robert Maher to question a Crown witness on whether the Kennedy River Bridge was a “public place” (a question that had legal ramifications in terms of the public and therefore criminal nature of the contempt).⁵¹ Similarly, the appeal court conceded that “the trial judge was perhaps not as helpful as a judge on a shorter trial might have been” when several unrepresented Defendants had inquired about the lack of availability of the defence of necessity.⁵² Still, the appeal court couched their rulings in terms that justified Bouck’s decisions and prevented the array of procedural irregularities from reversing the outcome of the trial, strenuously avoiding a finding of a reasonable apprehension of bias against the accused. “The trial judge was attempting to conduct the trial under difficult circumstances and he cannot be expected to stop the proceedings to answer irrelevant questions.”⁵³ The Court of Appeal was unwilling to entertain any infringement on the authority of the judiciary, quoting favourably from a 1970 legal text that stridently defended the court’s “inherent jurisdiction” as a core element of the rule of law. The authority of superior courts was an “untouchable core jurisdiction (except by constitutional amendment).”⁵⁴

This line of reasoning on the “inherent jurisdiction” of the courts to decide on matters of contempt was sustained by the Supreme Court of Canada in a narrow 5-4 ruling on an appeal of the *Simpson* case. Canada’s highest court agreed to hear the appeal of only one of the Clayoquot defendants (out of 31 who applied), teenager Jonathan Pulker, who claimed his case should have been tried in youth court, rather than the BC

⁵¹ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

⁵² *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

⁵³ *MacMillan Bloedel v. Simpson*, 1994 BCCA 187.

⁵⁴ See *McEvoy v. A.G. of New Brunswick*, [1983] 1 S.C.R. 704; *Valente v. R.*, [1985] 2 S.C.R. 673; and *Hickman v. MacKeigan*, [1989] 2 S.C.R. 796

Supreme Court.⁵⁵ On the question of whether Parliament possessed the jurisdiction to transfer exclusive jurisdiction over contempt proceedings involving youth from superior courts to youth courts, pursuant to section 47(2) of the *Young Offenders Act* RSC 1985 cY-1, the majority of Supreme Court judges upheld the inherent jurisdiction of the judiciary in contempt proceedings. Removing the jurisdiction of the superior courts “would offend our Constitution,” Chief Justice Lamer declared, expressing the majority view.⁵⁶

A year later, the Supreme Court of Canada considered another appeal arising from the Clayoquot protests, dismissing an application from Greenpeace Canada that challenged the power of the courts to grant injunctions against unnamed members of the public engaged in protests that interfered with private rights. The question rested on whether court orders naming “John” and “Janes Does” were legally valid, or whether the private party initiating the action should be required to adjoin each defendant in the statement of claim. Justice Beverley McLachlan wrote the opinion for the unanimous decision of the court, commenting on the balancing of rights at the heart of judicial reasoning in response to protests:

In a society that prizes both the right to express dissent and the maintenance of private rights, a way to reconcile both interests must be found. One of the ways this can be done is through court orders like the one at issue in this case. The task of the courts is to find a way to protect the legitimate exercise of lawful private rights while preserving maximum scope for the lawful exercise of the right of expression and protest.⁵⁷

5. 6 Reflections on the Legal War in the Woods

⁵⁵ “Only one Clayoquot appeal to be heard,” *Times Colonist*, 7 October 1994.

⁵⁶ *MacMillan Bloedel Ltd v. Simpson*, 1995 4 SCR 725.

⁵⁷ *MacMillan Bloedel Ltd v. Simpson*, 1996 2 SCR 1048.

While the outcome of the Clayoquot trials was widely interpreted as a defeat for the protesters and confirmation of the close relationship between the government, the logging company, and the courts, the social movement mobilization at Clayoquot Sound in 1993 provided impetus for changes in the management of Crown forest lands on Vancouver Island and across British Columbia. Pressure on MacMillan Bloedel's customers in international markets, particularly the lucrative European market, also helped contribute toward improvements in forest practices and protection of old-growth rainforest.⁵⁸ In November 1993, fresh on the heels of the Clayoquot trials and convictions, the Government of British Columbia announced the formation of a Scientific Panel on Clayoquot Sound, to provide advice on world-leading practices in environmentally sustainable forestry. The government also released a draft "Forest Practices Code Discussion Paper" and "Forest Practices Code Rules," inviting comment from the public and stakeholders. The government incorporated this feedback into the Forest Practices Code of British Columbia Act, which was introduced in the Legislative Assembly in the spring of 1994 and adopted that June, prescribing forest practices on logging companies for the first time in the province's history, including rules relating to the protection of fish-bearing streams and other sensitive ecological areas. The government also initiated widespread consultation with the public and various stakeholders on the appropriate uses of Crown forest land, building on the earlier CORE process and culminating in adoption of the Vancouver Island Land Use Plan in 2000, which set aside substantial swaths of forest land for conservation purposes and designated "special management zones" where higher standards of forest management would be applied to safeguard biological

⁵⁸ See W.T. Stanbury and Ilan B. Vertinsky, "The Challenge to Canadian Forest Products in Europe: Managing a Complex Environmental Issues," Paper prepared for Canada-British Columbia Partnership Agreement on Forest Resource Development, March 1995 < <http://www.cfs.nrcan.gc.ca/pubwarehouse/pdfs/4070.pdf> > (viewed 2 May 2016).

diversity.⁵⁹ Areas of long-standing concern to environmentalists, including the Carmanah and Walbran Valleys, were granted protected status.⁶⁰ As a government minister later noted, prior to the CORE process, “the forest industry was basically the only tenant of the land. We’ve established that the land, that is, land use, is a community process.”⁶¹

Within Clayoquot Sound itself, the Nuu-chah-nulth First Nations secured an ongoing and central role in the management of the area’s forest resources. The BC government announced shortly after the Clayoquot trials that it was entering into treaty talks with the Nuu-chah-nulth, leading to an Interim Measures Agreement that transferred tenure over Crown forest lands in the sound from MacMillan Bloedel (and its successor, Weyerhaeuser Ltd.) to a new company owned by the First Nations (initially as a joint venture with MacMillan Bloedel, and later wholly First Nation owned). Iisaak Forest Resources, meaning “respect” and guided by the principle of Hishuk-ish ts’awalk, the Nuu-chah-nulth belief of “respecting the limits of what is extracted and the interconnectedness of all things,” entered into a Memorandum of Understanding with several environmental organizations in 1999, signalling a new era in the environmental politics of the sound.⁶² However, political scientist Karena Shaw described the tenure reform deal with the Nuu-chah-nulth as “a classic ‘divide-and-conquer’ strategy,” which “reorganized the strategic terrain” for environmentalists, who could no longer “use the treatment of First Nations as a justification for their own activities, and they would

⁵⁹ See Forest Practices Code of British Columbia Act, SBC 1994 Ch. 41; British Columbia, *Vancouver Island Land Use Plan*, 2000.

⁶⁰ Ronald B. Hatch, “The Clayoquot Protests: Taking Stock One Year Later,” in *Clayoquot & Dissent*, ed. Ronald B. Hatch, 199-208 (Vancouver: Ronsdale, 1995), 204-205.

⁶¹ William K. Carroll and R.S. Ratner, “The NDP Regime in British Columbia: A Post Mortem,” in *Challenges and Perils: Social Democracy in Neoliberal Times*, ed. Carroll and Ratner (Halifax: Fernwood, 2005), 111.

⁶² Iisaak Forest Resources, *Sustainable Forest Management Plan* (2011) < www.iisaak.com > viewed 27 April 2016; Karena Shaw, “Encountering Clayoquot, Reading the Political,” in *A Political Space: Reading the Global through Clayoquot Sound*, ed. Warren Magnusson and Karena Shaw (Montreal and Kingston: McGill-Queen’s University Press, 2002), 54-57.

potentially have to confront First Nations if the latter chose to approve logging plans in areas the protesters sought to protect.”⁶³ By entering into the deal with the First Nations, and appointing the “Scientific Panel on Clayoquot Sound” to advise on world-leading practices in environmentally sustainable forestry, the government had “sought to stitch together the now yawning gap in [its] political authority.”⁶⁴

The Clayoquot trials also provoked calls for legal reform, including suggestions that the ambit of judicial discretion in environmental cases be narrowed or removed. “Surely it is time to take this power to make temporary legislation away from judges in cases of public dispute,” declared Clayoquot defendant Maurice Gibbons in a volume of essays published shortly after the conclusion of the trials.⁶⁵ This advocacy mirrored moves in the United States, where as Melinda Benson has demonstrated, ostensibly neutral legal procedures are often deployed to the benefit of corporate license holders and to the detriment of ecological interests.⁶⁶ Amir Attaran has suggested that administrative law, and specifically a writ of *mandamus* against the Crown, would provide an effective “third strategy” to respond to civil disobedience and “keep the peace” in the forests, avoiding

⁶³ Shaw, “Encountering Clayoquot,” 42.

⁶⁴ Shaw, “Encountering Clayoquot,” 43. See also Maryjka Mychajlowycz, *Overview of Logging in Clayoquot Sound: 2000-2009* (Tofino, BC: Friends of Clayoquot Sound, 2009).

⁶⁵ Maurice Gibbons, “The Clayoquot Papers,” in *Clayoquot & Dissent*, ed. Ronald B. Hatch (Vancouver: Ronsdale, 1995), 98. See also Debra J. Salazar and Donald K. Alper. “Politics, Policy, and the War in the Woods,” in *Sustaining the Forests of the Pacific Coast: Forging Truces in the War in the Woods*, ed. Debra J. Salazar and Donald K. Alper (Vancouver: UBC Press, 2001), 3-21; Lorna Stefanick, “Baby Stumpy and the War in the Woods: Competing Frames of British Columbia Forests.” *BC Studies*, 130 (2001): 41-68; Michaela Killoran Mann, “‘Clearcut’ Conflict: Clayoquot Sound Campaign and the Moral Imagination,” MA thesis, Université Saint Paul University, 2013.

⁶⁶ Melinda Harm Benson, “Rules of Engagement: The Spatiality of Judicial Review,” in *The Expanding Spaces of Law: A Timely Legal Geography*, ed. Irus Braverman, Nicholas Blomley, and David Delaney (Stanford, CA: Stanford University Press, 2014): 215-238.

problems associated with Criminal Code charges or civil injunctions and contempt proceedings.⁶⁷

This strategy was supported by BC Supreme Court Justice Mark McEwen in the 2000 environmental case of *Slocan Forest Products Ltd. v. John Doe*, where the judge found that the provincial government's hands-off policies toward criminal prosecutions in response to environmental road blockades "manifestly fail to appreciate the proper function and limitations of this court's civil processes," raising the spectre of a writ of *mandamus* against the Crown, which provoked the ire of Crown counsel.⁶⁸ However, in granting the injunction to the logging company, Justice McEwen discussed the gulf between legitimate legal rights invoked by corporate license holders to natural resources and "rights" alleged by social movement actors, which had no standing in law and were therefore properly pursued in the political rather than judicial arena:

The alleged right is, of course, found in the various permits Slocan Forest Products holds, apparently authorizing the activities it is attempting to carry out at Trozzo Creek. As I have said, those who have impeded Slocan have offered no arguable legal right to do what they do. They have set up a competing 'right' to clean water, but do not suggest that this right has any legislated or common law status as against the clearly defined rights of Slocan Forest Products. Whether this is as it should be is not a legal question, but a question of social policy. Any change would be the province of legislators, not judges.⁶⁹

To date, proposals for reform have not been implemented. While some of the ecological issues that gave rise to the Clayoquot Sound protests were resolved in later years, the larger structural question of whether injunctions and contempt proceedings constitute appropriate responses to public protest over environmental issues remains unresolved. There has been no equivalent reform in the field of environmental policy to

⁶⁷ Amir Attaran, "Mandamus in the Enforcement of the Criminal Law: Ending the Anti-Protest Injunction Habit—Issues Arising from MacMillan Bloedel v. Simpson," *UBC Law Review*, 33, no. 1 (1999): 181-197.

⁶⁸ *Slocan Forest Products Ltd. v. John Doe*, 2000 BCSC 150.

⁶⁹ *Slocan Forest Products Ltd. v. John Doe*, 2000 BCSC 150.

match the Labour Code reforms of the 1970s (which substantially reduced the jurisdiction of the courts to issue injunctions and initiate contempt proceedings in labour disputes) or the Bubble Law of the 1990s (which provided a permanent “legislative injunction” that removed the requirement for judicial intervention against anti-abortion protests). While controversial, both of these legislative interventions in response to protest appear to have effectively addressed crises of legal legitimacy that arose in response to injunctions and contempt proceedings against striking workers and anti-abortion picketers. In the face of ongoing legal ambiguity in the field of environmental policy and environmental protest, it appears certain that civil disobedience, judicial interventions, injunctions, arrests, contempt proceedings, and criminal convictions will endure into the future—with a corresponding questioning of law’s legitimacy by environmentally-conscious citizens who find themselves on the receiving end of law’s coercive powers, for asserting customary claims to natural resources in the face of competing private property claims.

Conflict over natural resources, including forest resources, continues to extend into the legal arena. This reflects ongoing controversy over protection of biological diversity in areas that lack legislated protection: in 2003 and again in 2015, tensions flared over stands of old-growth rainforest in Vancouver Island’s central Walbran Valley, which were left unprotected when the Carmanah-Walbran Provincial Park was created in the 1990s and designated a “special management zone” in the Vancouver Island Land Use Plan (2000), while remaining subject to corporate control in Tree Farm License 46. A grandmother named Betty Krawczyk was at the centre of several years of litigation for her role in a road blockade along with other protesters in the Walbran, “attempting to get the law enforcement authorities to arrest them for a crime or crimes pursuant to the provisions of the Criminal Code of Canada,” Supreme Court Justice Bruce Harvey found.

“A public trial, perhaps a trial by judge and jury, would then serve as the platform to enable them to proclaim their grievances,” which the judge found amounted to criminal contempt of court in convicting Krawczyk.⁷⁰ The BC Court of Appeal upheld the conviction, with Justice Brenda Brown stating in 2007 that:

Everyone who breaches a court order faces contempt proceedings, environmental protestor or otherwise. As our courts have stated repeatedly, those who take issue with an order must take appropriate steps to challenge the order, whether by applying to set it aside, or by appeal. One cannot breach now, challenge later. To do so constitutes an impermissible collateral attack...

There are many in our society who believe passionately that the government response to various issues, be they healthcare, homelessness, or poverty, is wrong. If those with such passionate beliefs were to break court orders to enforce what they believed to be the correct response, our democratic society would fail.⁷¹

The judge’s comments in the case of *R. v. Krawczyk* (2007), like the approach of Supreme Court and Appeal Court judges in the trials and appeals of more than 800 Clayoquot Sound defendants, suggested that environmentalists’ disregard for the courts’ authority posed a fundamental threat to the rule of law, necessitating findings of criminal liability. While the environmentalists asserted ecological claims to Crown forest lands, challenging the harvesting rights of companies that held licenses to those lands, the injunctions and the decision of the Crown to assume responsibility for the conduct of the contempt proceedings shifted the issue from one of environmental policy to one of public order and the rule of law. Contested conceptions of property—in this case, contested claims to public forest lands asserted by environmentalists and logging companies—and contested conceptions of the appropriate use and organization of space—were at the root of the protests and legal struggles that erupted in the Walbran Valley, Clayoquot Sound,

⁷⁰ *Hayes Forest Services Ltd. v. Forest Action Network et al.*, 2003 BCSC 1444.

⁷¹ *R. v. Krawczyk*, 2007 BCSC 2011. See also *Hayes Forest Services Ltd. v. Krawczyk*, 2006 BCCA 156.

and other wild and contested corners of the province in recent decades.⁷² As we saw in other case studies in this dissertation, this clash of property claims and the resulting legal interventions provoked crises of legal legitimacy, turning otherwise law-abiding citizens into law-breakers in a spectacular failure of public policy, while exposing close economic relationships between the provincial government, judges, and logging companies.

However, as the chapters that follow demonstrate, the willingness of the BC judiciary to intervene forcefully and unilaterally on behalf of private property interests in other social contexts appears to be mellowing, with a growing legal recognition of customary and constitutional claims to property. This suggests a possible shift in the social relations of adjudication and the pattern of property, protest, and the law in British Columbia.

⁷² For a discussion of “environmental property rights,” see Christopher P. Rodgers, “Agenda 2000, Land Use, and the Environment: Towards a Theory of ‘Environmental’ Property Rights?,” in *Law and Geography*, ed. Jane Holder and Carolyn Harrison: 239-258 (New York: Oxford, 2003).

Chapter 6.

Standoffs, Roadblocks, and Breakthroughs for Indigenous Property Claims

Indigenous law is perhaps the most vital and evolving area of British Columbia law today. In the courts and on the ground, indigenous people and nations have asserted customary and constitutional claims to property, challenging title and licenses granted by settler governments and legal institutions and creating a more contingent and liminal legal space. In landmark decisions in *Calder* (1973), *Guerin* (1984), *Sparrow* (1990), *Delgamuukw* (1997), and *Tsilhqot'in* (2014), the courts have recognized a widening ambit for indigenous rights, buttressed since the 1980s by interpretations of s. 35 of the Constitution. On the ground, indigenous people have physically asserted these rights, sometimes through direct action to obstruct corporations from exercising conflicting rights to land and resources. In this chapter, I examine several case studies of indigenous assertions of customary rights in the face of competing private property claims—at Lyell Island in Haida Gwaii, Meares Island in Clayoquot Sound, Gustafsen Lake in the BC

interior, and Grace Islet in the Salish Sea—examples where indigenous people joined forces with social movements and non-indigenous allies to advance customary property claims. Building on the pattern in previous chapters, these case studies reveal deep crises of law’s legitimacy and contested social relations of adjudication—striking at the root of the Crown’s authority to make and enforce law. In this new reality of increasingly robust and successful assertions of indigenous customary law and property rights, we are witnessing a remapping of the province’s legal geography and power relations.

6.1 Conceptualizing Indigenous Challenges to Settler Property Rights

This chapter examines indigenous assertions of customary and constitutional rights through direct action, exploring how indigenous customary laws and practices have clashed with property claims of private holders of licenses and titles granted by the settler state, and how these clashes have been manifested on the land and in legal arenas. I argue in this chapter that we are witnessing a widening ambit for recognition of indigenous customary rights to property within settler legal systems, and that this emerging jurisprudence has created a more contingent and increasingly liminal legal space, where property claims are increasingly concurrent and shared rather than exclusive—a fundamental challenge to how fee simple, *profit-à-prendre*, and other forms of title or interests in property have been conceived by the settler society. As a result, British Columbia is in the midst of a new, untested period in terms of how rights, uses, and access to land and resources are negotiated, contested, and exercised.

To understand indigenous customary law and its implications on property and other relations in present-day BC and Canada, we can look to a number of recent works, including Sarah Morales’s doctoral research on the Hul’qumi’num legal tradition, which

aimed “to transform the Canadian legal system in the long term by advocating for true legal pluralism—one that will see Indigenous law, in particular Hul’qumi’num law, as an integral and important part of the total legal framework of the Canadian State.”¹

Hul’qumi’num and other indigenous groups “are seeking a vibrant pluralism that will actively seek out a viable partnership with the Canadian legal system,” Morales writes, suggesting this process should not be difficult to imagine, “given that the common law itself is the end product of a long historical process which saw parallel systems of law developing, often initially in conflict and rivalry.”² Morales’s work builds on the approach in John Borrows’s *Canada’s Indigenous Constitution* and studies of the origins, evolution, and application of indigenous law in diverse communities and nations, including Taiaiake Alfred’s *Peace, Power, Righteousness*, Monet and Skanu’u’s *Colonialism on Trial*, and Alan Hanna’s work on Tsilhqot’in legal traditions.³ Borrows succinctly describes the process whereby indigenous laws can be incorporated into Canadian law:

the courts have created an opportunity to receive these laws into Canadian law by analogy and through sui generis principles. Since First Nations possess the powerful ability to articulate their laws, it is time that these principles began to influence the further development of law in Canada. When First Nations laws are received with greater force in Canadian law, both systems of law will be strengthened concurrently.⁴

¹ Sarah Morales, “Snuw’uyulh: Fostering an Understanding of the Hul’qumi’num Legal Tradition,” (Ph.D. diss., University of Victoria, 2014), 9.

² Morales, “Snuw’uyulh,” 9.

³ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mill, Ont.: Oxford University Press, 1999); Don Monet and Skanu’u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet’suwet’en Sovereignty Case* (Gabriola Island, BC: New Society, 1992); Alan Hanna, “Making the Round: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective,” *Ottawa Law Review*, 45, no. 3 (2015): 365-402; Gordon Christie, “Indigeneity and Sovereignty in Canada’s Far North: The Arctic and Inuit Sovereignty,” *South Atlantic Quarterly*, 110, no. 2 (2011): 329- 346.

⁴ John Borrows, “With or Without You: First Nations Law (in Canada),” *McGill Law Journal*, 41 (1996), 664. See also John Borrows, “Indigenous Legal Traditions,” *Journal of Law and Policy*, 19 (2005), 167-

The Supreme Court of Canada first recognized the *sui generis* nature of indigenous rights in Canadian law in the 1984 *Guerin* decision, moving beyond the court’s tentative recognition of title in *Calder* (1973) to establish that the Crown had a fiduciary duty to consult indigenous people and respect indigenous interests—a decision affirmed in *Sparrow* (1990) that provided a framework for interpreting s. 35(1) of the Constitution and provided a basis for further legal advances by indigenous people within settler legal institutions, including the landmark *Tsilhqot’in* decision in 2014.⁵ However, as Andrea Bowker noted, this has been a slow and uneven process.⁶

Responses of the legal community to indigenous road blockades and occupations—and growing space for assertions of indigenous power—are influenced by the emerging jurisprudence on indigenous rights and title in BC and Canada. As legal historian Hamar Foster has noted: “the contest for control over what some people still call a ‘vast emptiness’ has been renewed,” noting how “today, competing visions of justice remain at the heart of reminiscences about legal inheritances.”⁷ Christopher Roth suggested in the wake of the Supreme Court of Canada’s important ruling in *Delgamuukw v. British Columbia* (1997) that the decision “provides for the elevation of

223; John Borrows and Leonard I. Rotman. “The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?” *Alberta Law Review*, 36, no. 1 (1997), 9-45.

⁵ *Calder v. British Columbia (Attorney General)*, 1973 SCR 313; *R. v. Taylor and Williams*, 1981 34 OR (2d) 360; *Guerin v. The Queen*, 1984 2 SCR 335; *R. v. Sparrow*, 1990 1 SCR 1075; *R. v. Marshall*, 1990 3 SCR 456; *R. v. Van der Peet*, 1996 2 SCR 507; *Delgamuukw v. British Columbia*, 1997 3 SCR 1010; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44. As the Supreme Court of Canada noted in *Sparrow* (1990), citing favourably from the court’s previous ruling in *Guerin* (1984), “the *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation” to indigenous people. *Guerin* combined with *R. v. Taylor and Williams* (1981) provided a “general guiding principle” for the interpretation of s. 35(1), that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”

⁶ Andrea Bowker, “*Sparrow*’s Promise: Aboriginal Rights in the BC Court of Appeal,” *University of Toronto Law Review*, 53 (Winter 1995), 1-48.

⁷ Hamar Foster, “British Columbia: Legal Institutions in the Far West, from Contact to 1871,” *Manitoba Law Journal*, 23 (1996), 340.

indigenous legal systems, including systems of land tenure and concepts of sovereignty, to the level of constitutional recognition, though it leaves wide latitude for exploring legally what that will mean.”⁸ Roth noted how: “Until relatively recently, there was little opportunity for British Columbia First Nations to exploit this gaping hole in the colonizers’ paperwork, due to restrictions such as a ban on organizing or fundraising for land claims, repealed only in 1951.”⁹ Warren Magnusson elaborated on this evolving political and legal space in a case study of Clayoquot Sound:

proper recognition of indigenous peoples is probably impossible within the framework of the state system, as normally conceived. Not to put too fine a point on it: the United States of America would have to be dissolved if the rights of indigenous peoples were to be given proper effect. ... Unlike most of North America, but like Australia, British Columbia was a place ‘settled’ under the British Crown without cover of treaty (Tennant 1990; Fisher 1992; Barman 1996; Asch 1998). Thus, there can be no pretense that the original inhabitants of the province gave away their land or sold it to the incomers. On any of the familiar principles of property, British Columbia belongs rightfully to the descendants of its original inhabitants. This is, to say the least, an unsettling idea from an incomer’s perspective. It sets conceptions of property, as well as sovereignty, in motion.¹⁰

The Haida at Lyell Island, the Nuu-chah-nulth at Meares Island, the Secwepemc at Ts’peten, and the Coast Salish people at Grace Islet asserted that indigenous law remained operative; that it had not been superseded or rendered obsolete by the imposition of colonial patterns of land use and property and by the colonial legal system and its coercive apparatus. Over time, the courts have come to agree with this viewpoint.

There is a strong spatial aspect to indigenous assertions of rights to land and resources. As legal geographer Nicholas Blomley notes, the “scattered geography of

⁸ Christopher F. Roth, “Without Treaty, without Conquest: Indigenous Sovereignty in Post-Delgamuukw British Columbia,” *Wicazo Sa Review*, 17, no. 2 (Fall 2002), 143.

⁹ Roth, “Without Treaty, without Conquest: Indigenous Sovereignty in Post Delgamuukw British Columbia,” 144.

¹⁰ Warren Magnusson, “Introduction: The Puzzle of Political,” in *A Political Space: Reading the Global through Clayoquot Sound*, ed. Warren Magnusson and Karena Shaw (University of Minnesota Press, 2002), 10.

colonization” in BC imbues First Nations with strategic power, with resource wealth and transportation corridors passing through indigenous communities and territories—often a reflection of a disregard for indigenous interests in the granting of resource licenses or the construction of infrastructure. This colonial built form provides a geographical basis for counter-hegemonic challenges to colonial systems of property and law: with scattered settler population centres connected to each other, and to sources of resource wealth and external markets, by a relatively sparse network of transportation traversing indigenous lands.¹¹ While lands recognized as indigenous by settler law represent a small fraction of lands within the traditional territories of these nations (the objection at the heart of many assertions of indigenous rights), the existing geography of indigenous-controlled lands and resources proximate to indigenous communities provides impetus to the phenomenon of road blockades and other forms of direct action against Crown and private property rights.¹² Hamar Foster highlights the contested and grey legal status of highways and roadways that run through indigenous communities, exposing competing conceptions of the relationship between British Columbia’s land tenure system and Indian Reserve lands, and jurisdictional ambiguity between provincial, federal, and indigenous powers arising from section 91(24) of the Constitution Act 1867, section 35 of the Constitution Act 1982, and emerging case law.¹³ In a recent national study of indigenous protest, Yale

¹¹ Nicholas Blomley, “‘Shut the province down’: First Nations Blockades in British Columbia, 1984-1995.” *BC Studies*, 111 (Autumn 1996), 5-35. See also Steven Point, “Understanding Native Activism,” *BC Studies*, 89 (Spring 1991): 124-129; Nicholas Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Press, 1994); Nicholas Blomley, “Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid,” *Annals of the Association of American Geographers*, 93, no. 1 (March 2003), 121-141.

¹² For the evolution of the Indian reserves in BC, see R. Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2003).

¹³ Hamar Foster, “Roadblocks and Legal History, Part I: Do Forgotten Cases Make Good Law?” *The Advocate*, 54, no. 3 (May 1996): 355-356; and Hamar Foster, “Roadblocks and Legal History, Part II: Aboriginal Title and s. 91(24),” *The Advocate*, 54, no. 4 (July 1996): 531-546.

Belanger and Whitney Lackenbauer suggest that: “Blockades and occupations are instrumental and symbolic, a means to reshape the spatiality of power and authority.”¹⁴

Further insight on indigenous assertions of rights can be gleaned from area-specific studies, such as works by Louise Takeda, Ian Gill, and Elizabeth May on Haida assertions of rights to the forest resources of the archipelago, and comparative studies such as Sarah Whatmore’s work on indigenous challenges to property rights in Australia.¹⁵ We can also look to the testimony of indigenous elders, activists, and leaders, including Haida leader Gujaaw who was interviewed for this dissertation, and Uni’stoten activist Freda Huston, who recently remarked: “My dad used to tell me ‘the strongest power you have is to occupy your land.’”¹⁶

A final theoretical approach that informs this chapter is postcolonial / decolonization theory. Control of space is essentially the colonial project itself. While colonization extends beyond the control of land, property, and physical space, these are its central elements: the appropriation and control of indigenous lands—often through violence or threats of violence—with a view toward the transfer of land from indigenous property (however that may be conceived in diverse forms) to private or public settler property. The process of deploying physical violence to control indigenous space was graphically demonstrated in the early settler history of British Columbia in the form of “gunboat diplomacy”; as Barry Gough, Daniel Clayton, Chris Arnett, and others have

¹⁴ Yale D. Belanger and P. Whitney Lackenbauer, *Blockades Or Breakthroughs?: Aboriginal Peoples Confront the Canadian State* (Montreal and Kingston: McGill-Queen’s University Press, 2015), 16.

¹⁵ Louise Takeda, *Islands’ Spirit Rising: Reclaiming the Forests of Haida Gwaii* (Vancouver: UBC Press, 2015); Ian Gill, *All That We Say Is Ours: Guujaaw and the Reawakening of the Haida Nation* (Toronto: Douglas & McIntyre, 2009); Elizabeth May, *Paradise Won: The Struggle for South Moresby* (Toronto: McClelland & Stewart, 1990); Sarah Whatmore, “De/Re-Territorializing Possession: The Shifting Spaces of Property Rights,” in *Law and Geography*, ed. Jane Holder and Carolyn Harrison: 211-223 (New York: Oxford, 2003).

¹⁶ Remarks by Freda Huston at a public event at the University of Victoria, August 17, 2015.

demonstrated, indigenous villages were levelled by the cannons of British warships to assert the Crown's authority and help secure the transfer of indigenous lands into settler property.¹⁷ Cole Harris has also interrogated this historical process of the appropriation of space, through the more subtle but no less systemic violence of using the power of settler state institutions to remap indigenous territories into the colonial space now called "British Columbia"—a process backed up by violence, actual and implied, involving courts, police, surveyors, priests, and Indian Agents.¹⁸ This process of colonization and appropriation is uneven—and failed to wipe out sources of indigenous sovereignty, governance, law, and control—leaving enduring cultural, social, and material bases for the robust assertions of indigenous rights explored in the case studies that follow.

6.2 Holding the Line at Lyell Island

The first case study in this chapter centres on the standoff of the Haida Nation at Lyell Island in Haida Gwaii in the mid-1980s—an example of the assertion of indigenous property rights and resistance to colonial property relations that attracted national and international media attention at the time, and which had a major impact in shaping the political trajectory of the Haida people, their relations with settler governments, and the management of natural resources on the island archipelago. To logging corporations and the provincial government, the area was the "South Moresby Supply Block"; to members

¹⁷ Barry M. Gough, *Gunboat Frontier: British Maritime Authority and Northwest Coast Indians, 1846-90* (Vancouver: UBC Press, 1984); Daniel Clayton, *Islands of Truth: The Imperial Fashioning of Vancouver Island* (Vancouver: UBC Press, 2000); Chris Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863* (Vancouver: Talonbooks, 1999).

¹⁸ R. Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2003). See also Nicholas Blomley, "Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid," *Annals of the Association of American Geographers*, 93, no. 1 (March 2003), 121-141; Tina Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994).

of the Haida Nation, it was a traditional and ongoing ancestral home that bound together cultural practices, spirituality, ecology, and timber and non-timber economic resources; to environmentalists in BC and beyond, it was the “Galapagos of the North,” a rare and threatened ecological jewel that sustained some of the greatest biodiversity of flora and fauna on the planet. The legal battle lines for Lyell Island and the broader South Moresby wilderness were drawn.¹⁹

Beginning in the 1970s, members of the Haida Nation began to ramp up their claims to the island archipelago that had never been surrendered in treaty. Their claims picked up steam in the context of the *Calder* decision before the Supreme Court of Canada and the growing movement for “red power” and indigenous rights, as well as environmental advocacy campaigns by conservation organizations including the Islands Protection Society, Greenpeace, and the Sierra Club of Western Canada. By the mid-1970s, discussions were underway among the Haida, the provincial and federal governments, and conservation organizations to establish a national park reserve to protect the sensitive ecological area in the southern portion of the archipelago (then known as the “Queen Charlotte Islands”). This included vast South Moresby Island, nearby Lyell Island, and more than 100 surrounding islands, where scientists had identified 39 endemic plant and animal species existing nowhere else on earth.²⁰ In 1981, the Haida unilaterally proclaimed a Tribal Park in the area, unwilling to wait indefinitely for action by the colonial governments; in 1983, they backed up this declaration by submitting a formal land claim to the Government of Canada, demanding that South

¹⁹ See “Queen Charlotte Timber Supply Area” and “South Moresby Supply Block,” n.d. (c. 1985), in Library and Archives Canada (hereafter cited as LAC), Greenpeace Canada fonds (hereafter cited as Greenpeace fonds), R4377, vol. 26, file 26-7 “Forestry campaign to save Old Growth forests, 1981-1985.”

²⁰ “Haida vs. loggers: a polite drama,” *Montreal Gazette*, 27 November 1985; “Haidas vow to keep up struggle against South Moresby logging,” *Ottawa Citizen*, 9 July 1986; “9 Haida will renounce citizenship to protest logging on BC island,” *Montreal Gazette*, 15 July 1986.

Moresby and Lyell be preserved as wilderness to protect ecological and cultural values.²¹

“We drew a line up north of Lyell,” recalled Guujaaw (Gary Edenshaw), a carver and singer who had apprenticed with the famous artist Bill Reid and whose family held trapping rights in the area. Guujaaw was instrumental in the movement to protect the South Moresby wilderness and advance Haida land claims, helping found the Council of the Haida Nation and working with non-indigenous people in the Islands Protection Society and other groups. “It’s easy to draw a line. It’s harder to hold the line.”²²

The BC government, which controlled natural resources on Crown lands according to the division of powers in Canada’s constitution, was led at the time by the conservative Social Credit party of Premier Bill Bennett and refused to recognize the Haida declaration of the Tribal Park and land claim, and instead rigorously upheld a tree farm license issued to the Vancouver-based logging corporation Western Forest Products and its contractor, Frank Beban Logging Ltd., under the provisions of the provincial Forest Act; logging had been underway continuously on Lyell Island since 1975, and a portion had been logged earlier in the 1930s and 1940s. The Frank Beban Company maintained a camp at Powrivco Bay, valued at \$1.5-million camp with amenities including a recreation centre and satellite television.²³ The provincial government’s position, restated many times during the conflict that followed, was that the British North America Act did not provide for indigenous title to land, and that the Queen Charlotte Islands properly belonged to the Crown, with the government free to license access to resources as it saw fit; no negotiations were possible unless the Haida withdrew their land

²¹ “Haida vs. loggers: a polite drama,” *Montreal Gazette*, 27 November 1985.

²² Guujaaw, interviewed by Benjamin Isitt, Vancouver, BC, 25 May 2015. See also “Guujaaw: A man of his people,” *Vancouver Sun*, 16 March 2002; Ian Gill, *All That We Say Is Ours: Guujaaw and the Reawakening of the Haida Nation* (Toronto: Douglas & McIntyre, 2009).

²³ “BC island logging jobs are lost forever, forestry boss says,” *Toronto Star*, 8 July 1987.

claim. However, in a concession to the indigenous and ecological claims to the forest resources, a moratorium was introduced on the issuance of new logging permits pending a decision by the provincial Cabinet on future use of the area.²⁴ There were also emerging proposals for oil and gas development off the archipelago that raised questions over indigenous and Crown rights and title.²⁵

In the autumn of 1985, while the study on the proposed national park was still underway, the BC government lifted the moratorium on new logging permits for Lyell Island, while announcing the formation of a wilderness advisory committee to make recommendations on future uses—demonstrating the phenomenon that political scientist Jeremy Wilson has described as “talk and log”—and prompting the Haida blockade.²⁶ Approval of three new cut blocks covering 87 hectares of Lyell Island reflected the political influence of Western Forest Product and its contractor, the Frank Beban Logging company, which had recently exhausted its approved harvesting sites on Lyell and faced the prospect of laying off 80 workers unless it was granted access to new “fibre.” At the time, unemployment in British Columbia stood at 13 per cent of the labour force, the second highest rate in Canada.²⁷ Faced with further despoliation of lands within their Tribal Park and subject to their land claim, the Haida chose to defy the settler law and take direct action, in the form of a road blockade on Lyell Island to stop Western Forest Products and Frank Beban Logging’s harvesting plans. This followed a failed attempt by the Haida to obtain an injunction to suspend the logging permits.²⁸ The settler law

²⁴ “Loggers to seek injunction against Haida,” *Globe and Mail*, 4 November 1985.

²⁵ “Logging, Oil Drilling Decisions Loom for ‘Canadian Galapagos,’” *Los Angeles Times*, 27 October 1985.

²⁶ See Jeremy Wilson, *Talk and Log: Wilderness Politics in British Columbia* (Vancouver: UBC Press, 1998). See also Wilderness Advisory Committee series, acc. no. 1995-006, 1995-036, Sierra Club Fonds, AR117, University of Victoria Archives.

²⁷ “Haida vs. loggers: a polite drama,” *Montreal Gazette*, 27 November 1985.

²⁸ Guujaaw interview, 25 May 2015.

seemed to be intervening partially, to aid the harvesting rights of Western Forest Products and its contractor, rather than intervening to uphold the rights and title of the Haida Nation. The Haida therefore invoked allegiance to their own laws and took direct action to uphold customary rights to land and resources. “We made a decision that the land was going to be protected,” Guujaaw recalls.²⁹

The Haida launched the road blockade on 30 October 1985, with about two dozen people establishing a camp at Sedgewick Bay on Lyell Island and refusing to allow workers from the Frank Beban camp, located about 10 kilometres away at Powrivco Bay, from accessing the new cut blocks. The blockade included the active participation of Miles Richardson, president of the Council of the Haida Nation, and Dempsey Collinson, chief councillor of the Skidegate Band, demonstrating political support for the grassroots action. As company lawyers began compiling evidence for an injunction application, company president Frank Beban initially struck a conciliatory tone, remaining with his workers at the Powrivco Bay camp: “I don’t want to have a confrontation. They are my friends. We’re not going to cause violence. We won’t log as long as they’re stopping us.”³⁰ However, two days into the blockade, Western Forest Products and Frank Beban Logging Ltd. filed applications for an injunction with the BC Supreme Court in Vancouver, and a week later, Justice Harry McKay granted injunctions barring the Haida from obstructing the logging road or logging operations on Lyell. During the hearing in Vancouver, Haida spokesperson Diane Brown told the judge, “I don’t want my children to inherit stumps,” suggesting that unrestrained exploitation of the land threatened the cultural survival of the Haida as a people. Indicating sympathy for the Haida position,

²⁹ Guujaaw interview, 25 May 2015.

³⁰ “BC Haida block road,” *Globe and Mail*, 31 October 1985.

Justice McKay responded: “Mrs. Brown, in my view, the Haida will always be a strong, proud people as long as they keep producing Haida like you.” However, in his reasons for judgement, Justice McKay said that he had no choice under the law but to grant the injunctions. The judge had earlier denied an application from Miles Richardson for a three-month adjournment, to allow the Haida to obtain and properly instruct legal counsel. “This is a political issue,” Richardson told the judge. “It has no place in your courtroom.”³¹

The dispute heated up in mid-November 1985, after the Haida symbolically permitted the loggers to access the cutblocks in compliance with the injunctions before reestablishing the blockade. On 14 November, the Haida allowed two trucks containing Beban and nine of his employees to pass, after a process server read the text of the court orders aloud to Richardson, in front of television and police cameras, and then attempted to distribute paper copies of the injunctions to the Haida on the road (most of whom refused to take them). When Beban and his employees attempted to return to the worksite later that day, they were blocked, as four elders sat on the road under a make-shift lean-to in the pouring rain, with several dozen Haida supporters lining the road (flown to the island to bolster the numbers at the blockade and camp).³² The New Democratic Party Member of Parliament for Burnaby, an activist lawyer named Svend Robinson, who

³¹ “Leave us more than stumps, Haida tell Vancouver judge Cruickshank,” *Globe and Mail*, 7 November 1985; “BC judge forbids Haida Indians from obstructing island logging,” *Globe and Mail*, 9 November 1985; “Judge orders Haidas to let logging proceed on BC island,” *Ottawa Citizen*, 9 November 1985; “Lumber company seeks injunctions,” *Ottawa Citizen*, 2 November 1985; “Logging blockade dispute delayed as lawyer sought,” *Globe and Mail*, 6 November 1985; “Logging companies to open new road after BC court gives access to island,” *Globe and Mail*, 12 November 1985. The *Globe and Mail* reported that in granting the injunctions, “The decision was the first in recent months to go against natives in their battles over aboriginal rights.” See “BC judge forbids Haida Indians from obstructing island logging,” *Globe and Mail*, 9 November 1985.

³² “Haidas face action in blocking loggers,” *Globe and Mail*, 15 November 1985; “Haidas block loggers despite injunctions,” *Montreal Gazette*, 15 November 1985; “Indians let loggers visit camp,” *Globe and Mail*, 14 November 1985.

served as the party's Justice critic, was among those on the Lyell blockade supporting the Haida position.³³ Beban, for his part, hardened his position, stating: "I have no respect for any lawbreakers no matter who they are and that's what they are now, is common lawbreakers."³⁴

Defiance of the authority of the provincial government and the colonial courts propelled the Haida dispute into the national and international spotlight in the second half of November 1985, resulting in more than 70 arrests. Western Forest Products had returned to court, seeking an enforcement order authorizing the police to act on Justice McKay's orders, but BC Supreme Court Chief Justice Allan McEachern, who heard the application, told company lawyers that no further order was needed, stating that: "Court orders must be obeyed."³⁵ In this context, 26 RCMP officers and several police vehicles were deployed to the remote island, augmenting the small local force based out of Queen Charlotte City, 150 kilometres to the north, as well as two special Haida officers who had been stationed at the Lyell Island protest camp (at the time, the archipelago had a population of 5,000 people, 2,000 of whom were Haida).³⁶ On 16 November, the police enforced Justice McKay's order. The RCMP superintendent for the area told reporters that he had been given a "free hand" by the provincial Attorney General to act as he saw fit.³⁷ When 80-year-old Haida elder Watson Price refused to move off the road, after

³³ "Indians let loggers visit camp," *Globe and Mail*, 14 November 1985.

³⁴ "Haidas form human blockade to prevent logging on BC island," *Ottawa Citizen*, 15 November 1985.

³⁵ "Loggers embroiled in dispute with Haidas to return to work," *Ottawa Citizen*, 16 November 1985. See also "Haidas block loggers despite injunctions," *Montreal Gazette*, 15 November 1985.

³⁶ "RCMP prepare for Haida-loggers showdown," *Ottawa Citizen*, 13 November 1985; "RCMP hopes to avert logging confrontation," *Globe and Mail*, 13 November 1985; "Loggers embroiled in dispute with Haidas to return to work," *Ottawa Citizen*, 16 November 1985; "Haida vs. loggers: a polite drama," *Montreal Gazette*, 27 November 1985.

³⁷ The legal authority behind the RCMP's decision to enforce the court order was discussed by RCMP Superintendent Robert Currie, who told the media from Prince Rupert that he had been given a "free hand" to make decisions by the provincial Attorney-General's Ministry: "I felt it was our responsibility to enforce the court order. As long as they continue to block the road, we will continue to make arrests." Currie said

being informed that he was obstructing Beban's lawful use of property, he was placed under arrest by RCMP Inspector Harry Wallace. Two other Haida elders were arrested that day, 67-year-old Ada Yovanovich and 65-year-old Ethel Jones, who had said earlier, "If they haul us off to jail we'll all go."³⁸ The elders were treated "gently," according to media reports, and were flown by helicopter to Sandspit, where they were fingerprinted, charged with mischief, and released after promising not to interfere with the logging.³⁹

In total, 72 Haida were arrested in the second half of November 1985 for blocking the logging road on Lyell Island in defiance of the court orders, asserting their customary indigenous claim to property and challenging the property interests of Western Forest Products, Frank Beban Logging Ltd., and the Crown. Many of those arrested had their faces painted in a traditional Haida style with charcoal and oil, including 10 young Haida who were arrested on 18 November and described as "political prisoners" by a spokesperson of the Haida protest camp.⁴⁰ Svend Robinson, the Member of Parliament and NDP Justice critic who had returned to Ottawa from Lyell Island, declared in a speech in Parliament that the arrests contravened Canada's Constitution, which recognized aboriginal rights: "If anyone is breaking the law, it's the BC government."⁴¹ (The MP would later be convicted of criminal contempt of court for his role on the

there was ample room at RCMP facilities in Queen Charlotte City or Sandspit to confine the Haida if the need arose, "but it is not our intention to hold anybody." See "Haida preparing for long struggle," *Globe and Mail*, 19 November 1985.

³⁸ "Haidas form human blockade to prevent logging on BC island," *Ottawa Citizen*, 15 November 1985; "10 more Haida Indians arrested while blocking logging on Queen Charlotte Islands," *Ottawa Citizen*, 19 November 1985; "Haida vs. loggers: a polite drama," *Montreal Gazette*, 27 November 1985.

³⁹ "Three Haida elders are arrested in logging protest on BC island," *Montreal Gazette*, 18 November 1985.

⁴⁰ "Haida preparing for long struggle," *Globe and Mail*, 19 November 1985; "10 more Haida Indians arrested while blocking logging on Queen Charlotte Islands," *Ottawa Citizen*, 19 November 1985; "12 more Haida Indians arrested," *Ottawa Citizen*, 21 November 1985; "28 Haida are arrested in BC logging protest," *Globe and Mail*, 26 November 1985; "Haida not criminals, judge tells B.C. court Cruickshank," *Globe and Mail*, 29 November 1985; "Haida ready to resume anti-logging protests," *Montreal Gazette*, 9 January 1986.

⁴¹ "Haida vs. loggers: a polite drama," *Montreal Gazette*, 27 November 1985.

blockade and fined \$750).⁴² The leader of the Opposition in the House of Commons, Liberal John Turner (who had visited South Moresby while on vacation the previous summer) alleged that the Haida's lands were being "despoiled" and called on Conservative Prime Minister Brian Mulroney to act to protect "the priceless natural treasure."⁴³

Seeking to curb the widening civil disobedience movement on Lyell Island, the logging companies filed an application in BC Supreme Court in late November 1985 for a declaration of criminal contempt of court against 16 Haida as well as MP Svend Robinson. The case was heard on 29 November in front of Chief Justice Allan McEachern, at the courthouse in the northern coastal city of Prince Rupert, across Hecate Strait from Lyell Island and Haida Gwaii. During the hearing, the judge refused to grant the Anglican Church of Canada intervenor status, stating that "this is no place for the church," and refused to allow the Anglican Bishop of northern British Columbia, who had travelled to Prince Rupert, to appear as an expert witness to testify to the Haida's spiritual connection to the land. The judge sought to confine deliberations to the narrow technical question of whether the accused had defied the court order and interfered with the lawful right of the logging companies to access the timber.⁴⁴ In his closing remarks on behalf of the Haida, Miles Richardson said that his people knew in their hearts that Lyell belonged to them, despite the BC government's refusal for a hundred years to

⁴² "Angered judge gives suspended sentences to Haida protesters," *Globe and Mail*, 7 December 1985; "MP cited," *Montreal Gazette*, 25 November 1985; "Haida not criminals, judge tells B.C. court Cruickshank," *Globe and Mail*, 29 November 1985. Robinson told the media that the decision to stand with the Haida on Lyell Island wasn't an easy one, being a lawyer and the NDP's justice critic, but that "there is a point where you have to stand up for what you believe." See "RCMP hopes to avert logging confrontation," *Globe and Mail*, 13 November 1985.

⁴³ "10 more Haida Indians arrested while blocking logging on Queen Charlotte Islands," *Ottawa Citizen*, 19 November 1985.

⁴⁴ "10 Haida convicted in logging case," *Globe and Mail*, 30 November 1985.

acknowledge or negotiate their land claims, and that they were obliged for religious reasons to block the logging and protect the land that sustained their livelihood and culture. Highlighting the clash of legal norms at the root of the blockade and legal proceedings, one of the defendants, Diane Brown, explained her reasons for blocking the road on 20 November: “I did it to protect the home of my ancestors. I did it because I felt it was right.”⁴⁵ McEachern found 10 of the accused guilty of criminal contempt of court, while he acquitted six others, stating that he was not convinced beyond a reasonable doubt that they knew they were defying a court order.⁴⁶

This clash of legal authorities was apparent a week later when McEachern and the convicted Haida returned to the Prince Rupert courthouse for the sentencing hearing. The judge asked the defendants whether they would promise not to return to Lyell Island for six months. One man, Willard Wilson, agreed, while insisting “we’re not doing anything wrong.” Wilson was released without sentence. The other nine Haida refused the judge’s request for promises to stay away from the island. “While I respect your courts and your laws, something within me is way more powerful,” said Diane Brown, a mother of two. “The need in my soul to protect my land happens to be stronger than your laws.” Brown and the other eight Haida told the judge they were prepared to do jail time to maintain this allegiance to their customary laws, which obliged them to protect their land and culture. McEachern sentenced the nine Haida to five months in prison, but in a surprise move, promptly suspended their sentences, allowing them to avoid jail time.⁴⁷ “He

⁴⁵ “10 Haida convicted in logging case,” *Globe and Mail*, 30 November 1985; “BC misled over timber, official says,” *Globe and Mail*, 3 December 1985.

⁴⁶ “10 Haida convicted in logging case,” *Globe and Mail*, 30 November 1985; “BC misled over timber, official says,” *Globe and Mail*, 3 December 1985.

⁴⁷ “Angered judge gives suspended sentences to Haida protesters,” *Globe and Mail*, 7 December 1985; “MP fined and 9 haidas get suspended sentences for contempt of court,” *Ottawa Citizen*, 7 December 1985.

backed down,” Guujaaw suggested in an interview decades later.⁴⁸ This sentencing decision probably reflected a practical consideration, which a *Globe and Mail* reporter had articulated prior to the hearing: “There is little doubt the 10 who have been convicted of criminal contempt of court will be considered martyrs in the native community if they go to prison.”⁴⁹

Gujaaw was among those convicted and sentenced for contempt by Justice McEachern, and reflected on the court proceedings:

At the time, our people had very little influence over anything. That’s what it took to shake it up and change things. It was our fight. ... We didn’t use lawyers. We represented ourselves. We certainly weren’t trying to beat it on technicalities or deny that we did it. We went into court to explain why we felt we had to do it.⁵⁰

Gujaaw described Justice McKay, who issued the original injunction, as “a pretty decent man,” while he described McEachern, the chief justice who handed down the convictions and sentences, as “the old tyrant.”⁵¹ In the wake of the contempt proceedings, which had been initiated by the logging companies through the civil process, the outstanding criminal charges against the Haida arrested at Lyell Island were quietly disposed of. Mischief charges against 61 people were abandoned by Crown prosecutors on the eve of a provincial court hearing at Queen Charlotte City in late January 1986; charges against the 11 remaining accused, including the three elders originally charged with mischief, were upgraded to the more serious offence of criminal contempt of court, but these charges were also dropped after the accused elected for a trial by judge and jury, and a

⁴⁸ Guujaaw interview, 25 May 2015.

⁴⁹ “10 Haida ponder jail in logging protest,” *Globe and Mail*, 2 December 1985.

⁵⁰ “Lyell Island: 25 Years Later,” *Vancouver Sun*, 17 November 2010.

⁵¹ Guujaaw interview, 25 May 2015.

judge declared at a preliminary hearing in May that he felt there was “little to be gained” by proceeding with the charges.⁵²

The Haida struggle at Lyell Island was described in media reports at the time as “an environmental cause celebre that has attracted international attention,” ramping up pressure on the governments of BC and Canada to help find a solution.⁵³ The Haida received diverse expressions of support, reflecting networks established in preceding years through the Islands Protection Society and the South Moresby campaign, including internationally renowned French explorer and conservationist Jacques Cousteau; several Members of Parliament; environmental organizations including Greenpeace, the Sierra Club, the Western Canada Wilderness Committee, and the labour-based Society Promoting Environmental Conservation (SPEC); the Anglican Church of Canada, which donated \$7,000 toward legal and logical expenses; and American folk singer Pete Seeger and Canadian rocker Bruce Cockburn, who played benefit concerts in Vancouver to aid the Haida cause at Lyell.⁵⁴ George Erasmus, chief of the Assembly of First Nations, declared that a national alliance of indigenous and non-indigenous people was prepared to stand with the Haida on Lyell. At the Provincial Legislature in Victoria, about 100 people staged a solidarity rally during the heat of the blockade in November 1985.⁵⁵

⁵² “Crown stays last of charges against Haida,” *Globe and Mail*, 30 May 1986; “Charges dropped against 61 Haida,” *Ottawa Citizen*, 30 January 1986; “BC minister a victim of battle for Lyell Island,” *Toronto Star*, 21 January 1986; “Haida elect trial by judge, jury,” *Ottawa Citizen*, 27 February 1986; “Haida ready to resume anti-logging protests,” *Montreal Gazette*, 9 January 1986.

⁵³ “Judge orders Haidas to let logging proceed on BC island,” *Ottawa Citizen*, 9 November 1985.

⁵⁴ LAC, Greenpeace fonds, R4377, volume 25, file 25-20 “Forests - South Moresby Wilderness, 1983-1984” and volume 26, file 26-1 “Forests - South Moresby Wilderness, 1985-1987”; “Haida Nation pleads for money as blockade expenses increase,” *Globe and Mail*, 28 November 1985; “Cockburn concert to aid the Haidas,” *Vancouver Sun*, 3 January 1986; “Cockburn's benefit concerts raise \$35,000 for Haidas,” *Ottawa Citizen*, 24 February 1986; “Haidas vow to keep up struggle against South Moresby logging,” *Ottawa Citizen*, 9 July 1986; “Cockburn helps Haidas,” *Ubysey* (Vancouver), 25 February 1986.

⁵⁵ “Haida promised aid in Lyell Island stand,” *Globe and Mail*, 22 November 1985; “Haidas face action in blocking loggers,” *Globe and Mail*, 15 November 1985. See also “Indians in BC risk jail terms to force settlement of their land claims,” *Ottawa Citizen*, 21 November 1985.

These expressions of support helped focus public attention on the Haida struggle, the unresolved indigenous land question in BC, and controversy over management of natural resources, intensifying political pressure on the governments of BC and Canada to act. The BC government faced particular embarrassment when it came to light that members of the provincial Cabinet held shares in Western Forest Products and its subsidiaries, including Forest Minister Tom Waterland, who was forced to resign from Cabinet after ten years in the position.⁵⁶ In contrast to the conservative Social Credit government's strident refusal to recognize or negotiate Aboriginal rights, the opposition provincial New Democratic Party said it was open to negotiating land claims, a policy the Federal government in Ottawa had maintained since it received the Haida claim in 1983.⁵⁷ Economic pressure also influenced the BC government's position, as a coalition of indigenous groups threatened to boycott the Expo '86 world fair scheduled for Vancouver the following summer, and the influential Business Council of BC said its members were "tired of always being the bad guys."⁵⁸

In the face of this pressure from an array of social sectors, the BC government reluctantly entered into negotiations with Canada and the Council of the Haida Nation over the future of Lyell Island and the South Moresby wilderness. In the midst of the

⁵⁶ Guujaaw interview, 25 May 2015; "BC minister a victim of battle for Lyell Island," *Toronto Star*, 21 January 1986; "BC axes new permits for Lyell Island logging," *Globe and Mail*, 8 February 1986; "BC Opposition Leader sued by minister," *Financial Post* (Toronto), 8 February 1986. Forests Minister Thomas Waterland resigned from the Cabinet in January 1986, after it was revealed that he held a \$20,000 investment in a pulp mill wholly owned by Western Forest Products that relied on Lyell Island timber, through an entity called the Western Pulp Partnership. Energy Minister Stephen Roger, who sat on the BC Cabinet environment and land use committee, held a \$100,000 investment in the mill, which he sold in the heat of the controversy, retaining his ministerial portfolio.

⁵⁷ "Loggers seek injunction against Haida," *Globe and Mail*, 4 November 1985; "Haida vs. loggers: a polite drama," *Montreal Gazette*, 27 November 1985; "Haidas face action in blocking loggers," *Globe and Mail*, 15 November 1985. BC's Social Credit Attorney General Brian Smith reiterated the provincial government's refusal to recognize or negotiate Aboriginal land claims shortly after the Haida had initiated the blockade on Lyell Island. Later in November 1985, BC Environment Minister Tom Waterland articulated the same policy: "The British North America Act in our opinion does not provide native Indians with title to land other than that which they have as reserves."

⁵⁸ "Temporary truce calms Haida-BC dispute," *Toronto Star*, 19 December 1985.

blockade and arrests in November 1985, Prime Minister Mulroney publicly offered to mediate a resolution (and conferred privately with BC Premier Bill Bennett at a first ministers' conference in Halifax), resulting in an olive branch from BC Attorney General Brian Smith, who offered to meet with Miles Richardson on behalf of the Haida on the condition that the civil disobedience campaign be called off and that the talks not be interpreted as negotiations over aboriginal title. According to one member of Bennett's cabinet, who spoke with this author on the condition of anonymity, Bennett called for a Cabinet vote on whether or not to negotiate with the Haida. Two-thirds of his ministers voted against, but the Premier then declared emphatically, "The ayes have it," and proceeded to initiate negotiations."⁵⁹ RCMP Superintendent Bob Currie, responsible for the policing operation at Lyell, said he welcomed government intervention and negotiations "as a way out of the situation we find ourselves in."⁶⁰ Smith and Richardson met in mid-December 1985, joined by federal Indian Affairs Minister David Crombie, resulting in what the media described as a "temporary truce" (facilitated by a Christmas hiatus of logging operations on Lyell).⁶¹ Early in 1986, the provincial government agreed in principle to the creation of a new national park reserve, while adhering to a hard stance that logging continue on Lyell for at least a decade and that the provincial share of compensation to logging companies for lost harvesting rights be minimal.

During the South Moresby negotiations, the logging operations that had provoked the blockade and arrests were allowed to run their course—reflecting the legal primacy of private property rights over indigenous rights for the time being. Frank Beban's logging crews returned to Lyell Island in January 1986 after a five-week Christmas break. They

⁵⁹ Anonymous informant, interview with author, Victoria, BC, 1 January 2018.

⁶⁰ "BC sets terms for meeting Haida," *Ottawa Citizen*, 26 November 1985; "Haida Nation pleads for money as blockade expenses increase," *Globe and Mail*, 28 November 1985.

⁶¹ "Temporary truce calms Haida-BC dispute," *Toronto Star*, 19 December 1985.

were briefly prevented from accessing the cut blocks by five Haida, but the Haida cleared the road at the request of police. The heat of the dispute appears to have cooled, perhaps in light of progress at the negotiating table, perhaps as a result of exhaustion. Beban returned to a more conciliatory tone: "I'm still trying to run this thing as if things are normal. The public have become aware of their [the Haida] complaint that their land claim has not been addressed. I don't know how much further they have to go to bring it to the government's attention."⁶² In February 1986, as logging in the three cut blocks approved the previous autumn neared completion, the BC government announced that no new permits would be issued until the wilderness advisory committee submitted its recommendations. However, when the committee recommended that logging continue, the Ministry of Forests approved a fresh permit for a 160-hectare cut block in July 1986, prompting Miles Richardson and eight other Haida to write to the Prime Minister renouncing their Canadian citizenship.⁶³ But the tide was running out on the industry. Beban reduced the size of his workforce from 80 employees to fewer than a dozen employees, as the company faced charges under the federal Fisheries Act for "the harmful destruction and alteration" of spawning beds in salmon-bearing Landrick Creek on Lyell Island.⁶⁴ Countering his earlier claim that a halt to logging would have

⁶² "Haida set to renew battle over logging in wilderness area," *Toronto Star*, 20 January 1986; "Haida reopen Lyell Island camp," *Globe and Mail*, 9 January 1986.

⁶³ "Logging going ahead on Queen Charlottes with BC's approval," *Globe and Mail*, 10 July 1986; "Logging resuming on BC's Lyell Island," *Toronto Star*, 10 July 1986; "Indians to drop citizenship in protest against logging," *Globe and Mail*, 15 July 1986; "9 Haida will renounce citizenship to protest logging on BC island," *Montreal Gazette*, 15 July 1986; "Haidas vow to keep up struggle against South Moresby logging," *Ottawa Citizen*, 9 July 1986; "BC axes new permits for Lyell Island logging," *Globe and Mail*, 8 February 1986. "Logging OK," *Montreal Gazette*, 6 March 1986; "Moresby logging is called vandalism," *Globe and Mail*, 11 March 1986. See also Wilderness Advisory Committee series, acc. no. 1995-006, 1995-036, Sierra Club Fonds, AR117, University of Victoria Archives.

⁶⁴ "Logger slams idea of Lyell Island ban," *Vancouver Sun*, 21 February 1987; "Lyell Island logger Frank Beban dies of heart attack," *Vancouver Sun*, 27 July 1987; "Charges dropped against logging firms," *Globe and Mail*, 13 August 1986; "Creek clean-up for prince cancelled," *Vancouver Sun*, 12 June 1987; "Stall on

devastating consequences for his workers, Beban admitted that three-quarters of the displaced loggers had found other work.⁶⁵ The BC Ministry of Forests ceased issuing new permits in the spring of 1987 and in June of that year, the last logs from Lyell were loaded into a boom for transport to mills down the coast.⁶⁶

In July 1987, twenty months after the Haida had initiated the blockade at Lyell, the federal and provincial governments entered into a memorandum of understanding imposing a permanent moratorium on further logging and agreeing to develop a management plan in concert with the Haida leadership and conservation organizations. The agreement, which was signed at a high-profile ceremony by Prime Minister Brian Mulroney and BC Premier Bill Vander Zalm, applied not only to Lyell Island but to South Moresby Island and the entire southern portion of the archipelago—encompassing 1,470 square kilometres of land and 138 islands—protected in the newly created Gwai Haanas National Park Reserve (originally, named the South Moresby Park Reserve).⁶⁷ Logging contractor Frank Beban, who had obtained the injunction against the Haida and whose assets included the \$1.5-million camp at Powrivco Bay, claimed that the BC

charging logging firm claimed by NDP MP Fulton,” 5 November 1988; “First step complete on Lyell replanting,” *Vancouver Sun*, 27 June 1989.

⁶⁵ “Laid-off loggers find new jobs,” *Globe and Mail*, 29 April 1986.

⁶⁶ “Logging company faces moratorium,” *Globe and Mail*, 23 March 1987; “Fighting over the axing of a paradise,” *Toronto Star*, 20 March 1987; “No easy answer,” *Globe and Mail*, 21 March 1987; “Haida return to Lyell Island,” *Vancouver Sun*, 30 March 1987; “Logger awaits permits to resume Lyell work,” *Vancouver Sun*, 17 June 1987; “BC island logging jobs are lost forever, forestry boss says,” *Toronto Star*, 8 July 1987.

⁶⁷ “South Moresby Agreement,” BC Government press release, 11 July 1987, in LAC, Greenpeace fonds, R4377, volume 26, file 26-2 “Forests - South Moresby Wilderness, 1987-1991”; “Haida delight over park tempered with concerns about land claim,” *Vancouver Sun*, 13 July 1987; “Indians welcome Ottawa’s support in their fight to preserve BC island,” *Toronto Star*, 11 March 1986; “Moresby park deal reached,” *Vancouver Sun*, 7 July 1987; “Ottawa, BC make a deal on national park for South Moresby,” *Montreal Gazette*, 7 July 1987; “BC loggers decry jobs lost for park in South Moresby,” *Globe and Mail*, 8 July 1987; “All Commons parties back Charlottes park,” *Vancouver Sun*, 14 May 1987; “Year-old Moresby park pact still in log jam,” *Vancouver Sun*, 11 July 1988; “Deal reached on Moresby Park,” *Ottawa Citizen*, 12 July 1988.

government “got bulldozed by Eastern political interests.”⁶⁸ Industry representatives claimed that the creation of the park reserve, which accounted for 70 per cent of land in Western Forest Products’ tree farm license, would result in the permanent loss of 900 direct and indirect jobs.⁶⁹ Within weeks of the announcement, as Beban was supervising the removal of his company’s logging equipment from the Lyell Island camp, the logger suffered a fatal heart attack and died at age 47. “He was a man protecting his investment,” Haida spokesperson Ernie Collison told a reporter. “We are a people protecting our heritage,” adding that Beban was an “honourable man” who “didn’t come out making racist comments.” Beban’s business partner said that uncertainty over the company’s operations had taken a toll on the logger.⁷⁰ Reflecting the international dimension of the dispute, Beban’s death was reported in the pages of the *New York Times*.⁷¹

There were four distinct outcomes of the Haida movement at Lyell and wider assertions of Haida rights and title during that period: (1) massive expansion of protected areas on the islands (which Guujaaw and others are quick to describe as *not* a “park”: “Ours is a Haida heritage site”); (2) development of co-governance structures between the Haida Nation and settler governments; (3) substantially higher standards of forest stewardship and improved management of natural resources; and (4) a political resurgence and advancement toward self-governance of the Haida Nation.⁷² The standoff

⁶⁸ “BC island logging jobs are lost forever, forestry boss says,” *Toronto Star*, 8 July 1987.

⁶⁹ “BC loggers decry jobs lost for park in South Moresby,” *Globe and Mail*, 8 July 1987; “BC island logging jobs are lost forever, forestry boss says,” *Toronto Star*, 8 July 1987.

⁷⁰ “Lyell logger hailed by Haida,” *Vancouver Sun*, 28 July 1987; “Lyell Island logger Frank Beban dies of heart attack,” *Vancouver Sun*, 27 July 1987; “Frank Beban lost battle to log Lyell,” *Toronto Star*, 28 July 1987. See also “Victoria pays \$480,000 for laid-off loggers,” *Vancouver Sun*, 5 October 1987; “Moresby money delay leaves loggers in limbo,” *Vancouver Sun*, 22 January 1988.

⁷¹ “With Logging Banned, The Logger is Mourned,” *New York Times*, 15 August 1987.

⁷² Guujaaw interview, 25 May 2015.

at Lyell contributed to far-reaching changes in the management of natural resources everywhere on Haida Gwaii, with the Haida Nation achieving a much higher degree of control over land use decisions and resources, amounting to an effective veto over major decisions. Harvesting rights to the forest resources of Haida Gwaii were taken away from Western Forest Products and MacMillan Bloedel through the cancellation of five timber licenses that had been held by the companies or their predecessors since 1945.⁷³

The struggle at Lyell was a key moment in the assertion of Haida customary and constitutional rights to the natural resources of the archipelago—and a key step in the political resurgence of the Haida Nation, as colonial relationships were replaced by the restoration of indigenous control of economic and political decision making, and the formation of new models of indigenous governance in response to structures that had been lost or disrupted as a result of the colonization process. Guujaaw, the carver, singer, and leader of the road blockade at Lyell, went on to serve as President of the Council of the Haida Nation for 13 years:

Now 50 per cent of the island [archipelago] is under protection—joint management—not parks. We wouldn't protect it and then turn it over to them to manage it. ... We ended up protecting 50 per cent, plus we cut the logging down by another 50 per cent. Without court or anything. In negotiations. It wasn't anything they wanted to do. It was something they had to do. ...

The structure of the Haida system is that the President is at the bottom of the pyramid. I lasted 13 years there. I'm still active in the Council. ... We're not doing the treaty thing. We're not organized as a society or a band council. We organized ourselves with a Constitution, not registered with any registry in Canada. [The Haida organizational structure] brings in village councils. Each person has equal say in the house of assembly where decisions are made—one person, one vote. Everybody sharing equally in decision making. Strong reliance on decision-making being supported by the people, keeping the people fully involved and engaged.⁷⁴

⁷³ *R. v. MacMillan Bloedel*, 1994 BCSC 534.

⁷⁴ Guujaaw interview, 25 May 2015.

This process of internal political resurgence and realignment of external relations between the Haida Nation and institutions of the settler state was exemplified in 2013 when the Haida were joined by several hundred indigenous and non-indigenous people from across “Turtle Island” (North America, including Liberal MP and future Prime Minister Justin Trudeau) to raise the Gwai Haanas Legacy Pole at Hlk’yah G̱awG̱a (Windy Bay) on Lyell Island.⁷⁵ This event symbolized assertion of Haida law over the territory, and a corresponding narrowing of the ambit of colonial law and settler property rights in Haida Gwai. The implications of the social forces unleashed at Lyell Island continue to be felt across Turtle Island and beyond.

6.3 Meares Island and the Assertion of Nuu-chah-nulth Customary Rights

Indigenous resurgence could also be discerned on Vancouver Island in the 1980s, tied to successful assertions of customary rights to land and resources on road blockades and in courtrooms. In the landmark legal decision in the *Martin* case (*MacMillan Bloedel v. Mullin; Martin v. Regina in Right of BC* [1985]), the BC Court of Appeal issued an injunction restraining logging operations by license-holder MacMillan Bloedel on Crown land on Meares Island, in the Nuu-chah-nulth Nation’s traditional territory in Clayoquot Sound, pending the determination of the question of aboriginal title. This represented a bold departure from previous legal decisions, where questions of indigenous rights and title were often ignored or shunted aside, as the judiciary sidestepped the unresolved land question and recognized private property rights conferred by the colonial legal system

⁷⁵ Ian Gill, *All That We Say Is Ours: Guujaaw and the Reawakening of the Haida Nation* (Toronto: Douglas & McIntyre, 2009).

and institutions of the settler state. Writing for the majority, Court of Appeal Justice Peter Seaton recognized the symbolic importance of the Meares Island case:

Meares Island has become the front line in the dispute over Indian title. It has also become central to the dispute between the logger and those who favour the preservation of wilderness areas. Meares Island is important to MacMillan Bloedel not because of its trees, but because it is where the line has been drawn. It has become a symbol.⁷⁶

Seaton's willingness to chart a new path in the jurisprudence relating to indigenous property claims, and to arrive at a decision at variance from the private interests of the logging corporation, may have reflected his legal career prior to being called to the bench. In contrast to many BC Court of Appeal judges, who had worked in private practice for major Vancouver law firms with a clientele rooted in forestry and mining companies, Seaton was a small-town lawyer working in a general practice in Vernon in the BC Interior; he was also the youngest person appointed to the BC Supreme Court in more than a century, and the first graduate of the UBC law school to be appointed to a superior court.⁷⁷ Seaton can perhaps be viewed as a legal equivalent of an "everyman," insulated from the social networks connecting the legal community and resource corporations, and therefore possibly more amenable to judicial decisions that varied sharply from the interests of corporations that held licenses to natural resource wealth.

In November 1984, the environmental organization Friends of Clayoquot Sound (FOCS) had launched a blockade of logging operations at Meares Island, in concert with the chief of the Tla-o-qui-aht village of the Nuu-chah-nulth Nation, Moses Martin. This followed the failure of a process known as the "Meares Island Planning Team," involving

⁷⁶ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

⁷⁷ Moore, *The British Columbia Court of Appeal*, 133-134.

two years of talks between the Tla-o-qui-aht and Ahousaht bands, the logging company, representatives of provincial ministries responsible for forestry, fisheries, tourism, water protection, and archaeological conservation, representatives of the Village of Tofino (which drew its drinking water supply from Meares Island), the Alberni-Clayoquot regional district, forestry workers in Industrial Woodworkers of America (IWA) Local I-85, and environmental organizations including the Sierra Club of Western Canada.⁷⁸ MacMillan Bloedel had walked away from the table after it became clear that the Tla-o-qui-aht and Ahousaht would tolerate no commercial logging on the island, which they claimed as their own in the absence of any treaties. The Village of Tofino formally supported the Nuu-chah-nulth position.

When MacMillan Bloedel proceeded with plans in the autumn of 1984 to establish a docking area and log dump at a place called Heelboom Bay from which to launch the logging operations on Meares Island (less than 2% of which had been logged commercially in the century and half since the imposition of British sovereignty), the logging company was met with Nuu-chah-nulth and non-indigenous allies constructing canoes on the foreshore in a visible demonstration of use of the land (which the appeal court would later dismiss as “a sham” designed to obstruct MacMillan Bloedel). The protest had been hastily mounted on 21 November 1984, the day the BC Ministry of Forests approved a cutting permit for 53 per cent of the 8,600-hectare island over a 35-year period; in addition to the canoe building activity on the shore, the Nuu-chah-nulth and non-indigenous allies established a flotilla of boats on the water to greet the logging

⁷⁸ See British Columbia, Ministry of Forests, *Meares Island Planning Options: Report of the Meares Island Planning Team*, 30 June 1983.

company vessels.⁷⁹ Michael Mullin, a resident of Tofino who had helped found the FOCS in the late 1970s (drawing on organizational expertise from civil rights and labour campaigns in Chicago a decade earlier), recalls the actions of Tla-o-qui-aht chief Moses Martin during the initial confrontation with the logging company: “Moses stands, and he says, ‘And you will respect the native persons in their habitations, their houses and their gardens. You are welcome to come ashore. But you will not do this in our garden. You will cut not trees here.’”⁸⁰

The logging company responded to the activities of the Tla-o-qui-aht chief and FOCS at Heelboom Bay by applying for a court injunction barring interference with their operations, which was filed in BC Supreme Court in Vancouver on 23 November 1984. However, reflecting a growing legal assertiveness of First Nations following constitutional recognition of Aboriginal rights in s. 35, Martin along with the chief of the nearby Ahousaht village, Corbett George, counter-claimed four days later. The Nuu-chah-nulth chiefs applied for their own injunction permanently restraining MacMillan Bloedel from conducting logging operations or trespassing on Meares Island, and sought three declarations from the court: (1) affirming Nuu-chah-nulth title to the island; (2) stating that no law of BC had any force or effect in contravention of this title; and (3) stating that the BC government had no authority to issue licenses or permits for the harvesting of resources in contravention of this title.⁸¹ The Nuu-chah-nulth chiefs also sought an interlocutory injunction restraining the logging company from undertaking any activities on Meares Island pending consideration of the land claim. BC Supreme Court Justice Reginald Gibbs considered the applications for interlocutory relief over two days

⁷⁹ “Community fights plans for logging on BC island,” *Globe and Mail*, 21 November 1984; “Logging firm gets injunction against Meares protesters,” *Globe and Mail*, 4 December 1984.

⁸⁰ Michael Mullin, interviewed by Benjamin Isitt, Tofino, BC, 24 May 2014.

⁸¹ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

of hearings in Vancouver at end of November 1984, attempting to balance these competing assertions of rights—the company’s proprietary claim to access and harvest timber from Meares Island in accordance with its license from the province, and the Nuu-chah-nulth customary and constitutional claim to the land and resources of the island. Gibbs’s decision, issued on 3 December, granted the injunction to MacMillan Bloedel, restraining interference with their operations, but imposed a condition limiting the company’s activities to light survey work, with no construction of docks or roads and no land clearing until the Nuu-chah-nulth claim had been heard.⁸² This reflected growing (if tentative) recognition of indigenous customary rights by the judiciary. Two days earlier, the Supreme Court of Canada had handed down its decision in the *Guerin* case (relating to the improper transfer by federal Indian Agents of land belonging to the Musqueam Nation for an elite golf course near Vancouver), recognizing indigenous title as a pre-existing legal right that preceded the proclamation of British sovereignty, imposing a fiduciary duty on the Crown toward indigenous people.⁸³

Consideration of the Nuu-chah-nulth claim against the logging company was postponed until the end of January 1985, after the BC government requested time to study another recent court decision, in the Ontario case between the Crown and the Temagami First Nation, which found that Crown title to natural resources trumped indigenous title.⁸⁴ In the intervening period, Justice Gibbs denied an application from MacMillan Bloedel seeking to keep the environmental protesters off Meares Island, amid

⁸² “Logging firm gets injunction against Meares protesters,” *Globe and Mail*, 4 December 1984; “Judge won’t ban activists from island logging site,” *Globe and Mail*, 18 December 1984.

⁸³ The Supreme Court of Canada’s decision in *Guerin* was released on 1 December 1984. See *Guerin v. The Queen*, 1984 2 SCR 335.

⁸⁴ “Judge won’t ban activists from island logging site,” *Globe and Mail*, 18 December 1984; *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154. See also *Ontario (Attorney-General) v. Bear Island Foundation*, 1984 ONSC 2136; David T. McNab, *No Place for Fairness: Indigenous Land Rights and Policy in the Bear Island Case and Beyond* (Montreal: McGill-Queen's University Press, 2009).

allegations of “tree spiking” (a form of sabotage that could be deadly to fallers and millworkers). Gibbs said he was “extremely reluctant” to prevent the 50-60 people at the Meares Island protest camp from exercising their normal rights to be on Crown land, but that he was prepared to do so if necessary to protect the property and rights of others.⁸⁵ When the Nuu-chah-nulth claim returned to Gibbs’s courtroom, the judge decided in favour of the logging company and against the First Nation. In a written decision issued on 25 January 1985, Gibbs stated that the indigenous claim had “no prospect of success at trial,” that neither party faced irreparable harm to their rights if the injunctions were not granted (both could be compensated with money), and that the indigenous claimants had “slept on their rights.”⁸⁶ A spokesperson for the Nuu-chah-nulth, George Watts, declared defiantly, “We are not going to let MacMillan Bloedel log Meares Island. It is stolen land.” Watts described Meares as “the final fight” for aboriginal title, a fight that would include a legal appeal against Gibbs’s ruling as well as direct action: “We are going to go to Meares Island and take it back.”⁸⁷ Reflecting the significance of the issues bound up in the Meares Island case, several BC First Nations, including the Carrier Sekani Tribal Council, the Gitksan-Wet’Suwet’en Tribal Council, the Taku River Tlingits, the Shuswap Tribal Council, and the Union of BC Indian Chiefs sought and obtained intervenor status in the appeal. Following meetings of the BC section of the Assembly of First Nations, which endorsed the Nuu-chah-nulth position, James Gosnell, president of the Nisga’a Tribal Council, told a news conference: “I don’t know what will happen. There could be

⁸⁵ “Judge won’t ban activists from island logging site,” *Globe and Mail*, 18 December 1984.

⁸⁶ “Court lets MacMillan Bloedel start logging on BC island,” *Globe and Mail*, 26 January 1985; “BC Indians vow to halt logging on island,” *Montreal Gazette*, 28 January 1985; *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

⁸⁷ “BC Indians vow to halt logging on island,” *Montreal Gazette*, 28 January 1985.

a bloodbath. But we won't be responsible for it. We will hold the white man responsible."⁸⁸

In their appeal against Justice Gibbs's decision to deny an injunction restraining logging, the Tla-o-qui-aht and Ahousaht chiefs based their case on the unresolved title question, suggesting that the harvesting of trees on Meares Island would result in the irrevocable loss of evidence of long-standing indigenous occupation and use of the land, evidence that was integral to the establishment of Nuu-chah-nulth title to the land. As the appeal court would later find, trees on Meares Island included evidence of human use going back to at least 1642, more than a century before the first settler would set foot on Vancouver Island. Persuaded by the Nuu-chah-nulth case, the BC Court of Appeal overturned the chambers judge's ruling denying the injunction in a narrow 3-2 decision. Writing for the majority, Justice Seaton found that the Tla-o-qui-aht and Ahousaht would be "deprived of valuable ecological rights" if the logging were allowed to proceed before the title question had been considered. Seaton rejected the claims of counsel for the logging company and the province, to the effect that an injunction restraining logging on Meares Island would deal a fatal blow to the forest sector in coastal BC:

It was strongly pressed on us that an order suspending logging on Meares Island would threaten the whole of the coast, indeed the whole of the Province; that if we made an order here, similar applications would be made for other areas and eventually the forest industry and other industries would be shut down.

I do not believe that to be so. Meares Island has attained a unique importance. I have already said that it has become a symbol for each side in the contest between the forest industry and the Indians. I have also said that to prevent or postpone logging on Meares Island will not have a significant economic impact. When other areas are considered, they will be considered in the light of this decision. They will be seen as an addition to the Meares Island restriction and in

⁸⁸ "Meares logging could be bloody, BC Indian says," *Globe and Mail*, 30 January 1985; *MacMillan Bloedel v. Mullin*; *Martin v. R. in Right of BC*, 1985 BCCA 154.

consequence, the balance of convenience may be seen to have shifted to favour the industry.

It has also been suggested that a decision favourable to the Indians will cast doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging. There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.⁸⁹

Justice Alan MacFarlane concurred with Seaton, stating that the question of indigenous title had been discussed since the *Calder* decision and recognized in the constitution, that the public anticipated a resolution through negotiation, and that the judicial proceeding was part of a larger process that would “ultimately find its solutions in a reasonable exchange between governments and the Indian nations.”⁹⁰

The Tla-o-qui-aht and Ahousaht victory in the Meares Island case, like the Haida victory at Lyell, demonstrated the powerful coalition of forces—a cross-sectional social movement—that could be assembled when indigenous assertions to land and resources were aligned with ecological claims to resources advanced by the settler-based environmental movement. At Meares Island, the Tla-o-qui-aht and Ahousaht developed effective working relationships and bonds of solidarity with the Friends of Clayoquot Sound (FOCS) and Sierra Club, and won support for their position from the settler government of the Village of Tofino. While the appeal court was quick to dismiss the non-indigenous protesters’ appeal against the injunction issued to MacMillan Bloedel, contrasting the company’s “restrained and responsible” conduct with “vandalism, threats and physical obstruction” by the environmentalists, the environmental movement was an

⁸⁹ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

⁹⁰ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

integral component of the coalition to protect Meares Island, providing material support to the First Nations during the blockade and legal challenge. William Carroll notes the trend toward “increased collective capacity of Indigenous communities and allies, as they confront various configurations of state and capitalist class power, to resist colonization as an ongoing process while enacting resurgence as a practical form of dis-alienation.”⁹¹

The BC Court of Appeal’s March 1985 ruling in the Meares Island case armed the Nuu-chah-nulth Nation with an injunction restraining logging by MacMillan Bloedel, to protect ecological and cultural rights relating to indigenous use of the land, while upholding the logging company’s injunction against non-indigenous protesters to protect “the rights of MacMillan Bloedel to that timber” pending determination of the title question.⁹² In deciding in favour of the Tla-o-qui-aht and Ahousaht, Justice Seaton and the BC Court of Appeal found that the balance of convenience favoured leaving the trees standing, rather than permitting the logging company to exercise its harvesting rights. The test of irreparable harm landed on the side of the indigenous claim, rather than the company seeking to generate revenues and profits from the forest resources of Meares Island:

The proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have recently been logged. It follows that rights far short of outright ownership might well warrant retaining the area until after a trial.⁹³

Justice MacFarlane concurred, noting that “the balance of convenience in this case is not in favour of immediate logging. Justice and convenience are the twin standards to be applied in deciding if an injunction is to be granted. ... Justice to the Indian bands in these

⁹¹ William K. Carroll, “Social Movements and Counter-Hegemony,” in *World to Win Contemporary Social Movements and Counter-Hegemony*, ed. William K. Carroll and Kanchan Sarker (Winnipeg: ARP Books, 2016), 59.

⁹² *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

⁹³ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

unusual circumstances means giving a decision on the merits of their claim before destroying the forest involved in that claim.”⁹⁴ In making this determination, the Court of Appeal recognized the contingency of private property rights conferred by institutions of the settler state in the face of competing assertions of customary and constitutional indigenous rights—and the court’s willingness to exercise its discretion to deny the equitable remedy of an injunction—a line of jurisprudence that would expand and evolve in the decades following the Meares Island case.⁹⁵

The rebalancing of rights by the BC judiciary in the Meares Island case, which represented a historic incursion by the courts into licenses to Crown land issued by the settler state, spurred political change.⁹⁶ In 1988, the Government of British Columbia, led by the conservative Social Credit party, created a Ministry of Native Affairs in a tentative first step toward the genuine engagement of indigenous title claims. A year later, the government formed a Native Affairs Advisory Committee and, in 1990, announced that it would enter into negotiations with indigenous groups that were not covered by treaty. MacMillan Bloedel never resumed logging operations on Meares Island. Both injunctions arising from *Mullin; Martin* technically remain in place, with the Tla-o-qui-aht and Ahousaht bands taking no further action in their statement of claim against the logging company. Over time, the Tla-o-qui-aht and Ahousaht acquired a private property interest to the Crown forest lands of Meares Island and Clayoquot Sound, with the transfer of

⁹⁴ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

⁹⁵ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

⁹⁶ See “Appeal court prohibits Meares Island logging,” *Globe and Mail*, 28 March 1985; “Injunction against logging still stands in BC,” *Globe and Mail*, 1 August 1985.

licenses to Nuu-chah-nulth-owned Iisaak Forest Resources as part of an Interim Measures Agreement in the wider treaty process.⁹⁷

Other assertions of indigenous rights to land and resources emerged around this time, with control over timber resources often being at the centre of clashes between First Nations, corporations, and the governments of BC and Canada—from the standoffs at Meares and Lyell islands, to action by members of the Kwakwaka'wakw Nation to prevent logging at Deer Island off Alert Bay in the Broughton Archipelago in 1986, to protracted legal proceedings involving the Okanagan Indian Band in the 1990s, and more recently, the Tsilhqot'in Nation. In 1999, BC Supreme Court Justice Jon Sigurdson granted an injunction to the BC Minister of Forest restraining several First Nations in the Okanagan region from logging without a valid permit, in contravention of s. 143 of the *Forest Practice Code*. Sigurdson ruled in *British Columbia (Minister of Forests) v. Okanagan Indian Band* that the public interest in seeing the existing law upheld was not easily outweighed by any prejudice to the defendant, even in the face of assertion of s. 35 aboriginal rights: “The just and equitable order in these circumstances is to ensure the governing law is enforced while allowing the respondents’ assertions of aboriginal title to be determined as expeditiously as possible. I grant the injunctions on that basis.”⁹⁸

⁹⁷ Iisaak Forest Resources, *Sustainable Forest Management Plan* (2011) < www.iisaak.com > viewed 27 April 2016; Shaw, “Encountering Clayoquot,” 54-57.

⁹⁸ See *British Columbia (Minister of Forests) v. Wilson*, 1999 BCSC 1723; *British Columbia (Minister of Forests) v. Derrickson*, 1999 BCSC 1724; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2000 BCSC 32; *British Columbia (Minister of Forests) v. Adams Lake Indian Band*, 2000 BCCA 98; *British Columbia (Minister of Forests) v. Adams Lake Indian Band*, 2000 BCCA 315; *British Columbia (Minister of Forests) v. Wilson*, 2000 BCSC 1135; *British Columbia (Minister of Forests) v. Adam Lake Band*, 2001 BCCA 647; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 371.

Blockades erupted at dozens of sites around British Columbia in the 1980s and 1990s, as Nicholas Blomley has documented.⁹⁹ In most cases, these assertions of indigenous rights resembled the actions taken by the Haida at Lyell Island and the Nuuchahnulth at Meares Island, with tactics largely confined to what settlers would describe as non-violent civil disobedience—peaceful yet firm action to obstruct access to unceded indigenous territory, whether by corporate license-holders attempting to access natural resources or by members of the public seeking to travel through highways that traversed indigenous communities and territories. However, in the mid-1990s, one conflict moved outside these tactical parameters and into the realm of armed conflict, resulting in a major clash between those asserting the indigenous interests and institutions of the settler state upholding private property interests and the rule of the settler law.

6.4 Standoff at Ts’Peten (Gustafsen Lake)

In the spring of 1995, members of the Secwepemc Nation, supported by indigenous and non-indigenous allies from across Turtle Island, began an occupation of private ranch land in the BC interior, near Gustafsen Lake and 100 Mile House, asserting their right to hold traditional Sun Dance ceremonies at a place they called Ts’Peten. The American rancher who held fee simple title to the land since 1972, Lyle James, had earlier revoked permission to conduct the ceremony at the site, which had taken place each summer for the previous five years. A petition from Secwepemc elder Percy Rosette and medicine man John Stevens to Queen Elizabeth II asserting a legal right to access the site was

⁹⁹ Nicholas Blomley, “‘Shut the province down’: First Nations Blockades in British Columbia, 1984-1995.” *BC Studies*, 111 (Autumn 1996): 5-35. See also “Indians in BC risk jail terms to force settlement of their land claims,” *Ottawa Citizen*, 21 November 1985.

ignored by the BC Attorney General in early 1995, leading to the establishment of the protest encampment.¹⁰⁰

The dispute escalated over the spring and summer of 1995, with James serving an eviction notice on the camp in June, which the Sun Dancers ignored, asserting an unqualified right to use the land that they described as the Gustafsen Lake Sacred Grounds. The defenders proceeded to hold the annual Sun Dance ceremony from 2 July to 12 July, combining cultural practices from Plains indigenous nations with elements of Secwepemc culture.¹⁰¹ The dispute was aggravated by tensions between the indigenous militants at the encampment and the elected Secwepemc leadership, who accused the Sun Dancers of mixing religion and politics, and who were themselves dismissed as accomplices of the colonial state. The militant leader Splitting the Sky (a leader of the 1971 Attica prison rebellion and American Indian Movement, who had settled in Canada in the early 1990s after marrying a Cree woman) called for supporters to converge on the site and bring arms.¹⁰² Later in July, an employee of the land owner was shot at but unharmed, presumably by the Secwepemc militants, after being sent to retrieve equipment from the ranch. Two provincial forestry workers also claimed to have been fired upon at the site.¹⁰³ The tactics and responses of indigenous people, settler allies, and state institutions to the conflict at Ts'peten were coloured by the earlier high-profile

¹⁰⁰ Nicholas D. Shrubsole, "The Sun Dance and the Gustafsen Lake Standoff: Healing Through Resistance and the Danger of Dismissing Religion," *International Indigenous Policy Journal*, 2, no. 4 (October 2011): 1-17. See also Nicholas Shrubsole, "Religion, Land and Democracy in Canadian Indigenous-State Relations," PhD dissertation, University of Waterloo, 2013.

¹⁰¹ Shrubsole, "The Sun Dance and the Gustafsen Lake Standoff," 7-10.

¹⁰² See Splitting the Sky. *The Autobiography of Splitting the Sky: From Attica to Gustafsen Lake* (Chase, BC: John Pasquale Boncore, 2001), 94.

¹⁰³ Shrubsole, "The Sun Dance and the Gustafsen Lake Standoff," 10.

standoff at Oka, Quebec in 1990, and tied to efforts by indigenous militants in Canada to draw international attention to the struggle for indigenous rights and title.¹⁰⁴

As the dispute at Ts'peten intensified, civil liberties lawyer Cameron Ward called on the provincial government in a *Globe and Mail* commentary to exercise its responsibility for the administration of justice by enforcing the criminal law, rather than requiring private citizens to rely on civil courts and injunctions, which (as has been discussed previously) provided few of the procedural protections for defendants in criminal proceedings.¹⁰⁵ Attorney General Colin Gabelmann responded that rather than obligate private citizens to enforce the criminal law, the province's current policy allowed police and prosecutors to pursue a "measured response to match the reality of civil disobedience actions, which range from serious criminal incidents to those that can be peacefully resolved at the scene."¹⁰⁶

Gabelmann was replaced by Ujjal Dosanjh as BC's Attorney General in mid-August 1995, signalling a hardening of the provincial government's attitude, which coincided with a sharp escalation of the conflict. Two days after Dosanjh's appointment, the Ts'peten defenders stumbled upon an RCMP emergency response team conducting a surveillance operation in the woods on the perimeter of the site and, believing an attack on the camp was imminent, opened fire. The officers were unharmed, but the incident had the effect of escalating the dispute into a full-blown armed standoff between the indigenous militants and the settler state. The federal state, with the support of BC's new

¹⁰⁴ See Ben David Mahony, "'Disinformation and Smear': The Use of State Propaganda and Military Force to Suppress Aboriginal Title at the 1995 Gustafsen Lake Standoff," (MA thesis, University of Lethbridge, 2001); Sandra Lambertus, *Wartime Images, Peacetime Wounds: The Media and the Gustafsen Lake Standoff* (Toronto: University of Toronto Press, 2004).

¹⁰⁵ "Why don't BC's police move faster to deal with roadblocks?" *Globe and Mail*, 18 July 1995.

¹⁰⁶ Colin Gabelmann, "British Columbia's Civil Disobedience Policy – A Measured Response," (1995) as cited in *Slocan Forest Products Ltd. v. John Doe*, 2000 BCSC 150.

attorney general, responded with a firm hand, deploying a small army of heavily armed RCMP officers, 400 in total, assisted by Canadian soldiers in an effort known as Operation Wallaby, which included air and ground support with helicopters, surveillance planes, and armed personnel carriers. Dosanjh articulated the provincial government's hardened position against the Ts'peten defenders, making it clear that the government would not countenance any armed challenge to the authority of the state, and drawing a line between what the government described as legitimate efforts of recognized indigenous governments to assert indigenous rights and title through the treaty process, and lawless challenges to established legal authority by armed sovereigntists. According to the Ts'peten defenders, the RCMP fired an estimated 77,000 bullets at the Secwepemc line, including allegedly hollow-point bullets banned by the Hague Conventions of war. The RCMP estimated that its officers fired 7,000 rounds. The operation cost \$5.5-million, one of the costliest paramilitary operations in BC history.¹⁰⁷

Ultimately, the Ts'peten defenders surrendered peacefully, led by medicine man John Stevens, who had filed the original petition with the Crown eight months earlier seeking to establish legal access to the ranch to conduct the Sun Dance ceremony. Fourteen indigenous and 4 non-indigenous people were charged with crimes relating to property and the possession of firearms, and following a ten-month trial, 15 were convicted with sentences ranging from 6 months to 8 years. There was only one injury relating to gunfire, when a non-indigenous protester was shot in the arm, allegedly by an

¹⁰⁷ "AG Dosanjh an outstanding man of principle," *Times Colonist*, 31 August 1995; Ben David Mahony, "Disinformation and Smear': The Use of State Propaganda and Military Force to Suppress Aboriginal Title at the 1995 Gustafsen Lake Standoff," (MA thesis, University of Lethbridge, 2001).

RCMP bullet though police denied this claim. Several RCMP officers claimed to have been shot by automatic gunfire as well, with bullet proof vests preventing any injuries.¹⁰⁸

Unlike the Haida standoff at Lyell Island and the Nuu-chah-nulth standoff at Meares Island, the legal and political outcome of the Secwepemc standoff at Ts'Peten in the summer of 1995 is more opaque. Further research and analysis is required, but I would speculate that divisions within the Secwepemc Nation, and particularly the lack of formal support from the Secwepemc leadership for the armed challenge to the American rancher's property rights, undermined a more successful assertion of indigenous rights and a more transformative outcome. The tactical decision to take up arms in the absence of support from recognized indigenous leadership contributed toward a hardening of positions, and limited the potential support base for the Ts'Peten defenders within the settler society and among some indigenous people.

The "scattered geography of colonization" (as described in the introduction to this chapter) and the unevenness of the colonization process also helps explain the different trajectories of these case studies. To be sure, Ts'peten (Gustafsen Lake) was located in the hinterland, far removed from centres of economic and political power. However, unlike Lyell Island and Meares Island, it had direct road access to settler communities, RCMP detachments, and the provincial highway system, with more reliable lines of communication to facilitate the settler state response. In contrast, the Haida at Meares and the Nuu-chah-nulth at Lyell benefited from greater geographic isolation on the northwestern flank of the province, country, and continent, enjoying a relatively wider degree of autonomy and relatively greater freedom of action to assert customary property

¹⁰⁸ "Blood spills in sacred circle," *Times Colonist*, 31 August 1995; Shrubsole, "The Sun Dance and the Gustafsen Lake Standoff," 1, 10.

claims—and a correspondingly weaker position for state institutions to mount a defence of private property claims.

An additional geographical consideration is the more advanced stage of the colonization process in Secwepemc territory at the time of the Ts'peten standoff in 1995. In the century preceding the dispute, Secwepemc territory had been occupied, remapped, and divided in profound ways, subjected to land surveys, alienation of indigenous lands into Crown and then fee-simple private lands (as was the case with the ranch “owned” by Lyle James), and substantially transformed by an onslaught of settler-led development connecting the settler society: highways, mines, resource roads, ranch lands, farms, towns, cities, and other infrastructure development. This pattern of colonization had a profound impact on the Secwepemc people, diluting their connection to land, to each other, and to indigenous legal traditions, and thereby depriving the Secwepemc of sources of strength upon which to mount successful assertions of rights. This pattern of colonization also contributed toward dispersion and disunity among the Secwepemc people and communities, which became apparent during the Ts'peten standoff. In contrast, the process of colonization was substantially less advanced in the Haida and Nuu-chah-nulth territories in Haida Gwaii and Clayoquot Sound by the 1980s, with more limited incursions of settler laws, institutions, and industrial activities in the decades preceding the blockades at Meares and Lyell. While the Haida, Nuu-chah-nulth, and Secwepemc shared common experiences of land dispossession and cultural genocide by paternalistic state institutions and allied institutions (including the Indian Reserve system and the residential school experience), enduring “frontier” characteristics in the old-growth rainforests of Haida Gwaii and Clayoquot Sound armed the Haida and Nuu-chah-

nulth with enduring sources of indigenous customary law and cultural and political cohesion, upon which they mounted effective assertions of rights.

The uneven pattern of colonization also influenced potential support bases in settler society for these assertions of indigenous rights, an important factor in mobilizing sufficient political pressure to impel settler governments to pursue political solutions. At Lyell and Meares islands, the indigenous communities asserting customary rights to the land and resources were buttressed by strong environmental advocacy campaigns, owing to the pristine condition of the natural resources of the area, as well as relationships nurtured over several years between indigenous and non-indigenous people in the vicinity of communities such as Tofino, Massett, and Queen Charlotte City. This ecological ethos found formal expression in settler-based advocacy organizations such as the Islands Protection Society in Haida Gwaii and the Friends of Clayoquot Sound, which provided integral material and political support in the heat of the conflicts. Relations of trust and effective working relationships were established over several years between settlers associated with these groups and local indigenous leadership in the Haida and Nuu-chah-nulth communities. These effective working relationships in turn helped attract support from larger, more financially stable environmental organizations with provincial, national, and international reach, notably Greenpeace, the Sierra Club of Western Canada, and the Western Canada Wilderness Committee, which drew international attention to the ecological values and indigenous assertions of rights at Lyell and Meares and helped bring sufficient political pressure to bear on settler governments to negotiate political solutions. As far as I can discern from my research, there were no equivalent partnerships that emerged with the local settler population during the Ts'peten standoff, depriving the Secwepemc land defenders of a vital source of political and material

strength in their struggle to assert customary rights to the ranch land. This lack of local support among the settler society may have contributed toward the decision of the Ts'peten defenders to embrace more militant tactics, with “non-violent civil disobedience” appearing less feasible in the absence of a broad support base. To be sure, some settlers and settler organizations (such as the Victoria-based Settlers in Support of Indigenous Sovereignty [SISIS]) sought to mobilize support for the Ts'peten and opposition to the colonial state during the standoff in 1995. However, these settler advocacy efforts appear to have lacked a base in local settler communities within Secwepemc territory, and also lacked the organizational fibre and muscle (and broader provincial, national, and international connections) nurtured over several years of joint organizing among indigenous land defenders and settler allies.

Shedding light on the lines of demarcation at Ts'peten, and the chasm that separated the parties' interpretation of the legality of their acts, we can turn to a statement from Canada's former Prime Minister Brian Mulroney, during the Mohawk standoff at Oka, Quebec five years earlier, when armed warriors blocked a road in a bid to prevent the development of a municipal golf course in a stand of pine trees they considered sacred. Mulroney described the episode as “a situation where a band of terrorists takes over the leadership of a peaceful people.” Conversely, the Mohawks described the incident as “an armed conflict between two nations: one red, the other white” whose actions are “political, not illegal.”¹⁰⁹

6.5 Sovereignty and Treaty Making

¹⁰⁹ Martin J. Morris, “Overcoming the Barricades: The Crisis at Oka as a Case Study in Political Communication,” *Journal of Canadian Studies*, 30 (Summer 1995): 79.

The “legitimate” path for pursuing indigenous rights and title, according to the settler governments’ view, was the treaty process, spurred by court decisions in the 1970s and 1980s and translated into public policy and public action by the BC government from the late 1980s onward. In 1998, this decade-long process bore fruit, when the Governments of BC and Canada and the Nisga’a Nation signed the Nisga’a Final Agreement—the province’s first “modern-day” treaty. When two dissident Nisga’a hereditary chiefs, Frank Barton and James Robinson, applied for an injunction in July 1998 to halt a signing ceremony scheduled for the following week, BC Supreme Court Justice Robert Hunter refused to issue the order, saying the Nisga’a government had acted in good faith and that individual Nisga’a members, including Barton and Robinson, would have an opportunity to vote on ratification.¹¹⁰ Tom Berger was retained by the Nisga’a Tribal Council to argue against the injunction. This was appropriate, given the former Supreme Court judge’s long-standing involvement with the Nisga’a land claim (extending back to the *Calder* decision) and with the law of injunctions, although more often than not he had found himself on the opposite side of the court room from the government of the day. Berger successfully defeated the injunction application, with Justice Hunter ruling that the tribal council’s treatment of Barton and Robinson did not constitute “evidence of oppression or unfair prejudice.”¹¹¹ The treaty was signed as planned by the representatives of the indigenous and settler governments at a ceremony in New Aiyansh on 4 August 1998.¹¹²

The following year, in April 1999, the legislative assembly of British Columbia adopted the Nisga’a Final Agreement Act on a vote of 39-32, incorporating this first “modern-day” treaty into settler law (with the Parliament of Canada adopting its own

¹¹⁰ *Barton v. Nisga’a Tribal Council*, 1998 BCSC 2071.

¹¹¹ “Judge rejects injunction against Nisga’a Treaty,” *Calgary Herald*, 1 August 1998; *Barton v. Nisga’a Tribal Council*, 1998 BCSC 2071.

¹¹² “Nisga’a ceremony seals historic deal Treaty basics,” *Globe and Mail*, 5 August 1998.

statute to ratify the treaty in 2000).¹¹³ Provincial Opposition leader Gordon Campbell along with the BC Liberal legislative caucus voted against the legislation, voicing support in principle for the treaty process, while lambasting the government for invoking closure to end debate, which Campbell described as “one of the sadder moments in the history of the province of British Columbia.” However, the provincial minister responsible for inter-governmental relations, Andrew Petter, declared that:

the lessons of history are pretty clear, ... whenever a people or a government tries to move forward in the struggle to advance social justice, that movement is never easy. Whenever there is an effort made to turn the page, to put behind us some of the injustices of the past and move forward, there are always those who are prepared to stand up and give reasons as to why it should not happen or why it should not happen now.¹¹⁴

Campbell and the BC Liberals made a final attempt at defeating the treaty days before it was scheduled to come into force, filing a constitutional challenge in BC Supreme Court in May 2000 based on the division of powers in Canada’s constitution, which they claimed did not allow for recognition of the “third order” of indigenous government contemplated in the treaty. Tom Berger represented the BC government in the case. Justice Paul Williamson rejected the Liberals’ claim, concluding that “after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished.” The treaty and the indigenous government it recognized were therefore constitutionally valid.¹¹⁵

Notwithstanding threats to repeal or alter the legislation in the wake of Campbell’s election as premier in 2001, the Nisga’a Treaty was upheld and implemented,

¹¹³ Nisga’a Final Agreement Act, S.B.C. 1999 c. 2. See also Nisga’a Final Agreement Act, S.C. 2000 c. 7.

¹¹⁴ British Columbia, *Report of Debates of the Legislative Assembly of British Columbia*, 22 April 1999.

¹¹⁵ *Campbell v. Attorney General of British Columbia / Canada and Nisga’a Nation*, 2000 BCSC 1123; “Nisga’a treaty survived BC Liberals’ challenge,” *National Post*, 25 June 2000.

followed by several other treaties at various stages of negotiation, approval, and implementation. The drive by BC and Canada to settle the land question has prompted several older Treaty nations, notably Coast Salish nations covered by the Douglas Treaties on Vancouver Island, to issue renewed demands for their treaties to be implemented—more than 160 years after their approval by the Hudson’s Bay Company as agent for the colonial state. However, as Miranda Dyck suggested in a recent graduate thesis, the land claims process can be interpreted as “the newest in a long history of colonial dispossession,” aimed at advancing “capitalist accumulation through the seizure and development of Indigenous lands and resources.”¹¹⁶ This concern over extinguishment—that indigenous rights to land and resources that were never lost through conquest and which survived the colonization process, would be extinguished through modern-day treaties—has provoked divergent responses by First Nations and indigenous people toward the treaty process. Some First Nations have stridently refused to follow the path of the Nisga’a, shunning government overtures to negotiate and instead asserting indigenous rights through other means, while other First Nations have devoted considerable time and resources toward the pursuit of negotiated settlements with the Crown, as a path toward security, prosperity, and post-colonial relationships.

6.6 Direct Action and Contingent Property Claims at Grace Islet and Beyond

Growing legal recognition of indigenous rights and title by the BC judiciary has translated into growing legal latitude for direct action exercised in pursuit of these rights. This was evident in a case that I became personally involved with in the summer of 2014.

¹¹⁶ Miranda Lynn Dyck, “The Recognition of Indigenous Rights during the Red Power Movement,” (MA thesis, Carleton, 2011), i.

My involvement in the Grace Islet case did not reflect a decision on my part to pursue “social action research” as part of the methodology of this dissertation; rather, I became a participant in public events that happened to overlap with my topic of study. The dispute involved a rocky outcropping of land known as Grace Islet in Ganges Harbour, off Salt Spring Island in the Salish Sea. The land was owned in fee simple by a businessman named Barry Slawsky, but included approximately two dozen Coastal Salish burial cairns recognized by the BC Archaeological Branch, responsible for protection of cultural heritage resources in accordance with the provisions of the *Heritage Conservation Act*, and by archaeologists contracted by Slawsky. Hereditary Chief Eric Pelkey of the Tsawout band of the W̱SÁNEĆ Nation claimed that Grace Islet was included in the village sites and fishing grounds recognized in the North Saanich Treaty signed with James Douglas in 1852.¹¹⁷ The Cowichan and Penelakut Nations, members of the Hel’qui’ni’num language group of the Coast Salish people and without a treaty, also claimed Grace Islet as a traditional burial ground and cultural site.

The settler held title to the land, but there were overlapping claims of Indigenous title and customary use. When Slawsky obtained an archaeological alteration permit from the BC government and hired contractors who began to construct a luxury vacation home on the islet, a wave of protest emerged, involving indigenous people from the W̱SÁNEĆ and Hel’qui’ni’num nations, as well as settler people who objected to the desecration of the heritage site as well as despoliation of the ecology of the islet. I became involved in

¹¹⁷ For information on the North Saanich Treaty, see Janice Rose Knighton, “The Oral History of the 1852 North Douglas Treaty: A Treaty for Peace,” MA Community Governance Project Report, University of Victoria, 2004; Nicholas XEMFOLTW Claxton, “The Douglas Treaty and W̱SÁNEĆ Traditional Fisheries: A Model for Saanich Peoples Governance,” MA Community Governance Project Report, University of Victoria, 2003; Claxton, “To Fish as Formerly: A Resurgent Journey back to the Saanich Reef Net,” PhD dissertation, University of Victoria, 2015; Raymond Frogner, “‘Innocent Legal Fictions’: Archival Convention and the North Saanich Treaty of 1852,” *Archivaria*, 70 (Fall 2010): 45-94.

the movement to protect Grace Islet and halt the construction process. The protests included rallies in the Ganges townsite a stone's throw from the islet, as well as "on the water" protests involving flotillas of kayaks, canoes, fishboats, and other watercraft, including vessels from the Penelakut and Cowichan Tribes. On several occasions Grace Islet "protectors" landed on the foreshore of the islet, and on one occasion the group entered the construction site, disrupting work.

The land owner, Barry Slawsky, and his legal counsel responded by filing a civil claim and application for an interlocutory injunction in BC Supreme Court. However, when the matter went to a hearing in September 2014, BC Supreme Court Justice Douglas Thompson refused to grant the interlocutory injunction to the private landowner to restrain the protests. Slawsky's lawyer, John Alexander, alleged that it was a case of simple trespass and that the test established in *RJR-MacDonald* had been satisfied. However, the judge was not convinced. Rather than grant an injunction to immediately restrain protest on the islet and surrounding waters, Thompson ordered a one-month recess to allow the First Nations and other accused (including the author of this dissertation) to further develop their defences. As Thompson ruled in postponing the hearing on the plaintiff's application, which alleged trespass on lands the plaintiff owned in fee simple, "[the issue] may be as simple as the plaintiff says it is, or it may not be that simple."¹¹⁸ Two weeks later, within hours of receiving statements of defence, in which the Chief of the Tsawout band of the W̱SÁNEĆ Nation asserted he was exercising a customary indigenous right to visit the graves of his ancestors, and I asserted that I was

¹¹⁸ "Protesters in Grace Islet dispute given month to prepare case," *Times Colonist* (Victoria), 23 Sept. 2014.

assisting the Chief and other indigenous people in exercising these rights, the private land owner discontinued the civil action and agreed to pay costs.¹¹⁹

While we do not know how the matter would have been decided at trial, based on Thompson's preliminary ruling in refusing to grant the injunction, we can discern a widening legal ambit for assertions of customary and constitutional indigenous rights, even when the assertion of those indigenous rights comes into direct conflict with rights of private parties on lands owned in fee simple according to the settler law. Following the discontinuance of the civil action, the Province of British Columbia intervened to purchase title to Grace Islet from the settler landowner (for \$5.45-million, more than four times the assessed value of the land and the owner's costs for pursuing construction of the building, which was later dismantled). Stewardship of Grace Islet was conveyed to a consortium of Coast Salish Nations, in partnership with the conservation organization the Nature Conservancy of Canada.¹²⁰ What does the Grace Islet controversy tell us about the historical and legal geography of property and protest? That it is fluid, impacted by the political context and the relative strength of the contending parties. It is also impacted by the changing law as it pertains to indigenous rights and title. It is unlikely that the judge would have demonstrated the same reluctance to issue the injunction to the land owner if the Grace Islet protests had been grounded on ecological, rather than indigenous, assertions of rights.

6.7 Conclusion

¹¹⁹ John Alexander to Farris, et al., 8 October 2014; Notice of Discontinuance, 8 October 2014; Statements of Defence and Affidavits filed by Don Tom and Benjamin Isitt, October 2014, in response to *Slawsky v. Isitt et al.*, Victoria Civil Registry, 2014.

¹²⁰ BC Government Media Release, "Partnership formed to acquire Grace Islet," 15 January 2015 < <https://news.gov.bc.ca/stories/partnership-formed-to-acquire-grace-islet> > (viewed 15 January 2015); "Province buys disputed Grace Islet for \$5.45-million," *Times Colonist* (Victoria), 16 February 2015.

This chapter has provided a preliminary foray into a vast and evolving area of law, examining how indigenous people and their allies have challenged colonial property relations and asserted indigenous claims to control land and property through protest, and the corresponding response of property owners and members of the legal community. Beginning with the Lyell Island blockade against logging on Haida Gwaii in the 1980s, the chapter demonstrated how the blockade had a far-reaching political impact on the Haida Nation and its relationship with land, natural resources, and the Canadian state. Turning to the assertion of indigenous rights by the Nuu-chah-nulth Nation at Meares Island and elsewhere in Clayoquot Sound, we see pronounced linkages between indigenous peoples and other social movements, and a ground-breaking injunction granted to the First Nation by the BC judiciary to restrain the activity of a logging company. Moving from injunction law to criminal law, we find the distinct manifestation of indigenous rights with the 1995 armed standoff at Ts'Peten (Gustafsen Lake) near Kamloops. During that hot summer, members of the Secwepemc Nation and allies resorted to armed force to challenge the property rights of a private rancher, striking at the root of the Crown's authority to make and enforce law, while—at the same time— attracting much sharper legal penalties in the form of Criminal Code charges and lengthy prison sentences. Concluding with the brief case study of the stand taken by WSÁNEĆ and Hel'qui'ni'num people and settler allies to protect the burial ground on Grace Islet in the Salish Sea, we see the willingness of the judiciary to recognize indigenous rights capable of intruding on fee simple title to property, at least at the interlocutory stage of an injunction application. Linking indigenous protest to other social-movement challenges in twentieth- and twenty-first century BC, the chapter demonstrated the changing ways in which an array of legal actors—corporations, land

owners, legal counsel, judges, police, and legislators—have responded to attempts by indigenous people to assert indigenous rights through the control or appropriation of space. In the process, it examined how these legal conflicts provoked a fundamental questioning of law’s legitimacy among indigenous people and other social-movement actors, exposing contested social relations of adjudication surrounding indigenous rights.

Notwithstanding the wider ambit of recognition afforded to assertions of indigenous customary and constitutional property to land in recent years, Canadian courts appear to be more inclined to grant injunctions requested by corporations against protesters, rather than by social-movement actors attempting to enforce environmental or other rights through legal means. Looking to a recent case in New Brunswick (which, while not binding on British Columbia courts, may have a persuasive effect in future litigation), the Court of Queen’s Bench refused to grant an injunction to the Elsipogtog First Nation to halt exploration for shale gas in its territory. The First Nation asserted that the provincial government and SWN Resources Canada had failed to adequately consult the First Nation as required under s. 35 of the *Charter*. Justice Judy Clandening ruled against the First Nation, finding that the question of whether adequate consultation had occurred should be determined at trial, rather than at the interlocutory injunction stage, denying the application and allowing the company’s gas exploration work to proceed.¹²¹ In response, members of the First Nation blockaded a provincial highway, preventing the firm from accessing its exploration site and in the weeks that followed, mustered through extra-judicial means sufficient political power to force the company’s retreat from the province.

¹²¹ “Anti-fracking activists denied injunction in Canada,” *Al Jazeera*, 18 November 2013.

Recent court rulings in British Columbia, most notably the *Tsilhqot'in* decision, suggest the courts may be shifting their attitude toward the adjudication of indigenous title and rights, toward more robust legal recognition of indigenous claims that come into conflict, and weaken the exercise of, settler private property rights, particularly with respect to the development of land and extraction of natural resources.¹²² This emerging jurisprudence makes fee simple title and other forms of settler-recognized private property rights more qualified, contingent, and less certain. However, some scholars have suggested that despite its far-reaching implications, *Tsilhqot'in* continues to legitimize Crown sovereignty, legislative authority, and underlying title, maintaining a legal hierarchy where Crown title is treated as legally superior to Indigenous title.¹²³

The line of jurisprudence in recent indigenous law challenges us to move beyond two solitudes, based on either colonial law or indigenous law, to contemplate as John Borrows suggests what concurrent jurisdiction may look like in the Canadian context—and how this concurrent jurisdiction may be exercised asymmetrically in different geographic locales and with respect to distinct legal powers. In remote areas, where the colonization process is less advanced, where Crown title is the dominant form of tenure, and where indigenous legal traditions remain robust, we can envision what a transition from settler law to indigenous law may look like: reviving traditional legal systems, superseding licenses granted by settler state institutions over the use of land and resources, while adapting new legal forms to replace gaps in customary systems created over a century and half of colonial repression. It is perhaps more difficult to envision concurrent jurisdiction in densely populated urban areas in southern BC and Canada,

¹²² See *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

¹²³ Louis-Alfredo Garcia, “*Tsilhqot'in Nation v British Columbia: Aboriginal Title, Indigenous Resurgence, and the Politics of Recognition*,” (MA thesis: Carleton University, 2015).

where the colonization process is far more advanced, where indigenous legal traditions have been radically disrupted, where Crown lands have been largely privatized, where the settler population predominates over the indigenous population, and where settler reliance on fee-simple property relations is particularly entrenched. In these contexts, “indigenizing” the settler law through the incorporation of indigenous practices, customs, and ways of knowing may provide a window toward postcolonial legal relations—constructing Canada “on a broader base,” as John Borrows suggests, “recognizing Indigenous legal traditions as giving rise to jurisdictional rights and obligations in our land.”¹²⁴

Reconciling indigenous law and settler law—and indigenous and settler claims to property—will remain one of the defining legal questions and challenges in BC and Canada for the foreseeable future. In this new legal reality of increasingly robust and successful assertions of indigenous customary law and property rights, we will continue to see a remapping of the province’s legal geography and power relations.

¹²⁴ Borrows, *Canada’s Indigenous Constitution*, 7.

Chapter 7.

The Right to Sleep: Tenting as Protest and the Legal Politics of Shelter in Neoliberal British Columbia

Property claims by public authorities have become more contingent in British Columbia in the first two decades of the 21st century, in the face of successful legal assertions of a “right to sleep” and “right to shelter” in public spaces by people who are homeless, buttressed by the s. 7 *Charter* right to life, liberty, and security of the person. This a live and evolving area of law, with recent court rulings conferring a degree of stability on homeless encampments in urban areas, which, at the beginning of the twenty-first century, were often summarily removed through prompt and seemingly straightforward action by property managers, police, and (if necessary) the judiciary. The 2008 BC Supreme Court and 2009 Court of Appeal decisions in the case of *Victoria (City) v. Adams* represented important milestones in the evolving jurisprudence of urban tenting and the “right to sleep” and “right to shelter” in British Columbia. This line of legal reasoning reflects growing recognition of constitutional rights of marginalized people. It

also highlights the entrenchment of a permanent underclass in modern British Columbia, as neoliberal processes of “restraint” have intensified marginalization and displacement of poor people—necessitating a situation where courts have felt compelled to recognize specific rights to public spaces such as municipal parks and sidewalks. This could be interpreted as a judicial response to the economic conditions of the neoliberal age, where inequality is increasingly accepted as an inevitable fact, rather than attacked through redistributive social programs. However, further evolution of the law in the Victoria Courthouse encampment litigation in *Adamson* (2016) provides grounds for cautious optimism, suggesting that growing legal recognition of a customary and constitutional right to shelter may be translating into a positive (if tentative) right to housing in Canadian law.

7.1 Contesting the “Right to Sleep” and “Right to Shelter”

The final case study in this dissertation examines the legal politics of homelessness, and specifically the widening legal ambit for urban tenting and the “right to sleep” and “right to shelter,” exploring the ways in which poor peoples’ movements and advocates have asserted customary and constitutional rights to public spaces through “tent cities” and similar urban encampments—and how property managers and members of the legal community have responded to these assertions of rights. This chapter is grounded in evolving case law relating to the “right to sleep” and “right to shelter,” as well as theoretical literature on “the right to the city”—extending from foundational work by

Henri Lefebvre to recent research in legal and critical geography by scholars including Lynn Staeheli, Don Mitchell, David Harvey, and Mark Purcell.¹

In a recent study, Antonio Asuela and Rodrigo Meneses-Reyes define law as a “tool to provide essential order that will regulate the arrangement of things and people on the street.”² Staeheli and Mitchell argue for the importance of viewing public space as *property*, “a crucial set of relationships that structure the role, function, and nature of public space as space” and open up “new fronts in the ongoing struggles over and interventions in it.” They note that “being present in public space—making claims to and becoming visible in the streets, sidewalks, squares, and parks of the city—is a vital, necessary step in making claims *on* the public.”³ Purcell has demonstrated how processes relating to neoliberal restructuring of the state and society have given rise to specific forms of displacement and marginalization in urban areas, while simultaneously creating

¹ Henri Lefebvre, *Le Droit à la Ville* (Paris: Anthropos, 1968); Lynn A. Staeheli and Don Mitchell, *The Peoples' Property? Power, Politics, and the Public* (New York and London: Routledge, 2008); Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford, 2003); David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London and New York: Verso, 2012); Anna Minton, *Ground Control: Fear and Happiness in the Twenty-First-Century City* (London: Penguin, 2009); Don Mitchell and Lynn A. Staeheli, “Permitting Protest: Parsing the Fine Geography of Dissent in America,” *International Journal of Urban and Regional Research*, 29, no. 4 (December 2005): 796–813; Mark Purcell, “Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant,” *GeoJournal*, 58 (2002), 99–108; Katherine Beckett and Steve Herbert, *Banished: The New Social Control in Urban America* (Oxford: Oxford University Press, 2010); Timothy Cresswell, *The Tramp in America* (London: Reaktion Books, 2001); Nicholas Blomley, David Delaney, and Richard T. Ford, eds., *The Legal Geographies Reader: Law, Power, and Space* (Oxford: Blackwell, 2001); R.W.J. Boer and J. de Vries, “The Right to the City as a Tool for Urban Social Movements: The Case of Barceloneta,” Paper presented to 4th International Conference of the International Forum on Urbanism, Amsterdam, 2009; Meneses-Reyes, Rodrigo and José A. Caballero-Juárez. “The Right to Work on the Street: Public Space and Constitutional Rights.” *Planning Theory*, 13 no. 4 (November 2014): 370–386.

² Antonio Azuela and Rodrigo Meneses-Reyes, “The Everyday Formation of the Urban Space: Law and Poverty in Mexico City,” in *The Expanding Spaces of Law: A Timely Legal Geography*, ed. Irus Braverman, Nicholas Blomley, and David Delaney (Stanford, CA: Stanford University Press, 2014): 167–189.

³ Staeheli and Mitchell, *The Peoples' Property?*, xiv–xxi. See also Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford, 2003); Don Mitchell, “Anti-Homeless Laws and Public Space: 1. Begging and the First Amendment,” *Urban Geography*, 19, no. 1 (1998): 6–11; Don Mitchell, “The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the Rise of the ‘Purely Atomic’ Individual,” *Political Geography*, 24, no. 1 (January 2005): 77–100; Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (New York: Cambridge University Press, 2009).

space for new forms of resistance and urban politics to emerge.⁴ Shunning liberal and moderate conceptions of the “right to the city,” Purcell advocates instead for a renewed Marxist approach that is more consistent with Lefebvre’s original formulation and aims “to radically rethink the social relations of capitalism, the spatial structure of the city and the assumptions of liberal democracy.”⁵ Identifying the agency of poor people themselves and factors influencing the effectiveness of movements, Frances Fox Piven and Richard Cloward provide valuable comparative contexts in the case studies in *Poor People’s Movements* (1977).⁶ Engaging these themes, David Harvey notes that “the idea of the right to the city ... primarily rises up from the streets, out from the neighborhoods, as a cry for help and sustenance by oppressed peoples in desperate times.”⁷

This chapter is also informed by an older, international literature on the social-economic purposes of the law and the ways in which law’s violence has been disproportionately directed toward poor people. As noted in the introduction, Adam Smith wrote in the eighteenth century that “Laws and governments may be considered ... as a combination of the rich to oppress the poor, and preserve to themselves the inequality of goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to an equality with themselves by open violence.”⁸ Douglas Hay has applied this approach to modern times,

⁴ Mark Purcell, “Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant,” *GeoJournal*, 58 (2002), 99.

⁵ Mark Purcell, *Recapturing Democracy: Neoliberalization and the Struggle for Alternative Urban Futures* (New York: Routledge, 2008), p. 92; also Mark Purcell, “Citizenship and the Right to the Global City: Reimagining the Capital World Order,” *International Journal of Urban and Regional Research*, 27, no. 3 (September 2003): 564-90; Mark Purcell, “The Right to the City: The Struggle for Democracy in the Urban Public Realm,” *Politics & Policy*, 43, no. 3 (2013): 311-27.

⁶ Frances Fox Piven and Richard A. Cloward, *Poor People’s Movements: Why They Succeed, How They Fail* (New York: Pantheon, 1977).

⁷ Harvey, *Rebel Cities*, xiii.

⁸ Adam Smith, *Lectures on Jurisprudence*, Edited by R.L. Meek, D.D. Raphael, and P.G. Stein (Orig. Pub. 1763; Oxford: Clarendon, 1978), 208, as quoted in Hay, “Time, Inequality, and Law’s Violence,” 173.

suggesting that law's violence is "largely determined by the need to contain the effects, direct and indirect, of substantial social inequality."⁹ Hay identifies a close correlation between cyclical economic crises in societies and "peaks in the violence of the gallows," suggesting that more poor people were being subjected to law's violence by the late twentieth century than ever before, reflecting rapid growth in the resources and technology of policing, as well as recurring economic crises: "It is highly unlikely that, at any time in the past of English-speaking societies, we have stigmatized such a large proportion of our populations."¹⁰ Hay posits that the inevitable outcome of this skewed deployment of legal power was a crisis of law's legitimacy:

What does it mean for a society when the experience of law's violence, mainly directed against the poor, occurs at such high rates and at times of greatly increased inequality and sense of powerlessness among the poorest? The longer record suggests that the outcome is a sense of crisis and increased repression. I think that outcome is even more likely where the law's legitimacy is compromised by the fact that unequally distributed violence visibly extends beyond the criminal law. For lawyers are the visible agents of those institutions and persons who most benefit from material inequality.¹¹

It remains an open question whether the intensification of violence against the poor noted by Hay, and the corresponding crises of legal legitimacy, is being tempered in the Canadian context by constitutional protections afforded by the *Charter of Rights and Freedoms* in recent years.

The growing phenomenon of tent cities reflects the confluence of these social forces—a desire for community and security among poor people in the face of enduring systemic and overt legal violence, as well as a specific response to processes of neoliberal restructuring that intensifies marginalization and displacement of poor people, while

⁹ Douglas Hay, "Time, Inequality, and Law's Violence," in *Law's Violence*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1993), 151.

¹⁰ Hay, "Time, Inequality, and Law's Violence," 148 and 172.

¹¹ Hay, "Time, Inequality, and Law's Violence," 172.

giving rise to new forms of resistance and urban politics.¹² Vancouver activist Harsha Walia described the tent city that took root in Vancouver’s Oppenheimer Park in 2014 as “a DIY [Do It Yourself] kind of space. You don’t have to stand in a food line—everyone is involved in preparing food. That’s a big part of tent cities, and that’s what is often missing from the conversation.”¹³ This sense of solidarity and desire for community and security among marginalized, street-involved people has driven the formation of tent cities in Vancouver, Victoria, and other BC communities since the early 2000s, and has important parallels with earlier forms of protest in BC legal history, notably labour struggles with the common emphasis on conflicting conceptions of property and challenges to economic power and hierarchical class relations. As Mark Zion noted in a recent master’s thesis, “Tent cities make homeless people more visible by occupying a larger space collectively, disrupting conventional urban maps.”¹⁴

Problems relating to homelessness, poverty, and marginalization are not confined to British Columbia and Canada. Indeed, varying levels of poverty and economic inequality can be found in every state in the world—in both the global north and global south—with the intensity of poverty and its visible manifestations depending on factors including the level of state expenditures on redistributive programs and services, the relative strength of local and national economies, and the functionality of family and other support networks that can contribute to social integration rather than exclusion. In British Columbia and North America, poverty and visible homelessness have become

¹² Mark Purcell, “Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant,” *GeoJournal*, 58 (2002), 99.

¹³ “Do tent cities work?” *Vancouver Province*, 30 July 2014;

¹⁴ Mark Zion, “What is a Right to Shelter in the Desert of Post-Democracy? Tracking Homeless Narratives from the Courtroom to Dissensus,” (LLM thesis, University of Victoria, 2015), 145. See also John Franklin Koenig, “Spaces of Denial and the Denial of Place: The Architectural Geography of Homelessness in Victoria, BC,” (MA thesis, University of Victoria, 2007); Erin Black, “Private Dwelling in Public Space: Edmonton’s Tent City,” (PhD dissertation, University of Alberta, 2010).

increasingly acute in recent decades in the context of neoliberal structuring of the state and society.¹⁵ Local responses to destitution can be found in all jurisdictions, demonstrating the international nature of the problem. For example, the Supreme Court of India's decision in the 1980 case of *Ratlam Municipality v. Vardhichand* highlighted how a lack of support services left marginalized people to fend for themselves:

[T]he grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art.¹⁶

Going further than Canada's courts have been prepared to go, the Supreme Court of India conferred positive rights in that case, recognizing "the social justice component of the rule of law" imparted by India's Constitution, as well as common law related to the tort of nuisance. The court ruled that "the Municipal Council shall, within six months from to-day, construct a sufficient number of public latrines for use by men and women separately [and] provide water supply."¹⁷ This imposed a positive obligation on government to provide a minimum level of services, breaking ground in the terrain of judicial intervention in the executive function of public bodies.

7.2 Woodsquat and the Legal Politics of Shelter in Neoliberal BC

In the autumn of 2002, members of Vancouver's street community and housing activists established a squat in and around the abandoned Woodward's department store building on East Hastings Street in Vancouver's Downtown Eastside. Located in the heart of the

¹⁵ Seth Klein et al., *A Poverty Reduction Strategy for BC* (Vancouver: Canadian Centre for Policy Alternatives, 2008).

¹⁶ *Ratlam Municipality v Vardhichand*, AIR 1980 Supreme Court 1622, 1980 Cri.L.J. 1075.

¹⁷ *Ratlam Municipality v Vardhichand*, AIR 1980 Supreme Court 1622, 1980 Cri.L.J. 1075; James Billingsley, *Claiming Poor Rights: Narratives of Shelter, Space, and Freedom in India and Canada* (Victoria: Centre for Asia-Pacific Initiatives, University of Victoria, 2013).

notorious “poorest postal code in the country,” the “Woodsquat” (as the protest camp was called) mushroomed over the course of ten weeks into an eclectic, ramshackle community of nearly two hundred street-involved people and their political allies. Originally slated for social housing by the ruling New Democratic Party government, the future of the Woodward’s building was suddenly thrown into flux when the new Liberal administration swept into power in 2001 and promptly cancelled the project, as part of a wider ideological assault on social programs and policies associated with an interventionist welfare state. As welfare entitlements were restricted and public-sector workers faced job cuts and contract concessions, social movements saw a resurgence, including an eclectic poor peoples’ movement. As Piven and Cloward note, “protest tactics which defied political norms were not simply the recourse of troublemakers and fools. For the poor, they were the only recourse.”¹⁸

In the midst of the “Woodsquat,” the Province of British Columbia, as the owner of the building through a Crown corporation, the Provincial Rental Housing Corporation, initiated legal proceedings against the squatters, seeking injunctive relief ordering them to vacate the building. On 16 September, BC Supreme Court Justice Linda Loo issued an *ex parte* interlocutory injunction, leading to the forced removal and arrest of 54 people when 100 police re-occupied the building, putting an end to the week-long squat.¹⁹ However, this enforcement action simply moved the protest from the interior of the building to the surrounding public sidewalks, where the protestors dug in, establishing a make-shift city under the awnings that surrounded the iconic Vancouver landmark. “Tents, mattresses and other objects were placed around the building in contravention of the City’s By-law,”

¹⁸ See Piven and Cloward, *Poor People’s Movements*, 3.

¹⁹ *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36; “Squatters settle in,” *Vancouver Province*, 18 September 2002.

Court of Appeal Justice Anne Rowles later found.²⁰ More than two months after the encampment was established on the sidewalks on Hastings, Abbott, and Cordova Streets, and in the midst of a municipal election, the City of Vancouver obtained a subsequent injunction, ordering the removal of the camp on the grounds that it violated the city's *Streets and Traffic Bylaw*. Following another week of legal wrangling between lawyers representing the city and the protesters, the city received an enforcement order directing police to disband the camp, prompting the campers to pack up on their own accord and vacate the municipal sidewalk, amid promises of social housing from the provincial government and the newly elected left-wing city council.²¹

While no arrests or contempt proceedings arose from the encampment on the sidewalks around the Woodward's building, the squatters (aided by pro bono lawyers Cameron Ward and L.J. Tessaro), appealed against the injunction issued to the City of Vancouver, while also appealing against the original injunction issued to the Provincial Rental Housing Corporation that provided the legal basis for the police raid and eviction. The provincial government, for its part, appealed against a November 2002 ruling awarding \$100 in costs to each of 39 defendants who attended a court hearing to learn that charges arising from the original occupation had been dropped.²² In 2005, the BC Court of Appeal upheld the two appeals relating to the original injunction, while dismissing the appeal against the injunction awarded to the city. Arguments presented in

²⁰ *Vancouver (City) v. Maurice*, 2005 BCCA 37.

²¹ *Vancouver (City) v. Maurice*, 2005 BCCA 37; "The lesson of 'Woodsquat'," *Vancouver Sun*, 15 October 2002; "'We feel safe in that place'," *Vancouver Province*, 21 November 2002; "Shelter for squatters on offer as Woodward's deadline arrives," *Vancouver Sun*, 25 November 2002; "Housing found for squatters, but some refuse to leave Woodward's," *Times Colonist*, 25 November 2002; "20 squatters leave as city seeks clearout," *Vancouver Sun*, 27 November 2002; "They're still squatting at Woodwards," *Vancouver Sun*, 30 November 2002.

²² Community Services minister George Abbott described the decision to appeal Justice Janice Dillon's award of costs to the squatters as a matter of principle: "We're not about to reward people for bad behaviour." "Province appeals award to Vancouver squatters," *Times Colonist*, 11 April 2003; *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36.

City (Vancouver) v. Maurice (2005) and *Provincial Rental Housing Corporation v. Hall* (2005) provide important insights into the legal politics of sheltering and wider questions relating to the exercise of injunctions in response to protest. In their submission to the appeal court, the housing activists in the Woodsquat litigation took issue with what they described as a pattern of procedural unfairness in injunction proceedings initiated by corporations and governments against social movement actors:

The appellants argue that since *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R.(2d) 273 (C.A.), it has become almost settled practice in British Columbia for corporations or government entities to attempt to quash political or social protest activities by inviting the courts to grant injunctions and then to exercise the court's powers to punish for contempt. It is the appellants' submission that when the extraordinary remedy of an injunction is sought, the court must ensure that fundamental procedural safeguards are met.²³

Court of Appeal Justice Anne Rowles dismissed the challenge to the injunction issued to the City of Vancouver, which was confined to narrow technical arguments around the identification of defendants in the style of cause. The judge allowed the appeal against the injunction issued to the Provincial Rental Housing Corporation, finding that the trial judge erred in deciding that the *ex parte* interlocutory injunction posed no risk of harm to the protesters: "An unwarranted or unnecessary stifling of freedom of expression, including the right to dissent, is not something that can be measured monetarily, but 'harm' is not confined to monetary loss."²⁴

Notwithstanding growing legal recognition of a right to protest, the BC judiciary continued to respond in the early 2000s to injunction applications from managers of public property in predictable ways, citing the court's "narrow discretion" to consider

²³ *Vancouver (City) v. Maurice*, 2005 BCCA 37. See also *Everywoman's Health Centre Society v. Bridges*, 1990 BCCA 5409.

²⁴ *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36.

constitutional questions and other factors that would militate against issuing interlocutory injunctions. When street-involved people and their supporters occupied a series of Vancouver parks in 2003 to protest provincial government changes to welfare policy and a shortage of social housing, the judiciary demonstrated little hesitation in granting injunctions to the Vancouver Board of Parks and Recreation to remove the camps. The homeless and anti-poverty activists had established a camp at Victory Square on West Hastings Street in July 2003, coinciding with the announcement that Vancouver had been selected to host the 2010 Olympic Winter games; the campers relocated “Victory Squat” to Thornton Park, near the central railway station, a few weeks later, after war veterans objected to the encampment near the Victory Square cenotaph. In August 2003, with the camp growing to about 30 tents and 50 campers, BC Supreme Court Justice Ian Pitfield granted another injunction to the Parks Board ordering the removal of the Thornton Park camp, suggesting that refusal to do so would be construed as “an open invitation to permit others ... to create tent villages, towns, or cities in other parks in Vancouver” and that “[p]olitics, at least as regards the issue of housing for the homeless in Vancouver, is not part of the Parks Board mandate nor is housing an issue with which it should be required to cope.” In his decision in *Vancouver Parks Board v. Mickelson et al*, Justice Pitfield ruled that the balance of convenience was “not tipped in favour of the defendants by concern for their constitutional rights.”²⁵

The “Victory Squat” campers complied with the court ruling, vacating Thornton Park but relocating “Victory Squat” to yet another park, Portside (Crab) Park on Vancouver Harbour. Spokesperson Tony Ruzza from the Anti-Poverty Committee explained the political motivation behind the camp:

²⁵ *Vancouver Parks Board v. Mickelson et al.*, 2003 BCSC 1271.

This is an open air shelter run by the homeless for the homeless. This makes Victory Squat a political act. This is political protest against the BC Liberals. It is about welfare legislation that has seen more than 70,000 people forced off welfare. It is about a two-year-out-of-five welfare rule that will see more than 40,000 more thrown off welfare on April 1st. It is about the lack of adequate and affordable housing. What does city council and the parks board think will happen on April 1st?²⁶

Two weeks later, BC Supreme Court Justice Ian Meiklem granted another injunction to the Parks Board in the case of *Vancouver Board of Parks v. Sterritt*, ordering the campers to vacate Portside Park and declaring that:

the discretion of the court on an application for an interlocutory injunction to compel compliance with a public statute is very limited indeed. Very exceptional circumstances are required to deny an application for a statutorily-enabled injunction, and even if, as Mr. Justice Pitfield held in the Mickelson case, the assertion of a constitutional challenge invokes a different test, one that involves a balance of convenience test, the public interest in enforcement of laws existing and enacted for the public good generally outweighs the interest of individuals who challenge the law on the basis of the constitution or other bases.²⁷

In this respect, Justice Meiklem concurred with the reasoning in *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003), that the public interest in seeing the law upheld was not easily outweighed by any prejudice to the defendant.²⁸ Litigation relating to the “Victory Squat” demonstrated that recognition of constitutional and customary rights capable of trumping private property rights was a slow and uneven process.

7.3 Establishing the “Right to Shelter” in the Adams Decision

²⁶ Vancouver Anti-Poverty Committee, “Victory Squat Press Conference” media release, 15 August 2003. < <http://chodarr.org/sites/default/files/chodarr2300.pdf> > (viewed 26 April 2016).

²⁷ *Vancouver Board of Parks v. Sterritt et al.*, 2003 BCSC 1421.

²⁸ *British Columbia (Minister of Forests) v. Wilson*, 2000 BCSC 1135; *British Columbia (Minister of Forests) v. Jules (Adams Lake Band)*, 2001 BCCA 647; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 371.

The ambit of urban tenting and legal recognition of the “right to sleep” and “right to shelter” was expanded in important ways in the 2008 BC Supreme Court and 2009 Court of Appeal decisions in *Victoria (City) v. Adams*.²⁹ Those decisions reflected the culmination of several years of occupations and advocacy by street-involved people in Victoria, British Columbia’s capital city—a process highlighted in recent research by Koenig, Zion, and Billingsley, beginning with an encampment at the provincial legislature shortly after Gordon Campbell’s Liberal government took office, and followed by a cat-and-mouse game between homeless people led by a man named David Arthur Johnston and municipal bylaw officers and police in city parks and provincially owned greenspaces culminating in a tent city at a small municipal park called Cridge Park in downtown Victoria in the autumn of 2005.³⁰ Tensions were amplified by proposed provincial legislation, such as the Trespass to Property Act (which was subsequently withdrawn) and the Safe Streets Act of 2004 (which was adopted by the legislature), aimed at bolstering the powers of private land owners, bylaw officers, and police to displace street-involved people from private and public spaces—augmenting civil remedies in tort and municipal bylaws with quasi-criminal penalties imposed by legislative statute.³¹

Prior to the establishment of the Cridge Park camp, Johnston and other street-involved people had asserted a “right to sleep” at the nearby St. Ann’s Academy grounds,

²⁹ *Victoria (City) v. Adams*, 2008 BCSC 1363.

³⁰ See John Franklin Koenig, “Spaces of Denial and the Denial of Place: The Architectural Geography of Homelessness in Victoria, BC,” (MA thesis, University of Victoria, 2007); Mark Zion, “What is a Right to Shelter in the Desert of Post-Democracy? Tracking Homeless Narratives from the Courtroom to Dissensus,” (LLM thesis, University of Victoria, 2015); James Billingsley, *Claiming Poor Rights: Narratives of Shelter, Space, and Freedom in India and Canada* (Victoria: Centre for Asia-Pacific Initiatives, University of Victoria, 2013).

³¹ Koenig, “Spaces of Denial and the Denial of Place,” 164; Trespass to Property Act, Bill M-203, 2004; Safe Streets Act, S.B.C. 2004 c. 75.

provincially owned land that included the offices of the provincial Ministry of Advanced Education as well as substantial greenspace. For more than a year beginning in January 2004, Johnston and his associates sought to shelter themselves on a nearly daily basis at the St. Ann's grounds, resulting in repeated arrests, multiple Criminal Code charges of trespass, breach of peace, and obstruction of justice, and several prison sentences.³² In September 2005, the Provincial Capital Commission, the Crown corporation responsible for management of the St. Ann's grounds, applied for and received a civil injunction from Supreme Court Justice R.D. Wilson ordering the removal of the camp.³³

Johnston and his associates complied with the letter of the court ruling, relocating across the street to the City of Victoria's Cridge Park, establishing a camp that grew over a matter of weeks to encompass approximately 70 persons in 20 tents. The city applied for, and received, an interlocutory injunction from Supreme Court Justice Allan Stewart restraining the campers from remaining in the park, and police had removed the camp by the end of October 2005.³⁴ Several years of legal wrangling followed. The city applied for a permanent injunction in the face of ongoing roving tenting by David Arthur Johnston and others, while counsel for the campers, Victoria lawyers Irene Faulker and Catherine Boies Parker, applied for a court decision on the constitutional question of whether the city bylaws violated ss. 7 and 12 of the *Charter*, relating to right to security of the person and the right to not be subjected to cruel or unusual treatment or punishment. In October 2008, the trial judge, Supreme Court Justice Carol Ross, declared that sections of the City of Victoria's Parks Regulation Bylaw and Streets and Traffic

³² David Arthur Johnston, "Journal of the Occupation of St. Ann's Academy, January 2004 to May 2013" <<http://www.angelfire.com/apes/hatrackman/welcome.htm>> (viewed 26 April 2016).

³³ *Provincial Capital Commission v. Johnston et al.*, 2005 BCSC 1397.

³⁴ *Victoria (City) v. Adams*, 2008 BCSC 1363; "Cridge Park campers pack up," *Times Colonist*, 29 October 2005.

Bylaw that prohibited overnight sheltering and sleeping in municipal parks and sidewalks violated s. 7 of the *Charter* “in that they deprive homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, and are not saved by s. 1 of the Charter.” Madam Justice Ross declared that those section of the bylaws were “of no force and effect insofar ... as they apply to prevent homeless people from erecting temporary shelter.”³⁵

The City of Victoria appealed the decision, and the Attorney General of BC and Union of BC Municipalities joined the case as intervenors in support of the city’s position, while the BC Civil Liberties Association intervened in support of the respondent campers. In its 2009 ruling in *Victoria (City) v. Adams*, the Court of Appeal panel upheld Justice Ross’s ruling, declaring: “we find no legal basis to interfere with the trial judge’s conclusion ... that the prohibition in the bylaws on the erection of temporary shelter violates the rights of homeless people to life, liberty and security of the person under s. 7, and the violation is not justified under s. 1 of the Charter.” The Court of Appeal rejected the city’s argument that the Supreme Court ruling intruded on the legislative authority of local government to make complex decisions on public policy.³⁶

The City of Victoria responded to the *Adams* decision by amending its Parks Regulation Bylaw to permit overnight sheltering by people who were homeless between 7:00 pm and 7:00 am (with some variation for daylight saving time).³⁷ However, advocates including the homeless man at the centre of the original litigation, David Arthur Johnston, were not content with the allowance for overnight sheltering. Johnston

³⁵ *Victoria (City) v. Adams*, 2008 BCSC 1363; “Court strikes down Victoria bylaw against homeless camping,” *CBC News Online* (Vancouver), 14 October 2008; “Victoria bylaws unconstitutional, court told,” *Globe and Mail*, 17 June 2008.

³⁶ *Victoria (City) v. Adams*, 2009 BCCA 563.

³⁷ City of Victoria Parks Regulation Bylaw, Amendment Bylaw (No. 06) No. 10-021; City of Victoria Parks Regulation Bylaw No. 07-059.

believed the “right to sleep” extended into the daytime hours as well, and proceeded to set up his tent in city parks in defiance of the amended bylaw. Johnston was arrested on multiple occasions between 2010 and 2013, receiving prison sentences for as long as 90 days and embarking on a month-long hunger strike at the Wilkinson Road provincial jail in nearby Saanich.³⁸ As Mark Zion noted in his master’s thesis, Johnston challenged the constitutionality of the civic bylaw’s prohibition on daytime sleeping as an affront to his dignity, but failed to satisfy the evidentiary burden to successfully make out this claim in court. “Johnston and others demonstrate that homeless citizens are capable of democratic citizenship that works along an expansive temporal register rooted in the present, but extending ‘backward’ into more egalitarian predecessors in the past and into a more equal imagined future.”³⁹

In the wake of the *Adams* decision, the BC courts decided on another case relating to the occupation of public space. In *Vancouver (City) v. Zhang* (2010), the Court of Appeal struck down sections of a Vancouver municipal bylaw that prohibited the erection of shelters associated with political protest. The case related to a semi-permanent, 24-hour-a-day protest that had been established outside the Chinese Consulate on Granville Street in Vancouver, where members of the Falun Gong sect held vigil to protest human rights violations against their associates in China. In overturning the relevant sections of the bylaw and a lower-court injunction ordering the removal of the shelter, the appeal court allowed that some form of sheltering could be interpreted as ancillary to the s. 2

³⁸ “Homeless advocate’s outburst halts hearing,” *Times Colonist*, 20 October 2011; “Correction centre doctors keep close watch on hunger strike prisoner,” *Times Colonist*, 17 November 2011; “Right-to-camp advocate David Arthur Johnston sentenced to 90 days,” *Times Colonist*, 15 January 2013; David Arthur Johnston, “Journal of the Occupation of St. Ann’s Academy, January 2004 to May 2013” < <http://www.angelfire.com/apes/hatrackman/welcome.htm> > (viewed 26 April 2016).

³⁹ Mark Zion, “What is a Right to Shelter in the Desert of Post-Democracy? Tracking Homeless Narratives from the Courtroom to Dissensus,” (LLM thesis, University of Victoria, 2015), 155-157.

Charter right to freedom of expression. Writing for the appellate panel, Justice Carol Huddart found that “the reasonable regulation of commercial and artistic expression cannot justify a by-law that effectively precludes any use of a structure, however minimal, for political expression.”⁴⁰ However, the courts were later quick to narrow the application of the ruling in *Zhang* to avoid authorizing more wide-scale tent protests. As Supreme Court Justice Terence Schultes would declare in the Occupy Victoria case a year later: “A vigil by a single person in a meditation hut next to a sidewalk regulated by a traffic bylaw raises very different concerns than those posed by a significant, ongoing tent encampment in a public square that is regulated by a park use bylaw.”⁴¹

7.4 Occupy: Tenting as Political Protest

In September 2011, several hundred protesters occupied Zuccotti Park, a privately owned public square in the heart of Wall Street, New York City’s financial district and the epicentre of global finance capital. The Occupy Wall Street encampment, which included daily “peoples’ assemblies” of campers and other New York citizens, became a lightning rod for global opposition to the concentration of wealth and power in the hands of an elite “1 per cent,” inspiring similar occupations and movements by the “99 per cent” in approximately 1,000 communities around the world—including encampments in British Columbia in Victoria, Vancouver, Comox, Nelson, and Nanaimo.⁴²

⁴⁰ *Vancouver (City) v. Zhang*, 2010 BCCA 450.

⁴¹ *Victoria (City) v. Thompson*, 2011 BCSC 1810.

⁴² See Stuart Schrader and David Wachsmuth, “Reflections on Occupy Wall Street, the State and Space.” *City*, 16, nos. 1-2 (2012): 243-248; Jonathan Massey and Brett Snyder, “Occupying Wall Street: Places and Spaces of Political Action,” *Places* (September 2012) < <https://placesjournal.org/> >; Michael Bueckert, “Solidarity with Whom? Occupy Wall Street and Responsibility to the Other(s),” in *World to Win Contemporary Social Movements and Counter-Hegemony*, ed. William K. Carroll and Kanchan Sarker (Winnipeg: ARP Books, 2016), 327-341; Jennifer Koshan, “I Fought the Law: Civil Disobedience and the Law in Canada,” *University of Calgary Faculty of Law Blog on Developments in Alberta Law (ABlawg.ca)*,

In Victoria, the “Occupy Victoria” camp was established in Centennial Square, a municipally owned and operated plaza adjacent to the City Hall on 15 October 2011, an international “day of action” in solidarity with the Wall Street camp and the global movement. Initially, the civic authorities condoned—even supported—the camp and its demands for reform of the global economic system, with Victoria City Council adopting a resolution on 27 October declaring “that the City of Victoria supports the People’s Assembly of Victoria in principle and practice.”⁴³ However, as the camp grew to about 70 tents and the demographic shifted from social-justice protesters to street-involved people, including people managing addictions, opposition among downtown businesses and other interest groups mounted. There was also a specific conflicting claim to the municipally owned land in the Centennial Square: for a “Christmas tree light-up” and other seasonal events organized by the Downtown Victoria Business Association, under a permit issued by the city to promote holiday shopping. In the face of this pressure, and with a municipal election approaching, the City of Victoria reversed its position and applied for an injunction to displace the camp.⁴⁴

On the eve of the 19 November municipal election, the City of Victoria’s application against the Peoples’ Assembly of Victoria and the Occupy Victoria camp was heard before BC Supreme Court Justice Terence Schultes. The campers were represented by a legal team that included Victoria lawyer Rajinder Sahota assisted by University of Victoria law student Anushka Nagji, while City Solicitor Tom Zworski represented the city. Notwithstanding a formidable defence asserting that the s. 2 *Charter* right to freedom of expression should trump promotional activities that the Downtown Victoria

27 February 2012 < http://ablawg.ca/wp-content/uploads/2012/02/blog_jk_occupy_feb2012.pdf > viewed 30 March 2012.

⁴³ Minutes of Victoria City Council Meeting, 27 October 2011.

⁴⁴ “Occupy Victoria protesters given notice to vacate Monday,” *Toronto Star*, 6 November 2011.

Business Association proposed to conduct in Centennial Square under permit from the city, Justice Schultes granted the injunction on 18 November. In his decision in *Victoria (City) v. Thompson*, Justice Schultes distinguished “statutorily-based injunctions” from equitable injunctions, suggesting that in the former judges had a very narrow degree of discretion. Citing the BC Court of Appeal decision in *Vancouver (City) v. Maurice* (2005), where Justice Rowles had declared that “the courts will refuse an injunction to restrain the continued breach only in exceptional circumstances,” Justice Schultes found that the issues raised by the Occupy Victoria respondents did not amount to “exceptional circumstances.”⁴⁵ Applying the test from *RJR-MacDonald*, the judge found that “the balance of convenience dictates the petitioner should be free to come to the conclusion that any encampment, wherever and however situated in the square, is not in keeping with the best public use of that space under its delegated legislative powers.” Justice Schultes rejected the suggestion that by granting the injunction the court was “validating the [city’s] preference for mundane holiday celebrations geared to promoting downtown business over an impassioned fight for global justice.” Rather, the court was “upholding the ability of a government to act in exercise of its authority to allocate public space in accordance with a bylaw, whatever its *Charter* deficiencies are found to be at the petition stage... .” In a concession to the Occupy Victoria protesters, Justice Schultes refused a request from the city for an enforcement order, commending the respondents for “a praiseworthy degree of responsiveness” to the city’s concerns and for conducting themselves during the hearing with “a high degree of respect for the law.”⁴⁶

⁴⁵ *Victoria (City) v. Thompson*, 2011 BCSC 1810. See also *Vancouver (City) v. Maurice*, 2005 BCCA 57.

⁴⁶ *Victoria (City) v. Thompson*, 2011 BCSC 1810, “Oral Reasons for Judgement,” November 18, 2011.

However, mirroring earlier injunction proceedings against social movement actors in BC, the City of Victoria did not proceed with its petition at trial, meaning the substantive *Charter* questions alluded to by the judge—and the *raison d'être* for the Occupy protest movement against inequities in the global distribution of wealth—were never fully aired in the legal arena. The court declined to consider these substantive issues at the injunction hearing, focusing instead on narrow technical questions relating to the legitimate use of public space and governmental authority. The Occupy Victoria protesters largely complied with the court's ruling, with fewer than a dozen tents (out of the original 70) remaining by the 19 November deadline established by Schultes, followed by a final cleaning up operation by city crews under police supervision on 22 November.⁴⁷ With the camp gone, the Downtown Victoria Business Association proceeded unimpeded with its planned seasonal activities; with “normality” restored to the public square, the city no longer had reason to pursue the petition through the court system. The “interim” relief granted by the BC Supreme Court by way of the interlocutory injunction served a longer-term purpose intended by the city's application—displacing the Occupy protesters and restoring “normality” to Centennial Square without the substantive issue of the global distribution of wealth and power ever being heard in the courtroom.

A similar pattern unfolded in other communities in the province, country, and continent as municipal authorities sought and received orders from courts to remove Occupy encampments and restore “normality” to public spaces that had been seized by supporters of the global movement. In Vancouver, the city applied for, and received, an

⁴⁷ “Occupy Victoria protesters go quietly,” *CBC News Online* (Vancouver), 19 November 2011; “Victoria granted injunction against Occupy camp,” *Globe and Mail*, 18 November 2011; “Occupy Victoria campers ordered off Centennial Square,” *Victoria News*, 18 November 2011; “Police clear Occupy Victoria site,” *Times Colonist*, 22 November 2011.

injunction ordering the removal of the “Occupy Vancouver” camp that had been established on the grounds of the Vancouver Art Gallery, lands leased by the city from the province, and therefore subject to the municipal *City Land Regulation Bylaw*, following a high-profile overdose death of a woman at the camp.⁴⁸ The judge in that case, BC Supreme Court Associate Chief Justice Anne MacKenzie, suggested that the broader question relating to s. 2 freedom of expression rights and other “constitutional arguments are properly examined at the trial of the matter to provide the parties sufficient time to prepare and to allow the Attorney General the opportunity to intervene...,” rather than at the interlocutory injunction application stage.⁴⁹ However, as occurred in Victoria, these constitutional questions were never properly considered in a legal arena, since the City of Vancouver did not proceed with a trial, after the *raison d’etre* for the legal action—removing the camp—was achieved with the granting of the interlocutory injunction. When the Occupy Vancouver campers cheekily responded to the court order by relocating a block away from the Art Gallery to the entrance to the Vancouver Law Courts, Justice MacKenzie issued a subsequent order mandating that the tents be removed within four hours.⁵⁰ Occupy Nanaimo, the last encampment in British Columbia associated with the global Occupy movement, was removed on 9 December 2011, after the City of Nanaimo received an injunction from BC Supreme Court Justice Catherine Wedge. The protesters, who had occupied Diana Krall Plaza outside the public library in the city centre for seven weeks, voluntarily vacated the site when city officials,

⁴⁸ “City wins injunctions against Occupy Vancouver,” *Globe and Mail*, 18 November 2011.

⁴⁹ *Vancouver (City) v. O’Flynn-Magee et al.*, 2011 BCSC 1647. See also Occupy Vancouver Collection, msc 146, Simon Fraser University Special Collections and Rare Books.

⁵⁰ *In the Matter of Access to the Courts of Justice*, 2011 BCSC 1815.

armed with the injunction and backed by RCMP officers, ordered them to leave.⁵¹

However, City Councillor Fred Pattje expressed sympathy with the protesters and their cause, declaring: “You can evict a tent, but you can’t evict an idea.”⁵²

7.5 Evolving Jurisprudence of the Right to Shelter

At the time of writing (January 2018) the jurisprudence relating to urban tenting in British Columbia continues to evolve, particularly in terms of encampments involving people who are homeless, with growing legal recognition of a *Charter*-protected right to sleep and to shelter oneself in the absence of adequate alternative shelter, arising from the s. 7 right of life, liberty, and security of the person. However, this process has been uneven, reflecting specific circumstances in each case as well as latitude in the ways in which individual judges have exercised their discretionary authority when evaluating applications for interlocutory injunctive relief, reflecting the unsettled nature of the conflicting property claims of public authorities and the constitutional rights of campers. A desire for community and security among marginalized, street-involved people in the urban centres of British Columbia underpins the ongoing phenomenon of tent cities, against the backdrop of neoliberal restructuring which has intensified marginalization and displacement in urban areas, as Purcell and others have noted.⁵³

In 2014, street-involved people in Vancouver established a large camp at Oppenheimer Park in the Downtown Eastside. The camp existed for three months, from July to October, and included assertions of aboriginal rights in the immediate wake of the

⁵¹ “Occupy group moves on, but won’t give up,” *Nanaimo News Bulletin*, 13 December 2011; “No longer welcome,” *Times Colonist*, 13 December 2011.

⁵² “Occupiers told to leave plaza or face legal action,” *Nanaimo News Bulletin*, 29 November 2011.

⁵³ Mark Purcell, “Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant,” *GeoJournal*, 58 (2002), 99.

Supreme Court of Canada's decision in the *Tsilhqot'in* case. The campers had responded to an eviction notice issued by Vancouver Police by serving their own eviction notice on the city, stating that the park was located on unceded indigenous land. This prompted the traditional speaker for the Musqueam Nation, which claims downtown Vancouver as part of its territory, to visit the Oppenheimer Park camp and state that the campers were pursuing a "noble cause," but that it was not appropriate for anyone to use Musqueam to further their own cause in Musqueam territory; Musqueam Chief Wayne Sparrow said his nation would pursue its land claim through negotiations with the federal, provincial, and municipal governments. The Squamish and Tsleil-Waututh Nations, which also claim territory in Greater Vancouver, issued their own statements distancing their land claims from the eviction notice issued at the camp. Ed John, representing the BC First Nations Summit, said indigenous people were growing increasingly impatient: "It's not surprising that First Nations people would get on the land and say, 'This is our land.' Technically, they're right... but aboriginal title is a collective interest."⁵⁴

In September 2014, the Vancouver Parks Board applied for an injunction to remove the Oppenheimer Park camp, which had grown to nearly 200 campers. Supreme Court Justice Jennifer Duncan initially provided a 10-day adjournment to allow the defendant campers and their counsel additional time to prepare their case, but following the hearing in early October, the judge granted the injunction. Justice Duncan conceded that litigation of injunctive relief had evolved to favour "an approach which takes into account Charter issues rather than the consideration of a pure statutory breach," but ruled that the balance of convenience under both the *Thornhill* and *RJR-MacDonald* tests

⁵⁴ "Vancouver's Oppenheimer Park protest raises question of aboriginal title to urban centres," *CBC News Online* (Vancouver), 23 July 2014.

favoured the granting of an interlocutory injunction to the Parks Board.⁵⁵ On 16 October 2014, Vancouver Police and Parks Board employees moved in to dismantle the camp; five hold-out campers in two tents were arrested for breach of the court order, but no charges were laid, with police saying they had no interest in criminalizing the campers.⁵⁶

Ongoing tensions relating to urban encampments were also manifested in the Fraser Valley of the Lower Mainland, a culturally conservative area often immune from social-movement protests. In October 2015, Chief Justice Christopher Hinkson of the BC Supreme Court struck down sections of a municipal bylaw in the city of Abbotsford in the Fraser Valley that prohibited overnight sheltering by people who are homeless. This decision marked the culmination of several years of tensions between municipal officials and street-involved people associated with the BC/Yukon Association of Drug War Survivors and represented by the Vancouver-based Pivot Legal Society (a non-profit advocacy firm focusing on poverty law). The municipal response to homelessness and sheltering in Abbotsford parks had been imbued with an ugly edge, reflecting conservative attitudes in that community and a staunchly conservative mayor and council that governed the community at that time. In one notorious incident, a municipal parks manager ordered his staff to spread chicken manure in a park where people who were homeless were known to seek shelter. In another incident, parks and bylaw staff slashed tents and used bear spray in a bid to disperse campers.⁵⁷ In his decision in *Abbotsford (City) v. Shantz*, Chief Justice Hinkson displayed a strong compassionate tone, noting that

⁵⁵ *Vancouver Board of Parks and Recreation v. Williams et al.*, 2014 BCSC 1926.

⁵⁶ “With few options, homeless predict return to dismantled tent city,” *Globe and Mail*, 16 October 2014; “VPD won’t recommend charges against Oppenheimer campers,” *Vancouver Courier*, 16 October 2014; “Oppenheimer homeless camp to be evicted after injunction granted,” *CBC News Online* (Vancouver), 8 October 2014.

⁵⁷ “Manure on homeless camp leads to Abbotsford lawsuit,” *CBC News Online* (Vancouver), 26 November 2013.

constant movement of the homeless exacerbated their already vulnerable positions, as it inhibited the ability of the service providers who endeavoured to help the City's homeless to actually locate them and provide help. I thus find that the evidence supports a finding that the Impugned Bylaws have had a serious effect on the psychological or physical integrity of the City's homeless.⁵⁸

The *Shantz* decision built on the foundation established in *Adams* in important ways—extending the court's recognition that legal weight should be afforded to the health and wellbeing of persons who are homeless, and elaborating on how the s. 7 right to security of the person specifically translates on the ground into the conditions faced by street-involved people.

This compassionate approach toward the rights of people who are homeless, and nuanced attention to the specific needs of individuals experiencing multiple barriers to housing and health and social challenges, including addictions, was sustained by Chief Justice Hinkson in *British Columbia v. Adamson*. In that April 2016 decision, the court refused an application from the Province of British Columbia for an injunction to displace an encampment consisting of approximately 100 people in 80 tents on the grounds of the Provincial Courthouse in downtown Victoria. The case was highly charged with symbolism and immediacy—occurring in a courtroom immediately adjacent to the impugned encampment, which had been entrenched for about five months. Several dozen of the campers, represented by counsel Catherine Boies Parker and Jasmine MacAdam from the Victoria firm of Farris, with funding provided by the non-profit Together Against Poverty Society (TAPS), were permitted to directly address the Court. Chief Justice Hinkson granted the defendant campers considerable latitude in their verbal submissions, appearing to recognize the multiple and persistent barriers experienced by street-involved people, including mental health and addictions issues.

⁵⁸ *Abbotsford (City) v. Shantz*, 2015 BCSC 1909.

Hinkson’s ruling in *Adamson* sustained the strong element of compassion toward the plight and rights of people who are homeless:

Ultimately, in determining whether or not to grant an interim injunction at this time, I find that the balance of convenience is overwhelmingly in favour of the defendants, who simply have nowhere to move to, if the injunction were to issue, other than shelters that are incapable of meeting the needs of some of them, or will result in their constant disruption and a perpetuation of a relentless series of daily moves to the streets, doorways, and parks of the City of Victoria.⁵⁹

Adamson went much further than *Adams* in recognizing inadequacies in the emergency shelter system, which often exclude the most high-need individuals, particularly individuals with addictions issues, and provide inadequate accommodations for couples, people with pets, and other specific user groups. In this respect, Chief Justice Hinkson expanded in *Adamson* on his compassionate approach in *Shantz*—suggesting a growing legal recognition of the s. 7 right to security of the person that is capable of trumping the assertion of property rights by public institutions—at least at the interlocutory stage, where the balance of convenience is increasingly seen as favouring the rights of people who are homeless to shelter themselves in the absence of adequate alternative shelter. While Hinkson ultimately granted an injunction to the provincial government (when the province applied again three months later), ordering the Victoria Courthouse campers to leave, the judge suspended its application for more than a month, with the court order “to take effect as soon as new housing created by the Province became available.”⁶⁰ The government of British Columbia ultimately acquired more than 200 new units of social housing to meet the conditions established by the Chief Justice for injunctive relief, purchasing a vacant hotel and a senior’s care home to house the

⁵⁹ *British Columbia v. Adamson*, 2016 BCSC 584.

⁶⁰ *British Columbia v. Adamson*, 2017 BCSC 168; *British Columbia v. Adamson*, 2016 BCSC 1245; “BC government granted injunction to shut down Victoria tent city,” CBC News online, 5 July 2016 < <http://www.cbc.ca/news/canada/british-columbia/victoria-tent-city-injunction-1.3666109> > (viewed 30 January 2018).

Courthouse campers in accordance with a detailed formula established in Hinkson’s ruling—breaking new ground in the jurisprudence of tenting and homeless encampments in the province.⁶¹

The emerging line of jurisprudence in *Adams* and *Adamson* was sustained a year after the Victoria Courthouse encampment litigation, when BC Supreme Court Justice Neena Sharma declined an application from the City of Vancouver for an injunction to disband a homeless camp that had been established on a vacant lot on Main Street owned by the city. The parcel, which has been unoccupied for two decades save for a brief homeless encampment a decade earlier, was slated for development for a non-market housing project. In April 2017, homeless people and their allies breached a chain-link fence surrounding the site and established an encampment. The City of Vancouver applied to the BC Supreme Court for an injunction to remove the camp. In a hearing on 17 May, counsel for the city pointed to the fact that in previous instances of homeless encampments on municipal land, the city had exercised restraint, suspending action for injunctive relief until such time as the encampment had become unsafe. However, in the case of the Main Street camp, counsel said that the city expedited action to clear the camp because of the pending housing project. Justice Sharma said she was not convinced of the

⁶¹ *British Columbia v. Adamson*, 2016 BCSC 1245; *British Columbia v. Adamson*, 2017 BCSC 168; British Columbia, Ministry Responsible for Housing, “Province shuts down courthouse encampment,” Media Release, 8 August 2016, < <https://news.gov.bc.ca/releases/2016MNGD0049-001451> > (viewed 8 August 2016). As a representative of the Together Against Poverty Society noted in an affidavit in support of the awarding of public-interest special costs on a full indemnity basis to counsel for the defendant campers in the *Adamson* litigation: “Since Farris took on representation of the Encampment residents we have seen direct and indirect investment in social housing totaling an approximate \$86 million. We believe this is in large measure attributable to the legal challenge to the Province’s injunction application. This funding has translated into 714 units of housing and shelter space targeted specifically to the homeless that were not even being considered in this community 11 months ago. We have three new buildings dedicated to permanent indoor homes. These are Mt. Edwards (38 spaces), Super 8 (51 spaces, not yet operational), and Central Care Home (140 spaces). All of these are a direct response to the Encampment and the litigation around it. We also have two transitional shelters dedicated to helping people make the important move from the street to the indoors. Choices (78 spaces) and My Place (40 spaces), are both also directly attributable to the Encampment and the legal action.” See *British Columbia v. Adamson*, 2017 BCSC 168.

urgency of the city's application, nor the avowed risk to funding sources, and accepted arguments by the homeless campers and their advocates that displacing the camp would compromise their safety. Following Chief Justice Hinkson's reasoning in *Adamson*, Justice Sharma found that the City of Vancouver failed to meet the test in *RJR-MacDonald*, with the balance of convenience favouring the homeless persons who were occupying the site, rather than the municipality that held title to the land. Describing the judge's ruling as a "very positive development," advocate Maria Wallstam from the Alliance Against Displacement stated that: "Part of our argument was that displacing the tent city would jeopardize the Charter right of homeless people to security and liberty, and we won. For now."⁶²

7.6 Conclusion

Does the Victoria Courthouse litigation in *Adamson* and related case law suggest a widening ambit of a positive right to housing in Canada? In the 2008 *Adams* decision, BC Supreme Court Justice Carol Ross did not rule on the question of whether the s. 7 *Charter* right to shelter conferred a positive obligation on government to provide access housing. Since the defendants in that case had not sought positive benefits, were "not seeking to have the City compelled to provide the homeless with adequate shelter," Ross ruled that it was "not necessary for the Court to consider whether s. 7 includes a positive right to the provision of shelter."⁶³ In 2014, the Ontario Court of Appeal, in the case *Tanudjaja v. Canada*, upheld a lower court ruling that had found that s. 7 and s. 15 of the *Charter* do not impose a positive obligation on the provincial and federal governments to

⁶² "Judge denies City of Vancouver application for injunction to remove tent city on Main Street," *Vancouver Sun*, 17 May 2017; "BC Supreme Court quashes bid to take down homeless camp," *Vancouver Sun*, 18 May 2017.

⁶³ *Victoria (City) v. Adams*, 2008 BCSC 1363

provide a comprehensive housing program. The Superior Court judge ruled that jurisprudence relating to those sections of the *Charter* had been largely confined to rectifying specific breaches of rights by institutions, rather than imposing broader obligations relating to comprehensive public policy and access to social services. The appellate panel confined its decision to a narrow question of whether the judge had made any errors in law in disallowing the action, and therefore avoided serious consideration of the substantive issue of whether a positive right to housing exists. However, the Court of Appeal conceded that the Supreme Court of Canada had left the door “slightly ajar” in the case of *Gosselin v Quebec (Attorney General)* (2002) on the question of “the extent to which positive obligations may be imposed on government to remedy violations of the Charter.”⁶⁴

The line of jurisprudence in *Adamson* (2016), building on the *Adams* decisions (2008 and 2009), suggests that the BC judiciary has recognized a positive (if limited) right to housing at common law, existing where a public authority seeks a court order to prevent people who are homeless from sheltering themselves. Arising from the principle recognized in *Adams* that a blanket prohibition on sheltering by a homeless person infringes their section 7 *Charter* right in absence of adequate shelter, the court found in *Adamson* that the balance of convenience in granting an injunction will not be satisfied unless the state can demonstrate that adequate alternate sheltering arrangements exist, with consideration given to the distinct needs and challenges of individuals requiring sheltering, including barriers in the existing housing and sheltering system. This represents a significant new direction in Canadian law, moving beyond the traditional

⁶⁴ See *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84; also *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

“negative liberties” protected in the Bill of Rights and later the *Charter*, toward imposing positive obligations on the state to support the social needs of citizens. Whether this line of jurisprudence represents a temporary or limited development, or whether it becomes a permanent feature of Canadian law expanding into other fields beyond the limited application of urban homeless encampments on public land, remains to be seen.

Judicial responses to urban tent cities in twenty-first century British Columbia demonstrate an important shift in the pattern of property, protest, and the law in the province—signaling that courts may be moving beyond a narrow reliance on upholding the rule of law when considering injunction applications, toward recognizing customary and constitutional claims to public property by poor people that are capable of usurping conventional property claims, at least at the interlocutory stage. This may signal a remapping of the legal geography of protest and urban spaces in the province—a relaxation of the judiciary’s traditional approach to injunction and contempt proceedings, and a corresponding diminution of legal technologies traditionally available to private property interests to defeat protests involving the control or appropriation of space. To be sure, the case law surrounding tent cities suggests that judges are much more receptive to claims asserted by people who are homeless, relying on the s. 7 *Charter* right to security of the person, than they are to claims to s. 2 rights to freedom of expression and assembly, when determining whether the balance of convenience favours the granting of injunctions to public authorities to displace encampments. But even the latter instances of “free speech” protests, particularly in the *Zhang* case and to an extent in the Occupy cases, reflect a widening ambit for customary and constitutional claims to property, and a corresponding narrowing of legal recognition of private property claims by public bodies. This rebalancing of the power and interests of social movement actors and conventional

owners and managers of property in the legal arena holds out the promise of side-stepping some of the crises of legal legitimacy that accompanied earlier episodes of protest in British Columbia's legal history—by demonstrating to social movement actors that the law can deliver social, as well as formal, justice.

Conclusion

Commenting on the relationship in Canadian law between private rights and public expression, including the right to protest, Justice Beverley McLachlin suggested in the 1996 Supreme Court of Canada decision in the Clayoquot Sound case of *MacMillan Bloedel Ltd. v. Simpson* that: “The task of the courts is to find a way to protect the legitimate exercise of lawful private rights while preserving maximum scope for the lawful exercise of the right of expression and protest.”¹

Throughout British Columbia’s legal history, judges and other members of the legal community have struggled to find this balance between private and public rights when confronted with protests—in the face of competing claims to property and competing conceptions of space—between customary and constitutional claims on the one hand, and more conventional private property claims on the other. For much of the past century, legal actors sided disproportionately with private interests, deploying

¹ *MacMillan Bloedel Ltd v. Simpson*, 1995 4 SCR 725.

injunctions and other legal remedies to defeat customary claims to property and buttress private claims. This frequently provoked crises of legal legitimacy, where social movement actors who found themselves on the receiving end of law's coercive powers questioned the impartiality of judges and the fairness of adjudicative procedures. These crises exposed divergent understandings of the "legal and social zones of toleration" within which protests occurred and the contested "power-geometry" of public and private rights to property.² However, more recently, this pattern has become blurred, as the judiciary and other members of the legal community appear to strive for more meaningful balance, driven by evolution of indigenous law, constitutional rights enshrined in the *Charter*, and assertions of other forms of customary rights. Changes in the composition of the legal profession and the judiciary, reflecting changing societal attitudes and representation of more diverse social, cultural, and ideological constituencies, may also be contributing toward this shift. The emerging jurisprudence suggests there is a growing contingency in legal recognition of private property rights when challenged by social movement actors, and a greater openness by legal actors to recognize customary property claims—revealing the emergence of an increasingly liminal legal space in the adjudication of disputes between private property interests and social movements over the control and use of space.

Discerning the Pattern of Property, Social Movements, and the Law

² Eric Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77," *Labour / Le Travail*, 27 (Spring 1991): 17; Doreen Massey, *Space, Place, and Gender* (Minneapolis: University of Minnesota Press, 1994), 265; also Doreen Massey, "Power-Geometry and a Progressive Sense of Place," in *Mapping the Futures: Local Cultures, Global Change*, ed. Jon Bird, Barry Curtis, Tim Putnam, George Robertson and Lisa Tickner (London, Routledge, 1993), 59-69.

The legal technology deployed in response to social movement challenges to property interests in British Columbia developed primarily in the labour context—for example, in response to picket lines by striking workers barring access to workplaces as a means of enforcing collective bargaining power and advancing collective rights to the fruits of production. In the early twentieth century, legal responses to labour protests often focused on the criminal law, and proscriptions against unlawful assemblies, rioting, and conspiracies in restraint of trade, with residual elements of the law of master and servant. It was these kinds of charges that accompanied the arrest and imprisonment of 200 striking coal miners during the “Vancouver Island War” of 1912-1914, after the strikers blockaded the entrance to pitheads, attacked company property, and interfered with the movement of replacement workers into and out of the mines, prompting the deployment of soldiers “in aid to the civil power” to occupy the coalfield and enforce martial law.

Later in the twentieth century, particularly in the decades following the Second World War, the legal technology shifted from the Criminal Code to the equitable remedy of civil injunctions and contempt of court proceedings. Indeed, it was in the labour context that the modern law of injunctions and contempt became largely settled in BC. The indiscriminate granting of injunctions against striking workers—with more than 200 injunctions issued by judges in *ex parte* in the 1950s and 1960s (without unions having knowledge or representation at the hearing)—contributed toward a widely held perception within the labour movement that the judiciary was biased in favour of industry and against workers, provoking demands for reform. In the 1970s, this pressure bore fruit, in the form of legislative action when the newly elected New Democratic Party government of Dave Barrett responded to working-class demands by introducing far-reaching amendments to BC’s labour laws, transferring the power to issue injunctions

during labour disputes away from the courts and toward a reformed Labour Relations Board. The changing legal responses to these labour protests demonstrated the contested nature of space, and how property owners and social movement actors appealed to an array of legal actors to buttress their own conceptions of the proper organization, use, and control of space and property.

Moving toward the end of the twentieth century, the locus of legal clashes between social-movement actors and property interests would shift again, toward indigenous blockades, at Lyell Island on Haida Gwaii, at Meares Island in Clayoquot Sound, and at Ts'peten (Gustafsen Lake) in the BC interior. These clashes highlighted assertions of indigenous rights to land and resources, representing a fundamental challenge to private property interests recognized by colonial legal institutions. These protests triggered a range of legal responses—from injunctions and contempt charges on Lyell Island, to Criminal Code convictions against the armed sovereigntists at Ts'Peten, to legislative action in the form of treaty making and other measures to give effect to assertions of indigenous rights. Importantly, the decision of Justice Peter Seaton and the BC Court of Appeal to grant an injunction to chiefs of the Nuu-chah-nulth Nation restraining logging operations of Macmillan Bloedel Ltd. in the Meares Island case in 1985, on the basis that Crown land in the company's tree farm license was "subject to certain Indian rights," demonstrated an important shift in the legal landscape governing protests in BC—from steadfast adherence to private property rights narrowly conceived, toward an appreciation of the legitimacy of customary and constitutional claims to property by indigenous people and social movement actors.³ This formulation of customary rights and recognition of competing property claims harks back to the

³ *MacMillan Bloedel v. Mullin; Martin v. R. in Right of BC*, 1985 BCCA 154.

interpretive lens developed in E.P. Thompson's *Whigs and Hunters* (1975); it is less a question of popular forces arrayed *against* the law, but rather a question of whose conception of the law, and whose claims to rights, property, and space, will prevail in deliberations of members of the legal community and state actors.⁴ Or, as David Harvey suggested in *Rebel Cities* (2012), "We inevitably have to confront the question of whose rights are being identified The definition of the right is itself an object of struggle."⁵

This process of recognition of customary and constitutional claims to property and public space, and the corresponding narrowing of the legal ambit of conventional private property claims, was uneven and inconsistent. This was apparent as the environmental movement emerged as a major locus of clashes with property interests and authority in the closing decades of twentieth century British Columbia. Repression rather than recognition remained the dominant pattern. While the courts had granted the injunction to the Nuu-chah-nulth chiefs to restrain logging of Meares Island in 1985, protests over logging of old-growth rainforest elsewhere in Clayoquot Sound on Vancouver Island resulted in the arrest of 900 people in the early 1990s on charges of criminal contempt of court for defying injunctions—the largest act of civil disobedience leading to imprisonment in Canadian history up to that point in time—as the courts imposed stiff penalties against 626 people convicted of criminal contempt to uphold the property interests of logging companies with licenses to extract timber from the Crown forest lands. Ecological claims to forest resources by non-indigenous people were less likely to attract legal recognition by the courts than indigenous claims to those resources asserted by the chiefs of the Tla-o-qui-aht and Ahousaht Nations in the Meares Island

⁴ E.P. Thompson, *Whigs and Hunters: The Origin of The Black Act* (London: Pantheon, 1975).

⁵ David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London and New York: Verso, 2012), xv.

case. Environmental road blockades in the early 2000s, though smaller in size than the Clayoquot blockades, displayed the familiar pattern of repression rather than recognition from members of the legal community.

Private property interests also appear to have been reinforced in legal responses to picketing by an atypical social movement—the conservative “right to life” movement that challenged women’s access to abortion services in the wake of the Supreme Court of Canada’s 1988 decision striking down Canada’s abortion law. While the anti-abortion picketers initially succeeded in asserting a *Charter*-protected right to freedom of expression and assembly in the vicinity of abortion clinics, defeating attempts by abortion providers to restrain picketing, the reluctance of the judiciary to protect access to abortion services prompted intervention by the Executive Council and Legislative Assembly of British Columbia, in the form of the Access to Abortion Services Act of 1995.

Notwithstanding constitutional challenges to the validity of this legislation, the courts ultimately upheld the “Bubble Law” as a reasonable incursion on freedom of expression, to safeguard the conflicting *Charter* right of women to security of the person and sovereignty over their bodies. Both of these episodes, notwithstanding the diverse socio-political contexts, demonstrate legal interventions to buttress private property interests and curb social movement claims to public space.

More recently, however, the courts have demonstrated the growing inclination to recognize customary and constitutional claims to property and public space, and a growing reluctance to hastily authorize law’s coercive powers in aid to private property interests challenged by social movement actors. This is particularly notable in the emerging jurisprudence with respect to “the right to sleep,” arising in relation to urban tent cities and poor people’s movements that have appropriated public spaces in British

Columbia's urban centres to challenge public policy and assert a constitutional "right to shelter," attracting injunctions and other legal responses. The line of jurisprudence established in the *Adams* and *Adamson* cases suggests that the courts are increasingly unwilling to recognize property interests asserted by governments to unilaterally regulate public spaces, when these regulations are found to unreasonably infringe on the *Charter*-protected right of street-involved people to life, liberty, and security of the person. Demonstrating this emerging pattern in stark terms, a homeless encampment was permitted to operate on the grounds of the Provincial Courthouse in Victoria for nine months in 2015 and 2016, notwithstanding strident opposition from the landowner, the Government of British Columbia. Demonstrating the way in which recognition of legally protected rights in the *Charter* can translate into the provision of positive social rights (which have hitherto been rarely recognized in Canadian law), the Victoria Courthouse encampment litigation provided sufficient legal leverage to the homeless campers to compel the provincial government to procure several hundred units of social housing to meet the threshold established by the Chief Justice of the BC Supreme Court for the granting of an injunction. As the foregoing discussion should make clear, we see the legal technology of coercion in British Columbia deployed in diverse social contexts, demonstrating continuity and adaptation over time.

The law of property and the equitable remedy of the injunction and subsequent contempt of court proceedings have figured prominently in this dissertation. So too have the politics of the judiciary and other legal institutions, and debates over law's legitimacy and the relative fairness of the courts, judges, police, and parliaments when adjudicating disputes between property interests and social movement actors. This dissertation was originally grounded in the role of judges in the adjudicative process, but expanded to

focus more broadly on “the legal community,” recognizing that judges are often not the motive force in legal actions against protestors. Indeed, legal counsel for property owners have often been the driving force in injunction and contempt proceedings, invoking familiar and time-tested legal remedies to protect the interests of their clients and defeat social movement challenges. As we have seen, this legal community has extended at times beyond lawyers and judges to include parliament as a legal institution as well as the military as a mechanism for enforcing legal authority. So the dissertation not only maps the geography of protest, but also the geography of the British Columbia legal community and how it has changed over time—illuminating the contested social relations of adjudication.

Theoretically, the dissertation draws from studies in the field of critical geography and legal geography pioneered by Doreen Massey and Nicholas Blomley, to works by Henri Lefebvre, Lynn Staeheli, Don Mitchell, David Harvey, and others on the regulation of public space and the “Right to the City.” This body of geographical work is informed by Marxism, viewing space as contested and demarcated by class interests, highlighting the ways in which class interests inform the exercise of legal power, with antecedents in the critical historiographic tradition of Edward Thompson and others. The spatial lens also locates the dissertation in the field of “spatial history”—exploring connections and linkages between space and time, and the ways in which the use, regulation, and control of space has been contested over time and conceptualized historically. Decolonization studies and postcolonial theory also inform the approach to competing property claims, particularly as it relates to overlapping authority between settler colonial law and customary indigenous law. As John Borrows notes, “Colonization is not a strong place to

rest the foundation of Canada’s laws. It creates a fiction that continues to erase Indigenous legal systems as a source of law in Canada.”⁶

Overlapping, concurrent, and competing property claims are at the heart of the conflicts examined in the case studies—with social movement actors asserting customary claims to space and property, and the registered owners and managers of property invoking legal powers to assert competing claims. This legal tension is illustrated by recent controversy on Burnaby Mountain, on lands adjacent to Simon Fraser University, where conflicting claims to property and the legitimate use of land erupted in 2014 into the largest incidence of protest-related mass arrests in British Columbia in recent years. The conflict arose from a license issued by the National Energy Board of Canada to the petroleum transmission company Kinder Morgan to undertake site investigation work on lands owned by the City of Burnaby on Burnaby Mountain, for the purposes of investigating the feasibility of a route alignment over the mountain for the proposed Trans-Mountain Pipeline Expansion Project, to expand the shipment of crude oil from the Alberta tarsands, through British Columbia, to Burrard Inlet for export to overseas markets. The City of Burnaby challenged the regulatory decision, asserting a legal right to be consulted prior to the energy company beginning the site investigation on the municipally owned land. The court denied Burnaby’s claim, recognizing the exclusive jurisdiction of the federal government acting through the National Energy Board to govern activities relating to inter-provincial energy infrastructure.⁷

⁶ Borrows, *Canada’s Indigenous Constitution*, 14.

⁷ “Mayor Derek Corrigan says Burnaby will stop Kinder Morgan pipeline in the courts,” *Vancouver Sun*, 18 November 2014; National Energy Board backs Trans Mountain on Burnaby pipeline impasse,” *Vancouver Province*, 7 December 2017; *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2014 BCCA 465; *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2015 BCSC 2140.

As we saw in previous protest movements examined in this dissertation, citizens and other interested parties responded to the failure of the formal legal avenue by obstructing mobility, establishing a blockade on Burnaby Mountain as a mechanism for challenging the pipeline project. Kinder Morgan responded by obtaining a court injunction barring people having knowledge of the order from obstructing work, asserting a private property right arising from its license to use the publicly owned land. The Royal Canadian Mounted Police responded by enforcing Kinder Morgan's injunction, arresting more than 100 people, including Grand Chief Stewart Phillip of the Union of British Columbia Indian Chiefs and elders and members from the Tsleil-Waututh Nation, in whose unceded territory the oil terminal is located.⁸ Many of those arrested were charged with civil contempt of court. However, within a week, Justice Austin Cullen had thrown out the contempt charges, after it came to light that Kinder Morgan had based its injunction application on inaccurate geographic information, with GPS coordinates designating an area that was completely outside the protest and drilling site.⁹ Though shrouded in this legal technicality, opponents of Trans-Mountain celebrated the decision as a victory, as Kinder Morgan proceeded to dismantle its infrastructure and abandon the test site. However, in November 2016, the Government of Canada provided conditional approval to the Pipeline project¹⁰, and by the autumn of 2017 (as this dissertation approached a conclusion), the company had embarked on preliminary construction activities along the pipeline route and in the vicinity of its terminal on Burrard Inlet,

⁸ "RCMP responds with respect as Grand Chief arrested on Burnaby Mountain," *Vancouver Observer*, 27 November 2014.

⁹ *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133; "Contempt charges thrown out in Burnaby Mountain pipeline protest," *Vancouver Sun*, 27 November 2014.

¹⁰ "Ottawa approves two pipelines," *Financial Post* (Toronto), 29 November 2016.

provoking a fresh round of civil-disobedience by indigenous and non-indigenous people.¹¹

At the time of writing (January 2018), the fate of the Kinder Morgan Pipeline expansion project and associated protests remains to be seen. Like the Grace Islet case over development of a burial ground on an island in the Salish Sea, the Burnaby Mountain court decision in 2014 was informed by the social and political context of the conflict between the property interest and the protesters, as well as the specific legal issues that were effectively invoked by the social movement actors to undermine the company's claim for injunctive relief to defeat the protest. The involvement of the City of Burnaby on the protesters' side, and against the company, added a layer of complexity, if not legally, then certainly in the court of public opinion, which has always coloured judicial reasoning in conflicts between property interests and protesters in BC's legal history. Whether recent court decisions are outliers and the wider pattern of the courts intervening on behalf of a narrow reading of private property interests remains to be seen, but I think it is fair to say that the law in this area is currently unsettled.

Reforming Legal Responses to Protest

In 1937, then labour lawyer (and future Chief Justice of Canada) Bora Laskin provided a summary of some of the principal criticisms of the law of injunctions at the time:

The complaints that have been levied against the injunction, particularly of the interlocutory type, may be shortly summarised: (1) They are granted upon affidavit evidence; there is no examination and cross-examination of witnesses or the careful sifting of facts, but the judge, sitting without a jury, is asked to choose between conflicting documentary statements, in which both sides strain the truth, to say the least; (2) They are prepared by the complainant's counsel and accepted

¹¹ See also "National Energy Board backs Trans Mountain on Burnaby pipeline impasse," *Vancouver Province*, 7 December 2017.

by the court with very little ceremony; (3) They prejudge the issues involved in a dispute by acting as strike-breakers; (4) They are couched in broad language and in such far-reaching terms that they implant a fear in men more potent than does the criminal law; (5) They endow the owner of a business or of property with a militant power, little short of sovereignty; (6) They place the judiciary, so far as the labourer is concerned, in the ranks of the employers; (7) They arouse a resentment and antagonism that often leads to active violence where there was none before; (8) They circumscribe union activity far beyond the needs of the particular case; (9) They generally issue *ex parte*, and quite perfunctorily, on a false analogy to cases involving real property, in which, on occasion, prompt action may well be necessary.¹²

Many of these grievances remain as true today as they were at the time Laskin was writing in the 1930s. In the intervening period, criticism of injunctions has not been confined to labour circles; in 1970 Vancouver lawyer (and future BC Supreme Court and Court of Appeal Justice) Mary Southin, who had run for public office on two occasions under the Progressive Conservative banner, discussed the functioning of injunctions in an article in *The Advocate*:

There are some aspects of this whole problem which to my mind deserve some comment.

Ex parte injunctions or injunctions on such short notice that they are in reality *ex parte* injunctions are still being granted. If somebody is served at midnight to be in Court at 10.00 a.m. the next morning what real opportunity has his Counsel to prepare? Short notice where there is evidence of violence or apprehended violence or damage to property is one thing; short notice where the employer simply says he is losing money, even a lot of money, is another.

It should not be overlooked that when an injunction is granted on no notice or notice so short as to be derisory the men do not think they had a fair hearing and that reinforces their feelings of being victims of judicial bias. ...

Nor in my view should any *ex parte* injunction or injunction on short notice be granted with liberty to apply to set aside. All *ex parte* injunctions and if counsel requests, those granted on short notice should be to a day certain with liberty to the Plaintiff to move to continue. That puts the burden where it belongs: on the Plaintiff to show upon a full hearing that it is entitled to what it seeks.¹³

¹² Bora Laskin, "The Labour Injunctions in Canada: A Caveat," *Canadian Bar Review* (1937), 271-4.

¹³ Mary F. Southin, "The Courts and Labour Injunctions," *Advocate (BC)*, 28 (1970): 83-4.

Demands for reform to procedures governing the use of injunctions are not confined to Canada. US magistrate Morton Denlaw suggested in a 2003 essay that a uniform standard for the application of injunctions is “long overdue,” creating much greater certainty for judges, courts, and parties to disputes.¹⁴

Turning to the law of contempt, which frequently intersects with the law of injunctions, the Law Reform Commission of Canada waded into controversy surrounding the offence of criminal contempt of court in a report in the 1970s. Citing “the potential loss in public respect for the judicial system,” the commission advised the Crown to pursue charges only where the infraction was “deliberate, open, public and an evident challenge to the judicial system or an obstruction of justice. All other cases should be dealt with as civil contempt under the rules of practice of the courts or the rules of civil procedure.”¹⁵

* * *

The future trajectory of the pattern of property, social movements, protest, and the law in British Columbia remains to be seen—whether the ambit of customary and constitutional rights recognized by the courts and other legal actors continues to widen and becomes settled over time, or whether the current phenomenon represents a momentary resurgence of legal recognition of “the commons,” prior to a period of retrenchment toward the supremacy of private rights. It is the strong hope of this author that the social relations of adjudication are changing and that the former scenario prevails—that the liminal legal space afforded to customary and constitutional rights is becoming the “new norm,” and that members of the legal community give proper consideration to these non-

¹⁴ Morton Denlaw, “The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard,” *Review of Litigation*, 22, no. 3 (Summer 2003), 495-539.

¹⁵ Law Reform Commission of Canada, *Contempt of Court: Offences Against the Administration of Justice, Working Paper 20* (Ottawa: Department of Justice Canada, 1977), 29.

conventional assertions of rights when evaluating and adjudicating competing claims to property, power, and public space.

Appendices

Appendix 1: Chronology of Key Events

1901 – the LeRoi Mining Company sues the Western Federation of Miners’ local at Rossland for damages for financial losses suffered during a strike.

1902 – the Legislative Assembly of British Columbia adopts the Trade-Unions Act 1902, indemnifying unions from civil liability in tort for damages incurred by employers during labour disputes, while rejecting a provision that would have remove the jurisdiction of courts to issue injunctions restraining picketing.

1907- the Parliament of Canada approves the Industrial Disputes Investigation Act 1907, providing a framework for the investigation and conciliation of labour disputes, legislation that would prove to be of limited utility in the years that followed.

1912 (16 September) – coal miners in the newly formed District 28 of the United Mine Workers of America in the town of Cumberland declare a “holiday” to protest the firing of a union-appointed gas inspector under the provisions of the BC Coal Mines Regulation Act 1911, initiating the Vancouver Island Miners’ Strike of 1912-1914.

1913 (August) – striking coal miners respond to the use of replacement workers by attacking company property in Ladysmith, South Wellington, and Extension, including the homes of mine managers and replacement workers, and barricading replacement workers into the pits, prompting the BC government to invoke “military aid to the civil power”, with 1000 soldiers deployed into the strike zone and more than 200 arrests.

1913 (October) – Provincial court judge Frederic Howay convicts 38 miners of rioting for their role during the disturbances in Ladysmith, and acquits only one, handing down sentences of between three months and two years imprisonment with hard labour (the maximum sentence for rioting in the Criminal Code). In contrast, only 12 of 127 miners who are tried before juries at New Westminster in the months that follow are convicted on criminal charges for their conduct during the strike.

1914 (20 January) – coal miner Joseph Mairs of Ladysmith dies of complications arising from a bowel infection while incarcerated at Oakalla prison in Burnaby, while serving a prison sentence for the Criminal Code offence of rioting in relation to the miners’ strike.

1914 (August) – the United Mine Workers of America calls off the Vancouver Island miners’ strike, following the outbreak of the Second World War and as strikers flow back to work in the mines.

1937 – labour lawyer (and future Chief Justice of Canada) Bora Laskin notes in a scholarly article how injunctions “place the judiciary, so far as the labourer is concerned, in the ranks of the employers.”

1952 (August) – striking loggers belonging to the International Woodworkers of America (IWA), led by Tony Poje from the union local in the town of Duncan, picket a wharf in Nanaimo, preventing lumber from being loaded onto the ship MS *Vedby*. Poje is charged and convicted of criminal contempt of court for publicly defying an injunction against secondary picketing, and sentenced to three months imprisonment and a \$3,000 fine, decisions upheld by the Supreme Court of Canada in a landmark case shaping the law of injunctions and contempt in relation to protest.

1959 – George North, editor of the *Fisherman*, newspaper of the militant United Fishermen and Allied Workers Union (UFAWU), is jailed for 30 days at Oakalla prison for criminal contempt of court, for publishing an editorial lambasting “the closeness of the companies and the courts” during a labour dispute over construction of the Second Narrows Bridge on Burrard Inlet.

1966 – 30 labour activists, including the secretary-treasurer of the Vancouver Labour Council, are convicted of criminal contempt of court and sentenced to up to six months imprisonment, for mass picketing in protest against the firing of 257 workers during a tense strike at the Lenkurt Electric Company plant in Burnaby. The convictions and sentences fuel a provincial and national campaign by labour organizations against the use of injunctions in labour disputes.

1967-1968 – the president and secretary of the United Fishermen and Allied Workers Union, Homer Stevens and Steven Stavenes, are jailed for 11 months at the Mount Thurston prison camp in Chilliwack for criminal contempt of court, for refusing to send a telegram to union members ordering them to process fish during a strike of Prince Rupert trawlers, in defiance of a court injunction. The union is fined \$25,000 for its role in the contempt.

1970 – Women associated with the Vancouver Women’s Caucus embark on the “Abortion Caravan” to Ottawa, demanding repeal of Canada’s restrictive abortion law, mobilizing support across the country and culminating in protests at the Prime Minister’s residence and in the gallery of the House of Commons.

1973 – the New Democratic Party government led by Dave Barrett introduces and passes the Labour Code of British Columbia Act 1973, which includes among its provisions a clause transferring the power to grant injunctions during labour disputes out of the hands of judges and into the hands of a reformed Labour Relations Board.

1976 – the Criminal Code provision restricting abortions is thrown into doubt when the newly elected Parti Quebecois government of Quebec announces that it is abandoning the prosecution against Dr. Henry Morgentaler and several other medical practitioners, declaring the law is “inapplicable” in Quebec because of the refusal of juries to convict, and demanding that the federal government reform the law.

1981 – the Council of the Haida Nation unilaterally proclaims a Tribal Park in the South Moresby wilderness in Haida Gwaii, unwilling to wait for action by the colonial governments. In 1983, the Haida submit a formal land claim to the Government of Canada, calling for conservation of the area as wilderness to protect ecological and cultural values.

1982 – the Constitution Act 1982 is adopted by the Parliaments of Canada and the United Kingdom, and acceded to by nine of 10 provinces, recognizing Aboriginal rights under section 35 as well as the Canadian Charter of Rights of Freedoms under sections 1 to 34, provisions with far-reaching implications for legal recognition of customary and constitutional claims to property and space in subsequent years.

1984 (November) – The chief of the Tla-o-qui-aht band of the Nuu-chah-nulth Nation, Moses Martin, in concert with settler allies in the conservation organization Friends of Clayoquot Sound, establishes a blockade to prevent the landing of logging equipment at Heelboom Bay on Meares Island, preventing logging of old-growth rainforest by license-holder Macmillan Bloedel Ltd.

1985 (March) – A BC Court of Appeal panel headed by Justice Peter Seaton grants an injunction to the chiefs of the Tla-o-qui-aht and Ahousaht bands of the Nuu-chah-nulth Nation, prohibiting logging on Meares Island in Clayoquot Sound by logging company Macmillan Bloedel Ltd.—a landmark decision that recognizes Aboriginal rights capable of usurping the property rights of private license-holders on Crown land. The injunction remains in place.

1985 (November) – 72 members of the Haida Nation are arrested for blocking a logging road on Lyell Island in Haida Gwaii, obstructing operations of Frank Beban Logging Ltd. in defiance of a court injunction. 10 Haida, along with Member of Parliament Svend Robinson, are convicted of criminal contempt of court. The Haida receive suspended sentences of six months imprisonment, while Robinson is fined \$750. Charges against the other arrested Haida are eventually dropped.

1987 (11 July) – the Governments of BC and Canada announce that they have entered into an agreement with the Council of the Haida Nation to establish the Gwaii Hanaas Park Reserve, protecting one-third of the island archipelago including Lyall Island from logging and other industrial activities, while recognizing the rights of the Haida Nation to the natural resources of the area.

1988 (28 January) – the Supreme Court of Canada strikes down restrictions on abortion services in section 251 of the Criminal Code, requiring authorization by a doctors' committee, as an infringement of a woman's right to security of the person under section 7 of the Charter. Parliament adopts no alternate statutory language to replace the impugned section, so abortion remains henceforth unregulated in the criminal law of Canada.

1988 (November) – the Everywoman’s Health Centre opens on East 44th Avenue in Vancouver, providing access to newly decriminalized abortion services, while prompting frequent protests by anti-abortion activists aligned with Christian organizations and the “Operation Rescue” campaign. In the years that follow, stand-alone abortion clinics and hospital units are established in dozens of communities across British Columbia.

1989 (February 7): 105 anti-abortion activists associated with “Operation Rescue” are arrested for picketing and obstructing access to the Everywoman’s Health Centre, in defiance of a court injunction. 102 are subsequently convicted of criminal contempt of court and sentenced to 3 months imprisonment, which the judge suspends provided the protesters refrain from obstructing access to the abortion clinic for a period of 12 months.

1990 – BC Court of Appeal Justice Mary Southin upholds the sentences and convictions against the “Operation Rescue” protesters who picketed the Everywoman’s Health Centre, while noting “the grave question of whether public order should be maintained by the granting of an injunction.”

1993 (July – September) – approximately 10,000 people converge on a remote logging road near the Kennedy River Bridge in Clayoquot Sound on Vancouver Island, to protest cutting permits granted by the government of BC to Macmillan Bloedel Ltd. for the logging of old-growth rainforest. More than 900 people are arrested for defying court injunctions against blocking the logging road.

1993-1994 – the BC Supreme Court convicts 626 environmental protesters for criminal contempt of court, for defying court injunctions granted to logging company Macmillan Bloedel Ltd., which holds licenses to harvest timber on Crown land in Clayoquot Sound, the largest incidence of convictions arising from civil disobedience in Canadian history up to that point in time. 860 people are tried for criminal contempt in more than a dozen trials. The convicted protesters are sentenced with fines of up to \$3,000 and imprisonment of up to 60 days.

1995 (June) – the Legislative Assembly of British Columbia responds to violence against abortion providers and legal ambiguity surrounding anti-abortion picketing by adopting the Access to Abortion Services Act, establishing “bubble zones” around abortion clinics and the offices and homes of abortion providers where protest is prohibited. The legislation is upheld as constitutional and a reasonable infringement on freedom of expression following a decade of litigation.

1995 (July) – members of the Secwepemc Nation conduct a traditional sun dance ceremony on lands at Ts’peten (Gustafsen Lake), in defiance of a demand by the landowner, an American rancher, that they vacate the property. The dispute escalates into an armed standoff between the Ts’peten defenders and heavily armed Royal Canadian Mounted Police officers, the largest paramilitary operation on Canadian soil in recent history. Ultimately, the Ts’peten defenders surrender to police and the dispute ends without bloodshed; 15 people are convicted of Criminal Code offences and sentenced to between six months and eight years imprisonment.

2002 – a homeless squat in the closed Woodward’s Department store in downtown Vancouver spirals into a two-month occupation of the sidewalks surrounding the building, demonstrating the plight of the urban homeless, the growing movement for housing rights, and the use of injunctions to displace urban tent cities.

2003 – grandmother Betty Krawczyk is arrested, convicted, and jailed for criminal contempt of court, for defying an injunction against obstructing logging operations of Hayes Forest Services on Crown land in Vancouver Island’s Central Walbran Valley.

2009 – in the landmark *Adams* decision, the BC Supreme Court strikes down provisions in the City of Victoria’s Parks Regulation Bylaw as unconstitutional, finding that the prohibition on overnight sheltering within municipal parks violates a homeless person’s right under section 7 of the *Charter* to life, liberty, and security of the person, by preventing them from sheltering themselves in the absence of adequate alternate shelter. This decision is upheld by the BC Court of Appeal a year later, forcing the city to amend its bylaw to permit overnight sheltering in parks.

2014 (September) – BC Supreme Court Justice Douglas Thompson postpones consideration of an application from a landowner for an injunction barring two First Nations chiefs and settler allies from interfering with construction of a luxury home on a Coast Salish burial ground at Grace Islet off Salt Spring Island. Two weeks later, the landowner abandons the injunction application and discontinues the civil action against the chiefs and settlers. The provincial government intervenes, purchasing the disputed property from the landowner and initiating the dismantling of the luxury home, with stewardship entrusted in a conservation organization and a committee of Coast Salish Nations.

2014 (November-December) – more than 100 people are arrested on Burnaby Mountain for contempt of court for defying a court injunction against interfering with exploratory work underway by oil company Kinder Morgan for the Trans-Mountain Pipeline Expansion Project. The judge refuses to convict, in light of technical defects in the company’s injunction application, but the environmentalists herald this as a victory.

2016 (April) – Chief Justice Christopher Hinkson of the BC Supreme Court refuses to grant an injunction to the provincial government to evict approximately 100 homeless people camping on the Victoria Courthouse grounds, finding that the balance of convenience is “overwhelmingly” in favour of the defendant campers, who “simply have nowhere to move to.”

2016 (July) – Chief Justice Hinkson grants an injunction to the government of BC ordering the Victoria Courthouse campers to leave, upon receiving a subsequent application from the province, but suspends its effect until such time as “new housing created by the Province became available,” recognizing a tentative positive right to housing as a condition of issuing an injunction to a public body in some circumstances. 200 new units of social housing are acquired by the province to meet these conditions.

Source: compiled by author

Appendix 2.

Justices of the British Columbia Court of Appeal, 1909-2018

James Alexander MacDonald, 1909-1937
Paulus Aemilius Irving, 1909-1916
Archer Martin, 1909-1940
William Alfred Galliher, 1903-1933
Albert Edward McPhillips, 1913-1938
David MacEwan Eberts, 1917-1924
Malcolm Archibald Macdonald, 1924-1941
William Garland Ernest McQuarrie, 1933-1943
Gordon McGregor Sloan, 1937-1957
Cornelius "Neil" O'Halloran, 1938-1963
David Alexander McDonald, 1940-1944
Alexander Ingram Fisher, 1942-1943
Harold Bruce Robertson, 1943-1955
Henry Irvine Bird, 1944-1964
Sidney Alexander Smith, 1944-1960
Herbert William Davey, 1954-1973
James Moses Coady, 1955-1961
Frederick Anderson Sheppard, 1955-1965
Alexander Campbell DesBrisay, 1958-1963
Thomas Grantham Norris, 1961-1968
John Owen "Jack" Wilson, 1962-1963
Charles W. Tysoe, 1963-1973
Sherwood Lett, 1963-1964
Arthur Lord, 1963-1968
Norman William Whittaker, 1963-1964
Harry Joseph Sullivan, 1964-1965
Ernest Bolton Bull, 1964-1982
Hugh Alan Maclean, 1964-1978
Meredith McFarlane, 1965-1983
Angelo Ernest Branca, 1966-1978
Alexander Bruce Robertson, 1967-1979
Nathaniel Nemetz, 1968-1973; 1979-1988
John Davis Taggart, 1968-1994
John Lauchlan Farris, 1973-1978
Alexander B. B. Carrothers, 1973-1998
William Rogers McIntyre, 1973-1978
Peter Donald Seaton, 1973-1993
William Alastair "Bill" Craig, 1977-1996
Ernest E. Hinkson, 1977-1996
John Somerset Aikins, 1978-1989
John Douglas Lambert, 1978-2005
James A. Macdonald, 1979-1992
Richard Philip Anderson, 1980-1992
H.E. Hutcheon, 1980-1996
Alan Macfarlane, 1982-1999
William A. Esson, 1983-1989, 1996 - 2005
Beverley McLachlin, 1985-1988
Ronald I. Cheffins, 1985-1987
William J. "Bae" Wallace, 1987-1993
Charles Conrad Locke, 1987-1992
Allan McEachern, 1988-2001
Samuel Toy, 1988-1993
Mary F. Southin, 1988-2006
Patricia M. Proudfoot, 1989-2002
Hugh Percival Legg, 1989-1997
Martin R. Taylor, 1989-1995
George S. Cumming, 1989-2001
Josiah Wood, 1989-1996
Reginald J. Gibbs, 1989-1999
David B. Hinds, 1990-1999
Harold A. Hollinrake, 1990-2004
D.M.M. "Michael" Goldie, 1991-1999
M. Anne Rowles, 1991-2011
Jo-Ann E. Prowse, 1992-2013
Lance Finch, 1993-2013
Catherine Anne Ryan, 1994-2013
Ian T. Donald, 1994-2017
Mary V. Newbury, 1995-
Byran Williams, 1995-1996
Carol Mahood Huddart, 1996-2011
Thomas R. Braidwood, 1996-2005
John E. Hall, 1996-2014
Kenneth C. Mackenzie, 1998-2011
Mary E. Saunders, 1999-
Richard Low, 2000-2014
Risa G. Levine, 2001-2014
Kenneth J. Smith, 2001-2012
Allan D. Thackray, 2001-2007
Wallace T. Oppal, 2003-2005
P. D. Lowry, 2003-
Pamela Kirkpatrick, 2005-
Edward C. Chiasson, 2006-2015
S. David Frankel, 2007-
David Frankin Tysoe, 2007-

Robert J. Bauman, 2008-
Daphne M. Smith, 2008-
Kathryn E. Neilson, 2008-2016
Harvey M. Groberman, 2008-
Elizabeth A. Bennett, 2009-
Nicole J. Garson, 2009-
Christopher E. Hinkson, 2010-2013
Anne W. MacKenzie, 2011-
David C. Harris, 2012-

Sunni Stromberg-Stein, 2013-
Peter M. Willcock, 2013-
Richard B. T. Goepel, 2013-
John E. D. Savage, 2014-
Lauri Ann Fenlon, 2015-
Gregory J. Finch, 2015-
Gail M. Dickson, 2015-
John L. Hunter, 2017-
Barbara Fisher, 2017-

Source: Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years* (Vancouver: UBC Press, 2010); Government of British Columbia, Courts of British Columbia, "Current & Former Justices of the Court of Appeal," 2017 < http://www.courts.gov.bc.ca/Court_of_Appeal/about_the_court_of_appeal/justices_of_the_court_of_appeal.aspx > (viewed 30 January 2018).

Appendix 3:
Canadian Labour Congress resolution on injunctions, June 1966

Whereas the judiciary, by its readiness to grant injunctions, aligns itself on the side of employers; and

Whereas such judicial action inevitably leads to a loss of respect for the judiciary, and is bound just as inevitably to lead to defiance of the law;

Be it therefore resolved that the convention instruct the officers of the Congress and the provincial federations of labour, to urge its affiliated unions:

1. to engage in a strong and militant campaign to eliminate the use of the injunction in labour disputes;
2. to challenge injunctions wherever and whenever they are granted;
3. to organize systems of mutual aid for trade unions and members affected by the use of injunctions; and
4. to promote legislative, political and other activities in opposition to the use of injunctions in labour disputes.

-Resolution adopted by Canadian Labour Congress, June 1966

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British Columbia. Provincial Elections Act Amendment Act. S.B.C. 1949, c. 19.
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Concordance

Ahousaht. *See also* Nuu-chah-nulth
American Indian Movement
Anti-Poverty Committee
Barrett, David
Bennett, Bill
Bennett, William Andrew Cecil
Berger, Thomas
Berman, Tzeporah
Bonner, Robert
Bowser, William
Brewster, Harlan
British Columbia Civil Liberties Association
British Columbia Court of Appeal
British Columbia Federation of Labour
British Columbia Teachers Federation
Brown, Rosemary
Canadian Labour Congress
Clark, Christy
Clark, Glen
Council of the Haida Nation. *See also* Haida Nation, Guujaaw
Court of Appeal. *See* British Columbia Court of Appeal
Dohm, Thomas
Faulkner, Irene
Friends of Clayoquot Sound
Gustafsen Lake. *See* Ts'peten
Guthrie, Sam
Guujaaw, (Gary Edenshaw)
Haida Nation. *See also* Council of the Haida Nation
Harcourt, Michael
Howay, Frederic
Huston, Freda
Industrial Workers of the World
Islands Protection Society
Johnston, David Arthur
Kavanagh, Jack
King, Bill
King, William Lyon Mackenzie
McBride, Richard
McEachern, Allan
MacDonald, Alex
Mairs, Joseph
Mullin, Michael
Neale, Paddy

Neish, Elgin
North, George
Nuu-chah-nulth
Oliver, John
Pivot Legal Society
Secwepemc
Shoebottom, T.B.
Sierra Club of Western Canada
Socialist Party of Canada
Southin, Mary
Splitting the Sky
Stevens, Homer
Supreme Court of British Columbia
Supreme Court of Canada
Thomas, Hilda
Tla-o-qui-aht. *See also* Nuu-chah-nulth
Together Against Poverty Society
Ts'peten
United Fishermen and Allied Workers Union
Union of British Columbia Indian Chiefs
United Mine Workers of America
Vancouver Women's Caucus
Voice of Women
Walia, Harsha
West Coast Environmental Law
Western Canada Wilderness Committee
Whitaker, Norman
Wolverine (Jones William Ignace). *See* Ts'peten