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Commentary: The Forces That Conspire to Keep us "Idle"

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Commentary: The Forces That Conspire to Keep Us "Idle"

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Last winter, Canada witnessed a series of spontaneous and coordinated actions by Indigenous activists seeking to demonstrate solidarity with the hunger strike of Chief Teresa Spence of Attawapiskat. The actions, initially prompted by the Twitter meme #IdleNoMore, demonstrated that Indigenous peoples would not tolerate the increasingly aggressive federal legislative agenda of the Harper government; in particular, there was opposition to amendments buried in an omnibus budget bill that gutted protections for critical waters and fisheries.[1] Most of the actions consisted of flash mobs of round dancers and drummers gathered peacefully in public spaces; occasionally, participants adopted a strategy of direct action targeting critical infrastructure in opposition to the government's "responsible resource development" plans.

On July 25, 2013, Ron Plain of Aamjiwnaang First Nation faced the consequences of his decision to act as spokesperson for an Idle No More action last December. For thirteen days, Band members and their supporters blockaded a portion of the CN Rail line that crosses the Aamjiwnaang reserve. The ensuing exchanges among the protesters, CN Rail, the police, and the courts offer telling glimpses into the relations that conspire to keep us idle. The consequences for Plain were severe, but it is too early to predict whether they will have their intended effect of sapping the momentum of a resistance movement determined to derail the resource rush currently underway in Canada.

On December 21, 2012, demonstrators in Aamjiwnaang erected a blockade on the CN Rail line that passes through the reserve. The line shuttles an average of 450 cars a day of ethylene, polyethylene, butane, propane, ammonium nitrate, nitric acid, methanol, and other industrial freight to and from Sarnia, Ontario, the heart of Canada's "Chemical Valley." Within days of the blockade, petrochemical manufacturing plants in Sarnia were starved for inputs, and the Canadian Propane Association was warning of fuel shortages for home heating in eastern Canada. CN promptly obtained an *ex parte* injunction. Justice D.M. Brown of the Ontario Superior Court found, after viewing a photograph of a pickup truck parked on the rail line, that the trespass was "obvious" and accepted that irreparable economic

[1] Bill C-45, *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 2012, SC 2012, c 31. This bill (known as the *Jobs and Growth Act*) is now law.

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harm would ensue if the blockade continued.[2] In considering the "balance of convenience," Justice Brown stated:

> The protestors obviously are engaged in a form of expressive activity, but ... [they] do not have a complaint against CN, the property owner; their ire is directed toward the federal Parliament which passed legislation to which they object. Persons are free to engage in political protest of that public nature, but the law does not permit them to do so by engaging in civil disobedience through trespassing on the private property of others, such as CN.[3]

The company put in evidence a YouTube video in support of the proposition that protestors were not making a claim to Aboriginal rights or title, which, according to recent jurisprudence, would have complicated the issue of the "balance of convenience."[4] The video contained a statement by a demonstrator that "the blockade organizers want a meeting between Canada's Prime Minister Stephen Harper and Chief Spence."[5] Yet the court acknowledged that another of the demonstrators filmed in the video said that "he wanted an acknowledgement that the CN tracks were there illegally" and that "CN could file all the injunctions they wanted," but they could not remove the protesters "from [their] own territory."[6] As it turned out, Sarnia Mayor Mike Bradley and Police Chief Phil Nelson were not eager to remove the protestors from the tracks, arguing that any use of force would harm relations between the City of Sarnia and Aamjiwnaang First Nation. Mayor Bradley stated: "Has no one learned the lessons of Oka and Ipperwash? What you need to do in this situation is work day and night to find a peaceful solution."[7]

In granting an indefinite extension of the injunction, Justice Brown chastised the police for their efforts to avoid the use of force: "I must confess that I am shocked by such disrespect shown to this Court by the Sarnia Police."[8] Meanwhile, the weight of the economic impact began to settle on the Band. A community meeting was held in Aamjiwnaang on December 30, after which official Band support for the blockade was withdrawn. Protestors remained on site, however, and on January 2, CN Rail returned to court to request that Plain, the self-identified spokesperson, and Police Chief Nelson each be cited in contempt for failing to adhere to the court injunction. Later that evening, after a community feast and ceremony, the blockade came down.

CN Rail immediately ended its pursuit of Nelson but honed in on Plain, making it clear in a January 4 court appearance that the company would seek to recoup its costs against him personally and to secure an order prohibiting him from being near the rail line in the future. Plain refused CN's offer to resolve the application

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2 *CNR v Chief Chris Plain*, 2012 ONSC 7356, "Injunction Reasons," Brown J at para 21.

3 *Ibid.*

4 For a review of these developments, see Ryan Newell, "Only One Law: Indigenous Land Disputes and the Contested Nature of the Rule of Law" (2012) 11 Indigenous LJ 41–72.

5 *CNR v Chief Chris Plain*, 2012 ONSC 7356, "Reasons for Decision (further corrected)," Brown J at para 19.

6 *Ibid.*

7 Mike Alamenciac, "Sarnia rail blockade will end when Prime Minister Stephen Harper meets Theresa Spence, protesters say," *Toronto Star* (31 December 2012), online: www.thestar.com.

8 *Supra* note 4 at para 21.

for $5,000, said that he would not be intimidated, and stated his willingness to "run this up the flagpole"[9] if necessary.

Nor was Justice Brown yet satisfied. On January 5, hearing a similar application for an injunction against members of the Tyendinaga First Nation, who were also engaged in an Idle No More action on CN Rail tracks between Toronto and Montreal, Justice Brown quoted extensively from his ruling on the Aamjiwnaang blockade, expressing his growing frustration: "As a judge, I make an order expecting it will be obeyed or enforced. If it will not be enforced, why should I make the order? An order which will not be enforced is simply a piece of paper with meaningless words typed on it, and making a meaningless order only undermines the authority and concomitant legitimacy of the courts."[10] He went on to express his discontent with the situation in which "a landowner must resort to seeking a court injunction to stop the sort of unlawful conduct engaged in by the protesters." He detailed at length his view that the police enjoyed adequate powers of arrest to deal with the unlawful conduct without the further need of a court injunction.

By the time the contempt application was heard in June, CN Rail was seeking $50,000 in damages. The stakes were clearly high for both parties. Ron Plain had become a prominent symbol of Idle No More, and his court battles were considered to be an "example of the manipulation of the legal system by a private corporation."[11] At the same time, a punitive fine against him could deter those planning future actions. CN Rail and Canada's extractive sector faced the launch of "sovereignty summer" in which Idle No More and Defenders of the Land, an Indigenous land rights group, promised to deliver a series of disruptions to resource extraction activities across the country.

That grassroots Indigenous resistance under the banner of Idle No More would threaten, even anger, property owners was not surprising. That it would generate a backlash was also unsurprising; there are plenty of precedents in the recent past to establish that private companies will seek injunctions when Indigenous peoples obstruct their commercial or development plans.[12] Yet for the courts to so eagerly and aggressively use the injunction and the contempt of court powers in order to support the efforts of a private company to stifle the claims of Indigenous protesters was a striking development.[13]

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9 Tyler Kula, "Aboriginal protestor Ron Plain ordered to pay $16,500 for role Idle No More Sarnia blockade," *Sarnia Observer* (26 July 2013), online: www.theobserver.ca.

10 *Supra* note 4 at para 41.

11 Indiegogo campaign to raise funds for Plain's legal defense: http://www.indiegogo.com/projects/legal-defense-fund-to-support-ron-plain.

12 Newell, *supra* note 1.

13 Recent developments in the jurisprudence had pointed another way. The Ontario Court of Appeal indicated on two occasions that a narrow conception of the rule of law, such as that articulated by Justice Brown, would not suffice in situations where Aboriginal rights or title were at stake. It could be argued, as CN Rail did, that no such rights were at stake in Aamjiwnaang and that protesters were simply voicing their solidarity with Chief Spence. However, as Graham Mayeda states: "Courts are increasingly acknowledging that equitable remedies such as injunctions are not suitable where citizens, both Aboriginal and non-Aboriginal, seek to stimulate public debate about environmental and human rights issues through peaceful protest. The use of such remedies essentially converts a conflict between private parties (the protestors and the [private] company) into a conflict between the courts and the protestors." Graham Mayeda, "Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations" (2010) 6 JSDLP 143–76 at 158.

The aim of the company in pursuing a contempt of court order against Plain, and in seeking substantial damages, was presumably pacification. The effect of the order, though, was less clear. Ron Plain, as the court eventually acknowledged, was involved in peaceful protest linked to a political message about his traditional territory. He sought to expose the consequences of what Leanne Simpson calls the "extractivist ideology" behind federal legislative changes.[14] To activists in Aamjiwnaang, a protest against the federal government's legislative assault on the capacity of Indigenous people to oppose unrestrained resource extraction on and around their traditional territories is all caught up together with the incessant movement across their lands of chemicals, plastics, resins, and other hazardous goods. We would be remiss to forget the centrality of the railway in the history of Canadian colonialism and the fact that those tracks belonged to a Crown corporation in the not-too-distant past, before they became the "private property" of CN Rail that the court now seeks to protect against trespass. The movement of toxins across the reserve is also enmeshed in debates about the proposed network of pipelines for the transport of tar sands crude across the country, a system in which Sarnia is a key node.

These things are caught up together, but the courts appear to expect activists to distinguish between the role of the federal government and that of the private corporations that benefit from their legislative agenda when determining who to target. In the end, Plain was ordered to pay costs to CN Rail in excess of $16,000 for his "brief, yet flagrant, breach of a court order in a peaceful protest that caused no property damage."[15] According to the court, he chose to "act as the visible spokesperson of a protest that openly defied a court order."[16] The purpose of the courts' contempt power is said to be to encourage respect for the rule of law. Yet in this case it is likely that its exercise will, as Ryan Newell argues in another context, "only further alienate the Indigenous protestors whose faith in the legal process ha[s] already worn thin."[17]

This recent spate of demonstrations and injunctions, whether under the banner of Idle No More or not, represents the continuation of a long history of resistance to colonial law and policy that threatens lands and resources of Indigenous peoples. Looking closely at the consequences facing this one protester offers a glimpse into the usually occluded forces that conspire to keep us all idle.

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14 Naomi Klein, "Dancing the World into Being: A Conversation with Idle No More's Leanne Simpson," *Yes! Magazine*, March 5, 2012, http://www.yesmagazine.org/peace-justice/dancing-the-world-into-being-a-conversation-with-idle-no-more-leanne-simpson.

15 *Canadian National Railway Company v Plain*, 2013 ONSC 4806; Decision on Contempt Motion, Thomas J at para 34.

16 *Ibid.*

17 Newell, *supra* note 1 at 70.