A Study on the Canadian Mining Industry and the Potential for the "Duty to Consult" as a Pathway towards Reconciliation with Indigenous Peoples: Lessons for Brazil

by

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Abstract

Using a reconciliation framework, this research examines select Canadian case law and the evolution of the "duty to consult" to explore the potential lessons for resource extraction in Brazil. It conducts an analysis of the legal precedents that exist in Canadian common law as they relate to Indigenous communities and apply the framework drawn to the resource extraction process with the hope of determining best practices. In Canada, ongoing discussions and challenges about the importance of land to Indigenous Communities, their culture and traditions are commonplace, but in Brazil, legal precedents and policies do not appear as well developed.

Indigenous land claims and resource extraction decisions at the countries' top courts are of critical importance to both nations given that mining development impacts upon the social, economic, and cultural aspects of Indigenous Peoples in both countries. This research targets legal policies, commentary and Court decisions in Canada relating to Indigenous land and the mining industry, with an emphasis on constitutional law, to compare aspects of land claims and constitutional rulings and how they have influenced social policy on Indigenous lives in regards to reconciliation. There are constructive lessons for the Brazilian government emerging from the comparison regarding how Canadian constitutional law has framed Indigenous rights with regard to resource development. In this research, I have found in my analysis that the "duty to consult" it's an important key element in the path for reconciliation with the Indigenous communities. This study revealed the influence of colonial social structures that still persevere and directly affect Indigenous communities in contemporary society.

Keywords

"Duty to Consult", Indigenous Peoples, Land, Reconciliation, Resource Extraction

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Chapter 1

Introduction

1.1 Situating Self

Enraged by grievous exploitation of natural resources and destruction of Amazon and other ecological habitats in my native Brazil, I've seen first-hand the impact on Indigenous communities. When compared among Latin America (LATAM) countries, Brazil is culpable of one of the highest rates of annual deforestation of the Amazon. This scenario sparked my interest in law as a profession and subsequent pursuit of research in Indigenous community relations. During my Undergraduate studies, I also completed a thesis on the prevalence of internal colonialism and the impacts of these structures of domination over the Indigenous Peoples in Brazil. Through my Undergraduate studies in Brazil, I became more aware of the importance of Indigenous issues in countries such as Canada and Brazil. It's an important part of each nation's heritage.

Drawing on a diverse range of experiences, I bring an approach to my research that is open, analytical and reflective towards both Law and Indigenous studies. Since Fall 2018, I have undertaken the Masters in Indigenous Relations degree program which has presented me the opportunities to develop a thorough understanding of the Indigenous perspectives and knowledge with which I may be able to contribute to social, political, economic, environmental and health-related policy development in Brazil. My research interests circle around the potential for the "duty to consult" as a pathway towards reconciliation with the Indigenous Peoples of Canada and Brazil with regards to mining activity, land claims, and Indigenous communities in both

countries. This research highlights how the lack of regulation around mining can directly affect the Indigenous communities. In the same vein, I will discuss some of the legal precedents in Canada and which lessons can be learned by the Brazilian government in regard to Indigenous rights. This study will also conduct a doctrinal examination of important precedents of the Canadian Superior Courts and their interpretative relationship with the reconciliation framework.

1.2 Research Context

In the course of history, it is observed that assimilationist policy, aimed at leading to the cultural genocide of Indigenous Peoples in Brazil, has led to social exclusion, poverty, and displacement beyond the veiled prejudice represented in social invisibility and, mainly, neglect and State abandonment (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). Over the years, it turns out that this policy with the declared intention of preserving Indigenous culture, while attempting to integrate it into another - western -, has proved to be nothing harmonious and the outcome was that almost all the traditions and customs of Indigenous Peoples in Brazil were erased from Brazil's history and Portuguese language and culture has prevailed (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017).

Since the colonial era, the trajectory of the Indigenous Peoples is marked by omissions and recurrent direct violence that, consequently, negatively influenced the vision of the Brazilian society towards those communities. The hostility against Indigenous Peoples was greatly enhanced by the history of colonial domination, legal, political and economic exclusion (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). Relationships are based on the false belief of the "racial superiority" of non-Indigenous groups over Indigenous societies, creating Western ethnocentrism. Universalist ethnocentrism as a colonial heritage has forged structures and

practices in the social, political and legal spheres impacting all other fields of civil and political life (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017).

Until 1988, the Brazilian Government's policy approach was not to take into account the condition of being Indigenous, since the Indigenist policy was directed towards complete acculturation. The absence of supportive public policies and prejudice are the main adversities that these communities face in everyday life (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). Below is a direct quote from the Brazilian Constitution of 1988:

Art. 231. São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam, competindo à União demarcá-las, proteger e fazer respeitar todos os seus bens (Article 231 of the Brazilian Federal Constitution of 1988).

Art. 231. The Indians are recognized for their social organization, customs, languages, beliefs and traditions, and the original rights over the lands they traditionally occupy, and the Union is responsible for demarcating, protecting and ensuring respect for all its assets (Literal translation of the Article 231 of the Brazilian Federal Constitution of 1988).

However, the effectiveness of this constitutional precept is still a distant reality, since the disrespect of these peoples' ways of life, as well as their relative invisibility due to social exclusion, is consistently observed. In these and other ways, the State weakens and distances itself from the democratic spirit embodied in the declaration of diversity affirmed with the objective of promoting the recognition of the distinct cultural realities of Indigenous Peoples (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). Because of this situation, it is not uncommon to find State omission in many of the legal protection fields such as land claims. In

the structural scenario of the colonial State and its laws, the reasons of the State - modern rationality - arise from arbitrary elements that translate into violent reasons and the artifice of racial supremacy over minorities (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017).

In Canada, we can see a similar scenario for Indigenous Peoples, where the State is sometimes negligent towards them and their rights. This situation validated Indigenous contempt for Western theoretical reflections on the character of sociocultural plurality. State law too, on the surface while appearing rational and objective, holds deep colonialist roots which embody a historical genesis impregnated with racism and discrimination (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017).

In brief, the concept of colonialism and ethnic invisibility are intrinsically connected in the Brazilian social and economic context, especially when it comes to Indigenous Peoples. Internal colonialism is reflected in the uneven effects of economic development on a regional basis, otherwise known as "uneven development," as a result of the exploitation of minority groups within wider society and leading to political and economic inequalities between regions within a state (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). This is held to be similar to the relationship between metropole and colony, in colonialism proper. The phenomenon creates a distinct separation of the dominant core from the periphery in an empire. The main difference between neocolonialism and internal colonialism is the source of exploitation. In the former, the control comes from outside the nation-state, while in the latter it comes from within (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017).

Many of Brazil's problems are rooted in poverty and discrimination. In its vast plurality, it can be said that Indigenous Peoples are not fully enjoying the economic and social development of the country and are being deprived of rights by prejudice and indifference leading them to be

marginalized and suffering social exclusion. There needs to be further progress in terms of legislation to protect the rights of Indigenous Peoples and such legislation should be implemented immediately. Further, in the Brazilian context, many of these issues can be explained by the internal colonialism present in the social structure of the country. The roles of "colonized" and "colonizer" are well defined, that is, power relations arise through the hierarchy between these two poles and is marked by the sovereignty of the role of the strongest over the weakest (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). To any act emanating from the Brazilian government in reference to the Indigenous Peoples, there is an aspiration on the part of the State that these interactions happen by the total dependence, obedience, submission and subjection of these communities. The structure of the "conqueror" and "conquered", even though veiled, still exists in the Brazilian social and political arena, through micro-power relations (civil society vs. ethnic minorities) and macro-power relations (National State vs. minorities) suppressing any form of diversity and legal plurality recognized by the State and thus extending the marginalization and social invisibility of these communities (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). With this, the maintenance of these relations happens through the establishment and perpetuation of certain practices of social classes, like fewer jobs and educational opportunities for Indigenous people. Also, political, economic and social power somehow allow certain social classes to maintain a privileged hierarchical position in comparison to Indigenous communities that experience poverty and discrimination. There are parallels that can be noted here with respect to the conditions of many Indigenous Peoples in Canadian society.

Brazil has a plurality of laws and policies designed to promote human rights and improve the socio-economic situation of citizens, as we can see in the quota system for educational and

government jobs where the government facilitates African-Brazilian and Indigenous Peoples to have easier access when applying for a public University or a government job. However, these policies are not always being adequately implemented, with the result that Indigenous Peoples continue to face constraints on their rights. We see that ethnic invisibility is also a consequence of colonialism that still prevails in the organization of the Brazilian State, since this system admits that cultural differences and social formation are not valued and that only non-Indigenous patterns of behavior are recognized and ensured by rights guaranteed by the State (Mota, 2017; Quijano, 2000; Rozo & Del Cairo, 2017). The Brazilian governance systems preserve privileges which exclude groups and individuals that do not fit the pattern of supposed "racial superiority", including Indigenous nations. Therefore, there is no real recognition of cultural diversity in relation to Indigenous Peoples vis-à-vis national society, thus going in the opposite direction to that established in the Brazilian Federal Constitution.

Like in Brazil, Indigenous Peoples in Canada also suffered from the 'colonialism project' imposed by settlers. Historically, the initial impact of European contact on the Indigenous populations of the Americas was a massive loss of life through infectious diseases, violent encounters and displacement (Henderson, 2017; Wolfe, 2006). As an example, the emergence of the settler-controlled nation-state was associated with explicit policies aimed at cultural suppression and forced assimilation of Indigenous Peoples through the Indian residential schools leading to a "cultural genocide" of these groups (Kirmayer et al., 2014). Certainly, there is broad evidence in the Canadian literature about the first centuries of the encounter between colonizers and Indigenous Peoples. It is described in violent acts of aggression, dislocation, and cultural suppression driven by ideas and policies that were based on discrimination and racism.

Early history of Indigenous populations and colonialism gave way to a process of struggle with settler society and incorporation into the emerging nation-state. Indigenous Peoples occupied land that the settlers wanted for economical purposes and were repeatedly pushed back to the margins (Kirmayer et al., 2014). At the same time, they constituted a worry for the nation-state, which needed to address the evident inequities created by colonization. This led to specific forms of cultural oppression and structural violence, with the outcome that Indigenous Peoples, in Canada, became a marginalized sector of the society (Kirmayer et al., 2014). Indigenous Peoples throughout the globe have faced many similar challenges, although the history and politics of nation-states have influenced their subsequent trajectories. Many Indigenous groups had been targeted by intentional killing through conflict, the spread of infectious disease, and massacres throughout the eighteenth century. Kirmayer et al. (2014) points to the case of Newfoundland's Beothuk First Nation who were entirely eliminated through low-intensity conflict and starvation.

The principal statute governing Indigenous Peoples, in Canada, was the *Indian Act* through which the federal government administers 'Indian status', local First Nations governments and the management of reserve land and communal monies (Indian Act, 1985, c I-5). It was introduced as a consolidation of previous colonial ordinances that aimed to suppress First Nations culture in favor of assimilation into the new Euro-Canadian society. Over the years, the Canadian government has recognized that this legal instrument has enabled trauma, human rights violations and social and cultural disruption for many generations of First Nations Peoples (Henderson, 2018). Regarding the *Indian Act* and other federal assimilation policies, the most widespread and longstanding mechanism of segregation involved the national system of the Residential schools designed to eradicate Indigenous languages and cultures (Henderson, 2017;

Miller, 1996; Wolfe, 2006). These school's curriculum consisted of general education and basic vocational skills like industrial arts for boys; sewing, cooking and other domestic activities for girls. The last residential school was not closed until the 1990s and accordingly to the Canadian government more than 140,000 Aboriginal children and teenagers had been subjected to this educational system that systematically denigrated their Indigenous languages, culture, and spirituality as well as disrupting family ties and community (Kirmayer et al., 2014).

Only, in 1996, with the publication of the *Report of the Royal Commission on Aboriginal Peoples* did this imposed system of assimilation become well known. This report was based on oral testimony collected in hearings all over Canada as well as extensive historical and scientific documents (Royal Commission on Aboriginal Peoples, 1996). Various forms of mistreatment were detailed, accompanied by staggeringly high death rates as well as alarming levels of physical and sexual abuse in these institutions. Also, forced displacement of Indigenous communities and the bureaucratic machinery of the *Indian Act,* forbade Indigenous customs and gave rise to multiple forms of "internal colonialism" in Canadian society (Kirmayer et al., 2014).

In response to many lawsuits against the Canadian government to compensate those who were victims of the abuses that took place in the Residential school system, a Truth and Reconciliation Commission (TRC) was established, which aimed to hold hearings and collecting testimony on the legacy and impact of the Residential schools. Also, with the recommendations of the TRC, a reconciliation framework was introduced for government policies with respect to Indigenous Peoples across the country. Those traumatic historical events had marginalized most of the Indigenous Peoples in Canada, bringing trauma, cultural loss, poverty and discrimination into their daily lives. In many Indigenous communities, rates of suicide, alcoholism, domestic and sexual violence are far higher than national averages and, in some communities, have actually

increased during the last 20 years. This shows that the traumatic experiences of ancestors could lead to dysfunctional communities and the increasing incidence of suffering within contemporary Indigenous populations (Kirmayer et al., 2014). Indigenous Peoples want to reclaim their culture and traditions from the pre-colonial era such as cultural and social perspectives. They also stand for the rights of self-determination, tradition, and territorial sovereignty. This resistance contributed to the rise of Indigenous activism, research and advocacy about how to decolonize judicial institutions and fight against the Eurocentric perspective in resource development.

The historical suppression of their cultures and identities has now been recognized by the Canadian government (Department of Justice, 2018). That's why the reconciliation agenda is being presented to restore culture and tradition for the Indigenous Peoples. A focus on reconciliation has the objective of addressing and mitigating traditional patterns of subsistence, the overthrow of community autonomy, the mass expropriation of lands and resources, and the development of enormous economic inequalities among the Indigenous Peoples in Canada (Kirmayer et al., 2014). The concept of "duty to consult" arose out of court interpretation of section 35 of the Constitution which is discussed in detail in Chapter 3. It has the potential to give voices to the voiceless, and also facilitate greater autonomy and self-governance in their lands.

This is the context of my research that motivated me to circle my study around the Canadian experience with the Indigenous matters with regards to the mining activity, land claims and the path to reconciliation with the Indigenous communities. Posing a research question that explores this arena, creates an opportunity to discuss how empowerment may be tied to amplifying Indigenous voices in decisions that affect their traditional territories. Also, it is hoped that a consideration of Canadian legislation and case law will provide a comparison wherein

Indigenous communities have had some success in fighting to restore some of this agency to themselves through legalism. This research will highlight, too, the issue that lack of regulation around mining in Brazil directly affects the Indigenous communities and how it's deeply related to the social invisibility of Indigenous Peoples in Brazil.

1.3 Research Question

Using a reconciliation framework to examine Canadian legislation, jurisprudence and corporate practices, what lessons for Brazil can be learned about the evolution of Canadian reconciliation initiatives and the application of a "duty to consult" with the Indigenous communities? Are there elements of Canadian case law and the constitutional contexts of resource extraction and Indigenous rights that might provide guidance in the Brazilian context? Are there any lessons learned from the Canadian context that might be helpful to the mining sector in Brazil when it comes to Indigenous claims? The objective is thus to pull out lessons learned from a Constitutional point of view so that we have a better understanding of what effective partnerships might look like following Constitutional rulings. Since there is limited literature covering this topic, I aim to draw attention to the plight of Indigenous communities by pursuing this study such that both countries benefit.

1.4 Research Method and Methodology

This thesis researches the application of legal norms regarding Indigenous rights pertaining to resource development in Canada through a doctrinal examination of precedents of the Superior Courts in Canada, laws, and their interpretative relationship with the Constitution. The methodology for this project is based on instrumental doctrinal research. Using a qualitative

critical analysis, Constitutional texts, leading case law and legal scholarship showing how the Canadian judiciary has addressed Indigenous relations and rights with regard to resource development, it will help to determine what steps might be needed to ensure fuller participation of Indigenous populations, particularly in Brazil where Indigenous rights are often described as lacking. Also, this research will analyze legal precedents in Canada. The study also brings attention to importance of learning from constitutional experiences of nations who are in similar situations around the world. Relevant decisions in high level courts elsewhere can be brought to guide domestic level of judicial decisions. Even if learnings differ, shared experiences provide a good direction and a measure for States to understand where they are on the path towards reconciliation. My research project will also focus on the "duty to consult" as an instrument and concept for reconciliation between the mining industry and Indigenous communities. Through this research I will discuss the possibility of a *win-win* situation for all in the hope to draw recommendations for Brazil. Also, I hope to contribute to understandings about how constitutional law impacts Indigenous rights so that government policies and laws around mining are more reflective of true meaningful partnerships for all parties involved.

Chapter 2

Literature Review

2.1 Canada: Mining & Indigenous Peoples

In Canada, mining-related activities had, and continue to have, a significant impact on the economy and the environment. Mining and other resource industries comprise the main drivers of the Canadian economy. Canada has built a knowledge-based industry around its resource industries and has technical expertise in areas such as automation, robotics, mobile communications and other information technologies. It produces more than 60 minerals and metals. For Milioli (2004), the socioeconomic implications of mining are particularly significant in regional economies outside the country's metropolitan areas. As the world leader in mineral production, Canada has also had to respond to the environmental impacts of its domestic and overseas activities. The Canadian mineral sector is constantly considering the best approach to dealing with growing pressures from the national and international point of view, in order to secure networks of protected areas and sustainable natural habitats, ensure good community relations; meet fair claims of Indigenous land settlement, and achieve publicly respected environmental records.

In this regard, Canadian governments and companies are paying special attention to environmental concerns. Initiatives of legislation, regulated and voluntary, are quite extensive, compared to the countries of Latin America. Environmental assessment legislation has been in place in the Province of Ontario since the early 1970s and now extends to all jurisdictions in Canada. These parts of the legislation require extensive public consultation. The mineral industry itself has been engaged in many multi-stakeholder initiatives and has made significant

improvements in waste management and reductions in air pollutants and several other contaminants. In the Canadian federal system, provincial governments have constitutional authority for resource development. Provinces have a pivotal role in establishing legislation and policies related to mining. In this way, environmental legislation and advances in resource development can vary considerably across the country. All provinces have adopted environmental assessment processes that reflect their own political and socioeconomic requirements (Milioli, 2004).

The industry has many problems to solve, including increasing costs as well as the alienation of land for mining because of the designation of preservation areas, parks, or surrounding the claim for settlement of Indigenous land. Such pressures have inspired industry to encourage a more positive image of mining through the introduction of new voluntary measures, like increased protections for the environment, human health, and cultures, which would allow Indigenous Peoples, for example, to enjoy the use of their land. Processes of participation and analysis are aimed at assessing how mining and minerals can best contribute to a transition to global sustainable development (Milioli, 2004).

Canada has a long chapter of its own history of colonialism in relation to Indigenous Peoples. Policies of cultural genocide and assimilation have marginalized many of Indigenous Peoples and have deeply damaged the relationship between Indigenous and non-Indigenous Peoples. The early partnership between settlers and Indigenous Peoples was supposed to be seen as one of mutual support, respect and assistance that was confirmed by the Royal Proclamation of 1763 and the Treaties with the Crown that were negotiated in good faith by parties. However, history and a destructive legacy of social segregation of Indigenous Peoples is a powerful reminder that Canada disregarded its historical roots. Canada's determination to assimilate Indigenous Peoples,

in spite of the early relationship established at first contact and in Treaties, attests to that fact (Truth and Reconciliation Canada, 2015).

Regarding mining activity, in Canada, there is a critical role to play in advancing reconciliation and communication with Indigenous Peoples. Mining often has disproportionate impacts on Indigenous communities. Because of their close connection to the land, water, and resources therein, and their social and economic conditions, Indigenous Peoples living in current or former settler colonies are particularly vulnerable to mining's impacts (Horowitz et al., 2018). Mining produces often widespread environmental impacts both directly and indirectly related to extractive processes. These impacts may directly and disproportionately affect the land-based livelihoods and traditional activities of nearby Indigenous communities (Horowitz et al., 2018). Modern mineral development entails the large-scale "disassembly" of local environments to separate target minerals from their geological matrix. As these minerals often represent tiny fractions of the total orebody, large amounts of surface materials (overburden), waste rock, and tailings are removed and deposited as part of the excavation and mineral separation process (Horowitz et al., 2018). These vast streams of waste not only affect local surface environments (through waste dumps and pits), but also the local atmosphere (through dust and smelter emissions) and waterways - either through direct deposit of waste materials or through the leaching of toxic chemicals and heavy metals from waste rock and tailings (Horowitz et al., 2018).

The complex composition of ore deposits and mining techniques, combined with the diversity of local ecologies, means that the environmental impacts of mining – and the conflicts they generate – are highly specific to any given development (Horowitz et al., 2018). At the landscape scale, the environmental effects of development include surface disturbance and

deforestation from extractive activities and associated infrastructure, including roads, shipping facilities, exploration and drilling sites, waste impoundment facilities, and power dams (Horowitz et al., 2018). Mining activities can also cause extensive displacement of Indigenous communities and environmental damages. Many studies reveal that local Indigenous communities are engaged in a battle for the recognition and mitigation of mining's environmental legacies on their own territories, many of which may persist for decades or longer after the end of extractive activities (Horowitz et al., 2018).

Some governments and civil society are taking measures to decrease or reduce those negative impacts of this industry. Through regulation, policy and good practices, they are also trying to build partnerships between companies and Indigenous communities aiming that all parties involved can benefit economically and socially from it. Bringing consultation – the "duty to consult" – and communication to Indigenous communities as tools to rebuild this partnership will hopefully build more trust and confidence in this relationship.

2.2 Brazil: Mining & Indigenous Peoples

As in Canada, mining has played an important role in Brazil's history, economy, and society. Brazil, the largest country in South America, has well-structured and well-managed mining companies, among which Vale is one of the largest iron ore producers in the world (Milioli, 2004). Brazil, unlike Canada, does not have extensive environmental laws and regulations. The mineral question is somewhat referred to in the 1988 Federal Constitution but it doesn't give the guidelines in terms of a prior environmental assessment process that should ensure how government and public parties will consider potential environmental and social impacts before a project begins. In addition, it requires the control of methods and substances that endanger

health, quality of life and the environment. Specifically, it requires anyone who exploits mineral resources to recover the degraded environment by using the technical solutions required by law through the appropriate public regulatory agency. However, Brazil lacks the ability to effectively enforce legislation when abuses occur, and authorities are generally complacent. Researchers point out that in recent years there are still many mining companies operating in an illegal and irregular situation and that are directly affecting the environment and Indigenous communities (Curi, 2007).

Countries such as Canada, the United States and Australia have stricter requirements in their environmental legislation. An example of this is that today in Canada, a mine cannot open unless it has an acceptable closing plan and can demonstrate that it will be in a financial position to cover the site's rehabilitation costs (Milioli, 2004). Environmental regulations and practices are more advanced in these countries than in developing countries, such as Brazil. Some analysts, however, suggest that enforcing the principles of environmental assessment, legislation, and sustainability is also a challenge in countries like Canada (Milioli, 2004). Despite this, environmental issues have been prominent in documents produced by the mining interests of the public and private sectors, both in Brazil and in Canada. This growing awareness of the need for an effective strategy for sustainable development is partly a reflection of rapid investment growth, particularly in the areas of exploration, mineral development and North-South trade.

Under the Brazilian Federal Constitution of 1988, Indigenous lands in Brazil are considered to be federal property, although it is recognized that Indigenous Peoples have original rights, which pre-exist any other, on the lands they traditionally occupy. For the Indigenous Peoples in Brazil, land is more than a natural resource, it is a socio-cultural resource (Barreto, 2001). Since the 1988 Constitution, the debate around the issue of the extraction and use of mineral resources in

Indigenous lands has intensified, including giving rise to several bills in the National Congress, but nothing has really materialized or progressed regarding Indigenous claims of lands (Barreto, 2001). The regulation of mining and the potential economical use of Indigenous lands, the demarcation process as well as the numerous illegal occupations of loggers, miners and farmers make up the current chapters and Brazilian history of the disrespectful relationship with Indigenous Peoples in Brazil (Curi, 2007).

Contrary to the Constitutional provisions, Indigenous Peoples became invisible in the face of planning economic enterprises on their lands, and later, during the operational phase of these proposals, an obstacle to national development. The invasion of Indigenous lands by non-Indigenous Peoples for the illegal exploitation of natural resources is a reality that affects almost all Indigenous land in the country. Although the Brazilian Federal Constitution guarantees permanent possession to them of the lands they traditionally occupy and the right to exclusive usufruct over the natural resources therein, these precepts are not effectively respected, which causes many conflicts in their communities. In this sense, it is the responsibility of the federal government to suppress these invasions and to inspect the Indigenous areas to guarantee to these communities the maintenance of the natural resources necessary for their physical and cultural development. But the reality is completely different from what's written in the legislation and the application of law enforcement.

Those lands have very rich soil and subsoil with diamonds, gold and other ores. Every day, Indigenous Peoples confront invaders and the so-called development projects that settled without their consultation and approval or from the Brazilian government in their lands (Curi, 2007). Mining in Brazil, like any other economic activity in the country, is conducted in a neoliberal context that confuses economic growth with development. The notion of progress, based on a

quantitative perspective, measures the development of a country through its per capita income, disregarding fundamental social, environmental and cultural values (Curi, 2007). In the National Congress, the political intention to endorse feasible economic projects and to perpetuate this unjust economic model that maintains the social inequalities in the country is clear. Many episodes of genocide and displacement of Indigenous Peoples occurred because of those economic practices that perpetuate the marginalization of those communities.

The scenario for the Indigenous Peoples in Brazil is very unstable and uncertain. Requiring consultation with Indigenous communities in the decision-making process on resource extraction and development projects will encourage better assessment of the real impacts on the communities involved. This study aims to bring positive and critical discussion from the Canadian experience towards Indigenous Peoples to the Brazilian scenario. Thus, Indigenous communities in Brazil may be better situated to benefit from such developments if involved in the developmental stages.

2.3 Overview: Colonization vs Indigenous Peoples

Indigenous Peoples are considered to be the descendants of the pre-colonial peoples of the Americas, Australia, New Zealand, Asia, and Africa, and have historically occupied certain regions of the world. Mostly Indigenous Peoples share a similar historical background: Colonialism (O'Faircheallaigh, 2012). Accordingly to the Good Practice Guide Indigenous Peoples and Mining (International Council on Mining & Metals, 2010), as colonized peoples, Indigenous populations have experienced common impacts including physical or economic displacement and resettlement; reduced ability to carry on traditional livelihoods due to loss of access to land, and damage or destruction of key resources; social dislocation and erosion of

cultural values as a result of rapid economic and social changes and increased risk of exposure to communicable and lifestyle-related diseases.

Indigenous Peoples have profound and special connections to, and identification with, lands and waters and these are tied to their physical, spiritual, cultural and economic well-being. They also carry valuable traditional knowledge and experience in managing the environment in a sustainable manner. Indigenous Peoples in many regions of the world have been historically disadvantaged and may often still experience discrimination, high levels of poverty and other forms of political and social disadvantage (International Council on Mining & Metals, 2010). However, the ongoing impacts of colonization created a problematic scenario for Indigenous communities. This sector of the society has been treated as a marginalized minority ethnic group with a culture distinct from the national model (O'Faircheallaigh, 2018). Yet, some countries have not formally recognized the existence of Indigenous Peoples within their borders, or only recognize some groups. In some States, the political work of repairing and reconciling the nation state has strengthened the histories and identities of a dominant culture while marginalizing others in the name of national unity (O'Faircheallaigh, 2018).

Many Indigenous communities have an understandable lack of trust towards corporations or State agencies concerning their rights and protections of Indigenous interests. This issue is related to the roots of colonialism and the perpetuation of the colonial project established by many sovereign States like the U.K., France, Portugal, and Spain (O'Faircheallaigh, 2012). Over the last few decades, Indigenous groups have been recognized as a distinct societal category under International Law and domestic law especially because of their historical background and peculiarities of their life-style, culture and language compared to the Western societies (O'Faircheallaigh, 2018). Acknowledging and respecting Indigenous Peoples' rights, concerns

and interests should now be seen as a major ethical and legal responsibility regarding the roots and outcomes of Colonialism that displaced and marginalized Indigenous communities all over the globe (O'Faircheallaigh, 2012).

After a long period of oppression, Indigenous rights and demands have risen over the last few decades and this movement is growing stronger and stronger in some countries like USA, Canada and Australia (O'Faircheallaigh, 2012). At the States level, there has been a strong drive to define a structure of rights that specifically addresses the current situation of Indigenous Peoples. This scenario has developed in response to the growing recognition within the international community that Indigenous Peoples experience ongoing marginalization, prejudice and human rights abuses. Indigenous Peoples as rights holder groups demonstrates common claims and demands (O'Faircheallaigh, 2012). In addition, articulation of group rights as human rights underline the rights to life, survival, and subsistence, which form the very basis of Indigenous collective claims, particularly regarding participation in affairs that are of direct concern to them (Eichler, 2019). Other debates in Indigenous rights scholarship have shed light on the overall functions of articulating group-based rights within the wider Indigenous collective framework such as their association with broader struggles against inequality, poverty, racism, and marginalization (Eichler, 2019).

2.4 Rise of International recognition of Indigenous Rights

For Eichler (2019), international human rights law provides several protection regimes for participatory rights to be protected in general and Indigenous Peoples in particular. Indigenous groups benefit from previously established human rights treaties which stipulate participatory rights applicable to all and specific rights to be granted to particular groups. Some Indigenous

Peoples have successfully claimed minority rights in relation to the development of cultural identity and the right to participate in decision-making of community members. In fact, minority rights regimes serve as complementary mechanisms to protect Indigenous rights ~~is~~ in some cases (Eichler, 2019).

Indigenous Peoples have individual and collective rights and also, interests that are internationally recognized that should be protected by governments and respected by companies. Two of the key international instruments in this area are International Labor Organization (ILO) Convention No.169 on Indigenous and Tribal Peoples (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly in September 2007. The UNDRIP sets out rights that countries should aspire to recognize, guarantee, implement and establish a framework for dialogue between Indigenous Peoples and States (International Council on Mining & Metals, 2010).

The United Nations, for instance, has clearly linked the right to self-determination and the corresponding free disposal of natural wealth and resources to Indigenous Peoples. Similarly, Indigenous Peoples enjoy participatory rights under general non-discrimination treaties: they have the right to effective political participation including informed consent whenever decisions directly affect their rights and interests and are entitled to control and use communal lands, territories and resources. Further, Indigenous Peoples are given the right to participate in the management and conservation of natural resources according to international legal provisions on non-discrimination (Eichler, 2019).

The rise of global recognition of Indigenous rights initiated with the first international legal instrument dedicated to the protection of Indigenous Peoples' rights. The ILO Convention No. 107 presented concerns about the protection and integration of Indigenous and other tribal and

semi-tribal populations in Independent countries and was adopted in 1957 (Eichler, 2019). Yet, the follow-up instrument, ILO Convention No.169 on Indigenous and Tribal Peoples in independent countries, entails further reaching changes in the field of Indigenous Peoples' rights. This Convention contains a number of provisions on participatory rights, namely to participate in and to be consulted on various issues that affect Indigenous Peoples (Eichler, 2019). The Convention No.169 further stipulates that consultations have to be carried out in good faith, appropriate to the circumstances and comprehend the objective of reaching agreement or consent regarding the respective measure (Eichler, 2019).

Regarding the international arena and participatory rights, the UNDRIP is considered to be a milestone to the right to consent in particular. This instrument can help to inform understanding and respect for the rights, interests and perspectives of Indigenous Peoples regarding a project and its potential impacts in their lands. Pursuant to the Declaration, social and environmental assessments or other social baseline analyses should be undertaken to identify the nature and extent of potential impacts on Indigenous Peoples and their communities. The conduct of such studies should be participatory and inclusive to help build broad cross-cultural understanding between companies and communities (International Council on Mining & Metals, 2010). Agreed engagement and consultation processes should be applied in collaboration with potentially impacted Indigenous communities, in a manner that ensures their meaningful participation in decision making (International Council on Mining & Metals, 2010). According to the UNDRIP, where required, support should be provided to build community capacity for good faith negotiation on an equitable basis. These processes should strive to be consistent with Indigenous Peoples' decision-making processes and reflect internationally accepted human rights, and be commensurate with the scale of the potential impacts and vulnerability of impacted communities

(International Council on Mining & Metals, 2010). Eichler (2019) notes that consent is required as an objective for consultation before implementing legislation. However, this Declaration cannot simply be enforced under a State-level law. As a Declaration, the UNDRIP is not legally binding domestically, and does not establish any concrete legal obligations for States.

Eichler (2019), states that the consultation and consent model as established by UNDRIP has been further enhanced in subsequently adopted resolutions and declarations applying it to other contexts such as environmental risk reduction processes. The author also affirms that in contrast to UN Human Rights treaties and clearly defined human rights treaty bodies, UNDRIP provisions are promoted and realized in multi-actor settings, which promote and interpret Indigenous participatory rights in different fora. In sum, Eichler (2019) concludes that it is important to note that international legal instruments and monitoring mechanisms provide a general framework and a minimum requirement for Indigenous Peoples' participatory rights. Detailed legal provisions will develop in a flexible manner in each specific country context and culture. The element of representativity plays a crucial role in ensuring that consultation is carried out with true representatives of the communities that are affected. These international instruments reflect the objective of enabling Indigenous communities to be engaged participants in the use, management and conservation of natural resources that pertain to their lands.

Chapter 3

Understanding 'Duty to Consult' and its significance to Reconciliation

3.1 Introduction

The *Constitution Act, 1982* and particularly, the addition of section 35 is an important landmark for Indigenous Peoples in Canada. The rights included in this provision assisted the acknowledgment of the pre-existing Aboriginal rights to their land prior to the settlers' arrival (Newman, 2014). The "duty to consult" is considered to be a result of the complex cross-cultural interaction that has been changing over the decades and has made it possible to focus on previously unanswered questions within the legal system (Newman, 2014). Thus, the introduction of "duty to consult" is a response to the social-historical inequalities and to legal infringements that have led to negative impacts for the Indigenous communities.

For Newman (2014), the "duty to consult" is not unique to Canada. Remarkably, it has increased in the domestic legal system of other countries as well. This concept has also been developed in international norms on the rights of Indigenous Peoples. Later, a common ground will be demonstrated between International law and the Indigenous rights which crystallized many of these principles in the global arena. Among its dispositions, there are a number of norms that refer to the responsibilities of consultation prior to the development of resource extraction activities in the Indigenous communities that will be addressed at further length in this thesis. According to Newman (2014), the "duty to consult" reflects a broader international movement that aims to improve interactions between States and Indigenous Peoples. While Superior Courts in Canada have used this approach with the aim of promoting reconciliation between Indigenous and Non-Indigenous groups, it has not solely been used in Canada.

The “duty to consult” emerges from the recognition and affirmation of Indigenous and Treaty rights in section 35(1) of the *Constitution Act*, 1982. It is associated with the Supreme Court of Canada’s recognition of the obligation to protect the “honour of the Crown”. This historic obligation requires the federal government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous Peoples. The “duty to consult” in Canada is about correcting the imbalance of power that has historically prevailed between the State and Indigenous Peoples. The “duty to consult” also arises in the context of resistance or in the absence of attention to an Indigenous perspective. It can be a tool to address the historic sense of social annulment and marginalization of Indigenous communities. Also, the use of the “duty to consult” mechanism provides a potential technique to stop those in the position in power from speaking or making decisions on behalf of others, like Indigenous Peoples.

3.2 Core Principles

To better understand the "duty to consult", it is important to go beyond the case law and analyze its core principles. Only in this way, is it possible to understand its applicability and evaluate how the doctrine is advancing. It has taken a considerable amount of time for judiciary in Canada to finally acknowledge the potential of the “duty to consult” in its understandings. Newman (2014) says that the full spectrum of this duty hasn't been yet applied by the courts but it has provided better clarity regarding the role and responsibilities of governments. He mentions five principal components of the “duty to consult”:

- Firstly, the duty arises before the proof of Aboriginal rights or Aboriginal title claim or in the context of uncertain effects on Treaty rights.

- Second, it is triggered relatively easily, based on an insufficient level of knowledge the Crown has in relation to a potential claim, with which the government action has a conflict.
- Third, the strength or scope of the “duty to consult” in specific circumstances lies along a spectrum of possibilities, with a fuller consultation requirement arising from strong evidence of Indigenous claim and/or a significant impact on the underlying Aboriginal or Treaty right.
- Fourth, the duty is expansive in its range, from a minimum notice requirement to a duty to carry out some degree of accommodation of the Indigenous interests, but that it does not include a power of veto over any specific decision.
- Lastly, failure to meet a “duty to consult” can result in a restriction against a specific government action and often an order to carry out the consultation prior to moving ahead.

The doctrine of the "duty to consult" has its theoretical foundation in the principle that the government must act in consonance with the Crown’s obligations like the “honour of the Crown” which consists of the accommodation of Indigenous Peoples’ demands synchronized with the Crown’s interests (Newman, 2014). In subsequent chapters of the study, I provide examples of instances where such obligations were not met on the part of the Crown.

3.3 Judicial Support

The judiciary has applied the “duty to consult” for harmonious settlements to issues between Indigenous and non-Indigenous groups. As a tool, “duty to consult” is strengthened by the judicial support it has received in Canadian legal history. One significant consequence of Supreme Court verdicts is that the government is now pushed to outline a form of consultation

process. Adequacy of the process is measured on how effectively consideration of Indigenous matters of concern can best be integrated into government decision-making. If this approach is followed, Olynyk (2005) believes a righteous consultation can be achieved if discussed with the necessary resources that will commit to a purposeful attitude.

The Supreme Court also combines the "duty to accommodate" with the "duty to consult" in its understanding. The "duty to accommodate" similarly obligates the commitment from the Government in harmonizing conflictual interests between Indigenous and Non-Indigenous Peoples to walk through the path of reconciliation. Olynyk (2005) further explains that the “duty to accommodate” emerges when the Crown consults the communities and within that, there is a strong indication of the existence of Aboriginal rights. This is important as the role of the judiciary in establishing “duty to consult” is about encouraging negotiation as opposed to litigation. For example, where the Crown engages in conduct that has a prejudicial effect on a potential Aboriginal right or title, “duty to accommodate” is a tool expected to guide the Crown towards a more reconciliatory approach. Thus, one cannot be separated from the other. The Supreme Court of Canada's jurisprudence should continue to make clear the responsibilities of the Crown with Indigenous groups in reference to the “honour of the Crown”.

3.4 Applicability

The application of “duty to consult” has the potential to overcome silence over culture and traditions from Indigenous groups with the objective to claim and protect their territory. The “duty to consult” and, if appropriate, to accommodate the concerns of Indigenous Peoples, emerges when the government wishes to act in a way that may have adverse consequences for Treaty rights or for Indigenous rights, more broadly. The requirement applies to the federal,

provincial and territorial governments. For Newman (2014), it can be a tool used to educate governmental authorities that operate in a different cultural context without any specific training, and with a limited sense of the consequences of their actions on Indigenous matters. The "duty to consult" should be integrated into the environmental assessment and regulatory review processes. The "duty to consult" thus represents an ideal process to import understanding and respect into the application of land use and resource extraction and management legislation, through consultation with Indigenous communities. Ideally the "duty to consult" has the potential to reconfigure how Indigenous Peoples are acknowledged and engaged with in decisions and processes. The failure to consult meaningfully may result in the delay or eventual cancellation of a project, which can be a costly outcome for stakeholders.

For Olynyk (2005), when governments are aware of the potential existence of Indigenous rights and decide upon an action that might adversely affect them, this will trigger the governments' obligation to consult with the Indigenous groups. This accountability will rely on state authorities to set up approaches for consultations that are adequate to the resolutions being made and do not impose impractical burdens on the parties involved during the negotiation process (Olynyk, 2005).

According to judicial determinations following the "duty to consult" protocol, some procedural aspects can be delegated to other stakeholders with the intention to draw a parallel to evaluate how the impacts of the environmental assessments, for example, will be carried throughout the process. In this way, Olynyk (2005) observes that the Crown will be more efficient during the processes of consultations and will avoid possible delays or inefficiency from the governments' side to address the Indigenous demands. It will also assist to anticipate which issues are more likely to trigger the Crowns' obligation to consult and accommodate the communities. All over

the globe, many enterprises now have the ability and expertise to engage in a meaningful two-way dialogue for project-specific consultation with Indigenous Peoples. Over the years, these corporations had learned to build the capacity to implement measures to reduce the negative repercussions that can be experienced by the communities. This happened through the adaptations of the original plans with the objective to provide better economic benefits that, to some extent, offset the impacts of these projects (Olynyk, 2005).

3.5 Criticism and Limitations

Consultation does not imply an Indigenous veto upon development activity. Rather, consultation instead aims to protect Indigenous rights and to make decision-making upon the future use of resources inclusive for Indigenous Peoples. However, "duty to consult" can be very controversial in the sense that one position sees it as an opportunity for dialogue and integration with Indigenous communities. On the other hand, this can be seen as interference regarding Indigenous sovereignty and its rights, and as a maneuver to exploit Indigenous lands and its natural resources. These two stances may give rise to expectations and fundamental misunderstandings of the consultation process and what it may achieve. That is why it is recommended that the government and civil society should be involved during the consultative process, giving publicity to a proposed project and raising the social, environmental and economic issues. Superior Court decisions like the *Kitchenuhmaykoosib Inninuwug First Nation* and *Haida Nation* cases do not define how many levels of consultation should be required. On a daily basis, the governments must analyze and estimate the steps for the consultation to be appropriate in each and every case. Olynyk (2005) says that the scope of the "duty to consult" should be proportionate to the impact of the decision.

Despite the established recognition of the duties to consult and accommodate with Indigenous communities, which are constitutional obligations of the Crown, unfortunately, their application is not a reality in most countries including Canada, because governments are not bound to make resource management decisions accordingly to what is best for the Indigenous communities. In reality, policy-makers recommend that those proposed decisions should be a balance between other societal interests and Indigenous interests (Olynyk, 2005). Having said that, for the Superior Courts, the process of consultation does not amount to a power of veto. Indigenous groups do not have this prerogative during the consultation processes. The courts also support the view that the judiciary must not interfere in the final decision by the government, even if that is not accepted by the Indigenous groups. Contrary to this, for Olynyk (2005), the ideal situation would be if all parties involved could reach an agreement leading to a *win-win* situation. As believed by Olynyk (2005), in the long term, the consequences of those decisions on developers will depend on how provincial and federal governments respond to these challenges in ways that comply with guidelines provided by the Supreme Court. This Court made it clear it placed the onus with the Crown, but at the same time has given it the legal tools needed to adapt the necessary consultation process accordingly.

Another aspect is to really focus on the demands of the communities rather than just litigate on the "duty to consult" (Newman, 2014). Unfortunately, some of the negotiations between the governments and the Indigenous Peoples are only from a policy or economic standpoint and have not really focused on the wellbeing of the communities or the environment. Failure to address these issues can lead to much bigger issues in the future like lack of jobs, drinkable water, etc. (Newman, 2014). In the Aboriginal law context, given its broad complexity on its operational side, the "duty to consult" can create quite significant outcomes that are not yet contemplated by

the legal system. That said, the focus on this duty could be far reaching beyond just consultation (Newman, 2014). Despite of this, there remains legal uncertainty around the "duty to consult". The tool is structured as a "standard" instead of a "rule" and so is open ended. Many of the specific requirements of this tool are left open for the judiciary to determine on a case by case basis.

For many scholars, the "duty to consult" has been criticized for its approach as a mechanism of the repetitive dynamic of colonialism. Depending on the way that is performed it can cause negative impacts in the Indigenous communities. Creating disagreement within Indigenous governance structures results in weakening the power structures in the group (Newman, 2014). Similarly, accordingly, to Newman (2014), there may be concern that this process of consultation can cause inequality between different Indigenous communities with distinct capacities to leverage potential natural resource availability. This can bring social inequalities to the Indigenous communities. On the other hand, the effective exercise of this duty has brought economic gain for some Indigenous communities. Newman (2014) points out that the tool allows the development of collaborative resource extraction leading to the injection of millions of dollars of revenue, which also creates pressures for the Indigenous bands to reach a mutual agreement for the economical use of their land.

For policy-makers and the judiciary, it is important to assure that "duty to consult" meets its aim as a procedure but does not become a barrier or a veto power differently from its original scope. And for Indigenous Peoples, it is crucial that the "duty to consult" will not interfere in their core cultural and spiritual principles. Newman (2014) agrees that there must be a government guideline during the consultation to protect those beliefs assuring this relationship proceeds in a good way. He further goes on to say that "duty to consult" will guide the construction of a

responsible resource extraction project that in turn benefits the communities, but that it should not become a tool to delay lawful activities. Newman (2014) summarizes that the instrument of the "duty to consult" can be a multifaceted doctrine embodying a number of related aims and aspirations that give rise to various principles related to it. Its evolving development will continue to take time. Quite simply, the process is dependent on mutual respect and appreciation of each other's' customs and practices within the backdrop of tremendous grievances. Indigenous heritage and culture and traditional activities are a source of pride that allows Indigenous Peoples not only to face the hardships related to life on their beloved and respected land, but also to maintain their identity. If dispossession of and displacement from Indigenous lands occur, the consequences will directly affect their traditional knowledge, and their relations to the land and community. The land is considered to be sacred and should be respected. So, failure of "duty to consult" may result in the abandonment of reconciliation efforts on both sides.

3.6 'Duty to Consult' as a tool for Reconciliation

Newman (2014) states that the developing interpretations and applications of the "duty to consult" show the dynamic in the relations between the Crown and Indigenous Peoples. This duty can serve multiple purposes at the same time. Consultation should be a priority. But, at the same time the main purpose should be a trustful relation with Indigenous Peoples in the spirit of reconciliation. In essence, "duty to consult" is a foundation on which to build reconciliation. The "duty to consult" helps promote dialogue and assures that positive actions occur before the end of the consultation. One of the most important goals of this consultation process is to be economically efficient, in a good way, for all participants. In some instances, it can be a channel for new norms or reconciliation that, further, will build more trust and respect compounding the

intended effect. The "duty to consult" can be seen as a judicial precedent that has been developed in the Canadian courts over the years and still in progress. It aims to be a broader normative commitment that goes beyond formal Indigenous claims. Newman (2014) notes that this tool also fosters incentive for negotiation and is thus preferable on the grounds of what will promote the best *win-win* situation among Indigenous and non-Indigenous. For example, in the *Haida Nation* case, the Supreme Court stated that the "duty to consult" should take place in an honorable negotiation with the Indigenous Peoples. This will ideally result in an honorable covenant between the parties, reflecting the demands and rights of Indigenous People. The expected result is to reach reconciliation of prior Indigenous occupation and current Crown sovereignty based on the rights guaranteed by the *Constitution Act, 1982*.

Chapter 4

Reconciliation in Mining

4.1 Evolution of Reconciliation

Over the last two decades, the term reconciliation regarding the Indigenous Peoples and settlers has been widely used in practice to describe relationship and tension between these parties. This term can be seen in community building, relating to the environment, legal institutions, alliances, negotiations, academic circles etc. It is variously used by leaders like Chief Spence of Attawapiskat First Nation, Chief Stewart Philip and the Union of BC Indian Chiefs, and numerous chiefs and officials in the Assembly of First Nations. Also, it finds its way into broader political discourse. In 2017, the term of reconciliation was given heightened prominence and urgency (Asch et al., 2018). This term has been debatable and contested between settlers and Indigenous Peoples if it is an end state of some kind: a contract, reparations and compensation, self-determination, for others even a new form of colonization. Asch et al. (2018) note that while some insist reconciliation must be resisted, others see it as an essential process for the purpose of ongoing relationality.

The notion of reconciliation emerged, in Canada, after the trust that has been broken between the Crown and Indigenous Peoples in the last century. The destructive impacts of Residential schools, legislation and mostly the Crown's failure to honour the treaty promises has created conflicts and doubts between Indigenous and non-Indigenous Peoples in Canada (Truth and Reconciliation Canada, 2015). Reconciliation not only requires public apologies, reparations, the relearning of Canada's national history, and public commemoration, but also needs real social, political, and economic change. Dialogue and understanding of the impacts of colonization and

how assimilation policies have affected Indigenous Peoples leading to social and economic exclusion are essential to reconciliation and to reestablishing a mutually respectful relationship (Truth and Reconciliation Canada, 2015).

A reconciliation lens aims to confront the impacts of colonialism and to strengthen the demands and rights of Indigenous groups and their capacity to have these rights enforced, supported and respected by society. In discussing this further, some scholars observe that it is vital to expand the scope of reconciliation beyond Residential schools to encompass the whole settler-colonial project (Asch et al., 2018). For them, the meaning of reconciliation goes beyond the legacy of the Residential schools. Rather, it is a multi-faceted process that restores lands, economic self-sufficiency, and political governance to First Nations, and develops respectful and just relationships between First Nations and Canada. When discussed with Indigenous Peoples, a belief emerges that reconciliation will occur through establishing respectful relationships. This appears to be the foundation of moving forward with reconciliation. Moreover, it will require the revitalization of Indigenous law and legal traditions. Reconciliation and resurgence has been achieved, in part, through recognition and affirmation of Indigenous traditional foods, medicines, as well as language and cultural revitalization (Asch et al., 2018). Under a decolonial lens, reconciliation and resurgence occur when Indigenous Peoples exercise powers of self-determination, reclaiming and reconnecting with traditional territories by means of Indigenous ways of knowing and being (Asch et al., 2018). This implies a strong connection with the land and ecology that surrounds it.

Supporting this idea, Borrows (2019) shares that reconciliation implies an ecologically grounded ethical and political philosophy. This is about how it is we live best together. For him, complexities of reconciliation in the context of Indigenous view of the world as a living earth are

often ignored in our political discourse and debate. In other words, reconciliation is more than just a 'settlement' of affairs, rather an ongoing process. For some, reconciliation should reclaim, revitalize and regenerate Indigenous Peoples' ways of life as well as restoring human dignity and nurturing relationships of mutual respect (Asch et al., 2018). These discussions about reconciliation give rise to partnerships based on mutual consent and agreements providing a fair basis to reconcile. For Borrows and Tully (2018), in order to approach reconciliation, there should be a "decolonial commitment," in which both parties must first acknowledge conditions of ongoing coloniality, then seek to act in ways that interrupt, replace and dissolve those conditions.

Lastly, reconciliation is not only about the past, but it is also related to the future. Despite the impacts of colonization, Indigenous Peoples have led in the decolonizing work of reconciliation in practical terms (Asch et al., 2018). It is important for governments and other stakeholders to fully appreciate that Indigenous Peoples are 'rights-bearers' and not merely stakeholders. Acknowledging this fact undergirds their active participation in the reconciliation process. Tools such as "duty to consult" while ground breaking, should be supplemented by use of legislation in guiding the process forward. In doing so, an equal importance should be placed on the rights of Indigenous Peoples and their worldviews. It is this framework that could lead reconciliation efforts to their fruitful outcomes.

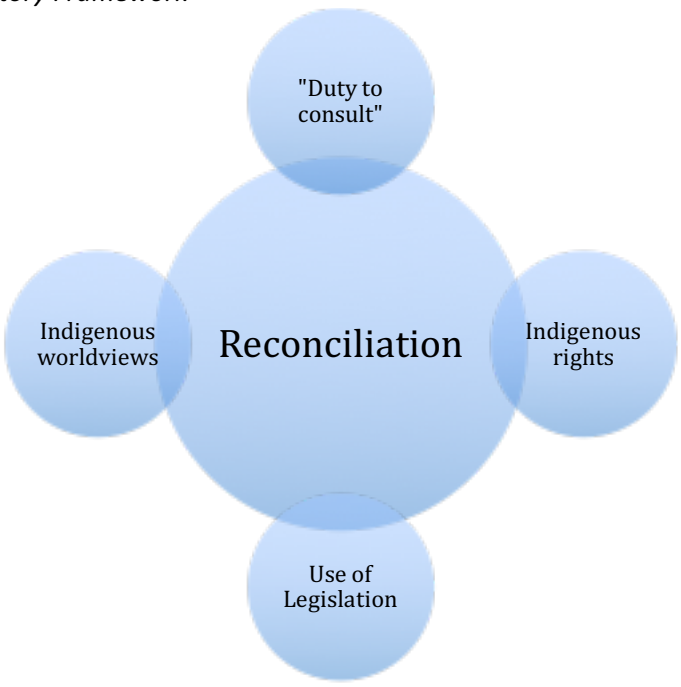
4.2 Reconciliatory Framework for Mining

On a possible path to reconciliation, research in specific sectors is also needed and it can lead to transformative social change desirable to all stakeholders. At the same time, it is important to acknowledge and accept the negative impacts of the colonial project and rectify those injustices.

In this study, I extend the scope of reconciliation as a framework beyond Residential schools to interrogate the usefulness of the "duty to consult" on mining development and resource extraction as a tool for reconciliation. This research project aims to consolidate a contribution to emerging reconciliation approaches between Indigenous Peoples and mining with reference to Canadian and Brazilian decolonial perspectives. It should be noted that in the absence of a formal and legal reconciliatory framework that guides resource extraction practices, we must look at the existing sources of guidance on matters of reconciliation. I have developed a potential reconciliatory framework drawn based on literature available to date in light of historical legal precedence. This framework is comprised of elements which should be combined to reach the true spirit of reconciliation. I use this framework in the analysis of Canada's reconciliation initiatives to date with respect to mining to draw lessons for Brazil.

Figure 1

Potential Reconciliatory Framework



Note. Drafted based on Supreme Court of Canada decisions involving Indigenous matters and UNDRIP.

4.3 Ideas for Reconciliation in Mining Sector

Mining companies are becoming more and more focused on advancing the reconciliation process at a corporate level. Advancement in relationship with Indigenous communities can be achieved in a multitude of ways. For example, a major concern for Indigenous communities has been that they have been treated unfairly in the past. The industry can lay out best practices specific to mining that ensure Indigenous communities are treated equally and considered rightful owners of the land. This has to be the basis of reconciliation pathways that will be forged out of mutual respect. Another area to consider is the benefits to First Nations regarding mining development which ultimately is key factor in reconciliation. Solely closing a decision on Impact Benefit Agreements (IBAs) is no longer being accepted as a means to better relationship building.

In the recent years, industry has acknowledged that they need to advance the participation of Indigenous Peoples in projects they undertake for a variety of goals in mind. Not only does this further the cause of reconciliation, it also serves the economic interests of the mining companies. For example, finding skilled and able talent for the industry has been a challenge. Some mining companies have opened a door for apprenticeships and qualification-based training for community members which in turn benefit both them as well as the communities. The path to reconciliation also requires cultural appreciation and understanding of Indigenous Peoples and as such, is critical in forging stronger economic relationships. Early dialogue, listening and engagement are crucial in evaluating the best ways forward. Also, communities will respect decision making processes if made aware of their options, possible benefits, potential

opportunities and potential impacts. Once realistic options are presented, understood and discussed, Indigenous communities can decide for themselves the extent of their involvement.

4.4 Perspectives on Mining Regulation in Canada

Natural resources have a long-shared connection with the history of the Canadian economy. Many rural and northern communities are supported by the mining industry, for example, bringing economic activity to these regions. This sector of the industry is well positioned to be a world leader in the short-term because of its abundant mineral reserves. In Canada, the mining industry is regulated and crosses all the legislative jurisdictions – federal, provincial and territorial. The highest Canadian court precedents speak directly to Aboriginal rights and the "duty to consult" before the resource extraction activity happens in traditional territories, as discussed in later sections of this study. According to various mining associations in Canada, many Indigenous communities are dealing with mining issues or disputes within their lands. This is despite the fact that government is expected to pursue collaborative consultative processes. For this reason, mining regulation has become an important subject to Indigenous and non-Indigenous groups. If Aboriginal title was already established in that area by the judiciary, the government must pursue agreement from the communities (Brown et al., 2016). Mining legislation has played an important role in establishing principles, standards, programs and guidelines to support the industry in the efforts to engage in a meaningful way with the Indigenous Peoples.

According to Brown et al. (2016), in Canada, the principal legislative and regulatory actors are the federal and provincial/territorial governments. But on different occasions, jurisdictions and governing limits have been an issue. Most of the time, Indigenous issues are dealt with at a

federal level but sometimes these matters can be within provincial borders which can delay finding solutions. For example, while provinces typically claim ownership of the underlying legal title to the land within their borders, and have power over subjects such as property rights and natural resources, the federal Parliament retains legislative jurisdiction over Indigenous matters. This scenario indicates that some regulatory determinations will be established through legal disputes such as those reaching the Supreme Court of Canada. This institution has been playing an important role in defining Aboriginal rights related to the mining industry and others.

At a Provincial level, there are tools like the Environmental Impact Assessments (EIAs). Their main objective is to measure and evaluate environmental impacts. As a secondary objective, they are tasked with evaluating impacts on affected Indigenous communities as well. As stated by Brown et al. (2016), some of the provincial governments still retain legislation that has a negative impact on the relationship with Indigenous communities. One example is the *Ontario Mining Act*, which presents a body of legal norms that should regulate the issues between the mining industry and the Indigenous consultation process related to exploration and development activities. Although it does enshrine a "duty to consult" at the legislative level, it does not require this to be done at the early stages of a mining claim. The *Ontario Mining Act* is further discussed in the later section of this chapter.

In the private sector, enterprises have realized that one of the key opportunities for their success is to facilitate partnerships with the Indigenous communities. In their social responsibility codes, companies are creating policies to innovate the negotiation process and to build meaningful partnerships with Indigenous groups. As the approach is still very new, there are many lessons to learn in this path about how these partnerships can be navigated to maximize the benefits and minimize the losses for both sides (Brown et al., 2016). One mechanism which tries to regulate

mining is Impact and Benefit Agreements (IBAs). These were introduced to assist companies to adopt more responsible engagements with Indigenous communities. Normally, these settlements are negotiated years before any actual resource development activity happens. Because of this timing gap, the communities have time to obtain more information and knowledge of these activities. These agreements should be discussed and negotiated within the parties involved, assisting them to manage possible impacts associated with the resource development and to secure economic benefits for the communities affected by these projects. Thus, establishing a respectful relationship with the communities where the benefits will be maximized and negative outcomes will be reduced. IBAs can vary in their scope and complexity, depending on the scale and nature of the project and the issues identified by the negotiating parties involved. IBAs allow companies and Indigenous Peoples to discuss and negotiate the terms that will include the duties and responsibilities of each one. From a reconciliatory standpoint, the tool is useful as it respects the Indigenous right to involvement in decision making process. IBAs can be equitable and are usually signed for a considerable length of time and in doing so, they can foster relationship between communities and the corporations, especially as these relate to projects that bring economic incentives for the members of those communities.

IBAs are not without their own criticism. For Caine and Krogman (2010), IBAs can cause economic injustices if benefits are not equitably distributed within Indigenous communities. Implicit agreement of standardized content of IBAs is another problem which results in identical agreements, which then facilitate consent and submission in natural resource development leading to unwanted consequences for the communities. The way in which IBAs are drawn up requires better understanding of the social injustice implications of these types of agreements. Caine and Krogman (2010) further mention that the inability of Indigenous Peoples to obtain

legally binding agreements regarding the outcomes of the resource development project is concerning. Another issue is of the standard approach IBAs take which does not take into account differences of various communities. When negotiation IBAs, this leads to acceptance of status quo on part of the Indigenous communities which in itself is not quite democratic.

Beyond borders, many international movements have also empowered the acknowledgment of Indigenous rights in the resource development process. In virtue of that, many Indigenous groups had a significant increase towards their governance over their traditional territories. With this, the communities having the right to their land became more educated and informed about the risks and benefits of the resource development industry (Brown et al., 2016). International law and organizations have crucial importance in bringing an understanding to the domestic levels of different legal systems that the Indigenous groups can benefit in the short-term from these industries in a proper sustainable and cultural way. For example, they can have economic and employment gains. Indigenous Peoples are learning more and consequently have established their own resource laws. This is serving the purpose to clarify the processes around mineral development. It also helps to properly convey community issues and expectations surrounding the environment sustainability, employment, revenue sharing, etc. (Brown et al., 2016).

It can be inferred that legislation in Canada has moved slowly and cautiously to further the reconciliation framework. The Truth and Reconciliation Commission was a great step towards the overall anchoring of the cause. However, there are many aspects of Indigenous lives which run into conflict with objectives of resource extraction. Courts have provided various tools such as the “duty to consult”, however, these fall short of any compulsory or enforceable action that may be needed to advance truthful and just reconciliation. The reconciliatory framework

proposed in this study draws elements from legal progress to date in Canada, wherein lies lessons for Brazil, drawn in later Chapters.

4.5 Critique of the Ontario Mining Act

The *Ontario Mining Ac*t is the provincial legislation that regulates and guides prospecting, mineral exploration, mine development, and rehabilitation in Ontario. As noted by section 2 of the Act, "the purpose is to encourage prospecting, registration of mining claims and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and Treaty rights in section 35 of the Constitution Act, 1982, including the "duty to consult", and to minimize the impact of these activities on public health and safety and the environment." The origins of the *Mining Act* date from Canada's colonial history and its efforts to establish a white settlement in the 19th century. *Ontario's Mining Act*, was first passed in 1873 and was significantly amended in 1906. For Simons and Collins (2010), this legislation reflects the aim of the settlers for the success of Canada as a sovereign state, building a resource-based economic system that facilitated the exploitation and extraction of natural capital. At first, this Act was drafted to develop and ease mining, and conversely, to avoid any significant opposition to this economic activity.

Despite the fact that the Act was amended following a public consultation process, it continues to underestimate participation from the communities affected by the mining exploration and favors the mining companies' rights (Simons & Collins, 2010). For example, in most areas of Ontario, it is not allowed by this Act for prospectors to stake claims on the minerals underlying traditional lands subject to an Indigenous land claim without notice to or consultation with the communities. While the amended legislation has provided more transparency and related participatory rights,

the opportunities for the community to engage in the early stages of the process are still limited. Notably, the new amendment sets out consultation duties at different stages for the operation of the mining companies (e.g. exploration, and mine development) providing tools for a possible conflict resolution that could emerge from the consultation process with Indigenous Peoples. Yet, in this *Mining Act*, there is no statutory "duty to consult" at the staking stage (Simons & Collins, 2010). Even though the amendments aimed to provide better recognition for the participatory rights of Indigenous communities, this legislation does not mandate joint decision-making or revenue-sharing. Simons and Collins (2010) are of the view that it would be appropriate if authorities could indicate that future legislation, in relation to the mining industry, would take into consideration International human rights to assist decision-makers and the Indigenous communities. This is so the mining activities can be regulated to a higher standard.

Other authors such as Manitowabi (2018) criticize the Act saying that this document encouraged that new settlers, seeking economic prosperity, would immigrate to Canada to develop an emerging mining industry, at that time, and occasionally displace Indigenous Peoples from their traditional territory. The Anishinabek Nation consider themselves stewards of the natural resources on their lands advocating on minerals and mining issues. Because of that, in the past years, the community has been working together with the government, especially with the Ministry of Northern Development, Mines and Forestry to update and revise the *Ontario Mining Act* bringing new insights and focusing on the Indigenous matters. Manitowabi (2018) notes that it is this interaction and the extensive leadership engagement from the community that resulted in the Anishinabek Mining Strategy report.

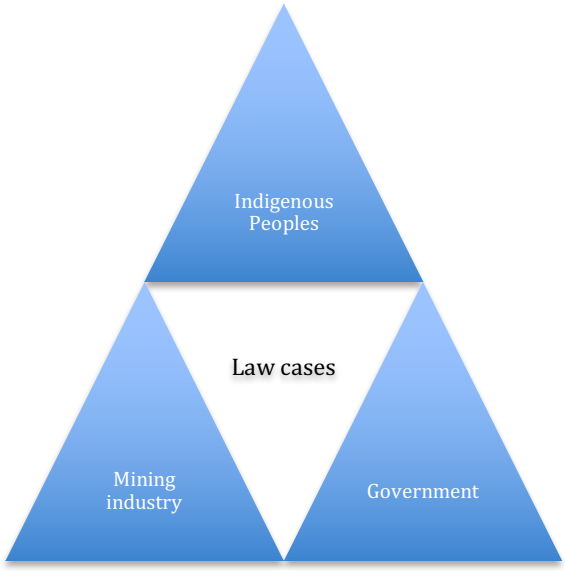
Another topic that is discussed often is that most of the Indigenous communities rely on government funds. Manitowabi (2018) maintains that funding agreements and policies that

govern them should flow more smoothly to make it less difficult for these communities to access funding for education and to ensure natural resources, like drinkable water, which many communities still do not have. For the communities, there remains a question on the authority of the Ministry of Northern Development, Mines and Forestry to approve a mining company to operate in the sacred lands of the Indigenous Peoples. Even after the approval, the communities want to understand how the government will follow up with resource-extraction activities in respect of the protection of their traditional territories.

The recommendations in the Anishinabek Mining Strategy report made it clear that the ideal scenario would be if the Indigenous Peoples would have the same weight in this relationship and be active participants from the start of the process. Also, the community hopes to inaugurate a meaningful partnership with the government (Manitowabi, 2018). Manitowabi (2018) opines that there is a need for a change in the mining legislation. Respect for Indigenous and Treaty rights should be incorporated in the law. Another secondary shift but, not less important, is to educate civil society of the necessity to preserve Indigenous cultures and knowledge. Last, it is important to have a fair and clear process of consultation and conflict resolution between the parties. The discussion for the development of the *Ontario Mining Act* can be seen as consequence of an international pressure reflected in the domestic law scenario. There are several considerable documents on Indigenous rights like the United Nations Declarations on the Rights of Indigenous Peoples. Likewise, we continue to see an increase of courts cases in Canada expressing this triangular relation: Indigenous communities, mining companies and government (Brown et al., 2016).

Figure 2

The Indigenous Peoples and Mining industry in Canada



Note. Adapted for illustration purposes from Brown et al. (2016).

So, the expectation is to amend the Act is such a way that this tri-party relationship is fully represented and respected on mutual grounds.

4.6 Refining Legislation for Reconciliation

According to Brown et al. (2016), the most common topics related to resource extraction legislation are Indigenous rights, Treaty rights, land-claim agreements, and the “duty to consult”. For many scholars, the levels of the participation of Indigenous Peoples in the consultation process in the mining sector still remains very low. Yet their needs should be acknowledged and respected. Many commentators observe that it is a time for changing the current government structure model to a more decolonized one (Brown et al., 2016). It’s crucial to a decolonializing perspective that legislators create laws that will be in favor of the "weaker side" of this

unbalanced relation. Indigenous groups need to be actively and successfully involved with resource extraction projects, especially if it's on their land. Also, it is important to highlight the importance of corporate accountability so the community can benefit at most (Brown et al., 2016). The decision-making process within the community may consider a full spectrum of relevant aspects before reaching a consensus. In the mining projects, monitoring social and environmental impacts is being seen as the biggest role played by the Indigenous Peoples. Due diligence is a must in order to prevent misuse of their land. For example, Brown et al. (2016) says that if the resource development is happening according to the legislation and sustainable protocols, the communities can see this as an opportunity for a business venture in a *win-win* situation, if they believe that mining can be accepted according to the Indigenous values and morals. Governments can create more crystal-clear legislation so as to define the role and responsibility of each stakeholder. Brown et al. (2016) is of the view that Indigenous Peoples need to be active participants in these debates with industry, civil society and Canadian governments.

Reconciliation is achievable on the premise that reconciling partners suspend "power-over" relations and engage in dialogue and negotiations as equals (O'Faircheallaigh, 2018). In my view, considering mining activity in Canada, it is important that reconciliation should be used as an instrument that will benefit Indigenous communities in the present and future. The Canadian government and private/international companies should first empower and consult with the Indigenous communities before any project that aims to be developed in the area. Seeking this dialogue, consultations should focus on a transparent and professional approach to the community with the goal to clarify any concerns they might have and for them to see advantages and any disadvantages to the community. Working in partnerships with Indigenous Peoples

ensures that lands and resources are developed in a culturally respectful way according to the Indigenous land-based life and principles. Establishing constructive and mutually beneficial relationships through cooperation and reciprocity leads to economic growth for both parties involved, the improvement of community health and well-being. Also, ensuring environmental sustainability will change the economic potential of Indigenous communities (Asch et al., 2018). Those partnerships will ensure that sustainable reconciliation will arise in a mutually beneficial relationship considering a decolonial commitment mentioned in the earlier section.

For most of Western history, the Crown has disposed of mineral resources on Indigenous lands, and corporations have decided whether and how to develop them, with no consideration to Indigenous Peoples or their interests. Today more Indigenous groups are able to negotiate regarding the terms on which development may happen on their lands. Despite this, very few Indigenous groups are able to reject development if they consider its impact will render their societies unsustainable. This is because there is little legislative support other than the "duty to consult" which does not equal veto in such projects. In summary, mining legislation to date has fallen short of the objectives of reconciliation. However, progress is being made as the Government of Canada brings forward to Parliament Bill C-15 that will implement UNDRIP. At the same time, courts in Canada continue to guide our collective understanding of rights and responsibilities of all parties involved.

Chapter 5

Some historic and modern Canadian legal decisions shaping Aboriginal rights with respect to resource development

The settlers that arrived in Canada in the 18th century used the argument of *terra nullius* to justify their actions against Indigenous Peoples. *Terra nullius* was a term used by British colonizers, to confirm how they assigned ownership of their entire colonies. Using the legal concept of the *terra nullius*, it was argued that those territories were unowned lands, where Indigenous Peoples had no property rights and denied their traditional ties to their land (Blackburn, 2007; Foster et al., 2011). Indigenous communities were the most affected by this concept that continues to have its consequences. They still struggle in the recognition, ownership, and rights of their territories as a result of this. European sovereignty was pursued by an arrangement of principles of the law of nations and the actual taking of possession by the colonizing nation-state that was not recognized by the Indigenous Peoples. McNeil (2016) notes that this reduced the complete independence of the Indigenous communities and their relation to their territory.

Before extensive settlement in Canada, the Crown and later on the Canadian federal government made sure to make treaties with Indigenous Peoples regarding territory and natural resources. These treaties usually required that Indigenous Peoples, in Canada, cede, release, and surrender their land and be resettled in designated areas to them by the government (Blackburn, 2007; Foster et al., 2007). Members of Indigenous communities thought that through signing those treaties they would be protecting their rights, land, and traditions. Also, they understood the agreements to establishing a nation-to-nation relationship with the Canadian government. But in

reality, they lost great portions of their territory, forcibly conceding their lands for settlement and legally securing Canadian sovereignty (Asch, 2000). On the West Coast of Canada, particularly in British Columbia, there were few treaties signed between the Indigenous Peoples and settlers. The explanation for the lack of treaties was that British colonizers from that region, argued that Indigenous Peoples couldn't understand the western concept of land ownership that was required by most treaties (Fisher, 1992).

During the period of the Anglo-colonization in North America, the status of man-land relationships had a shift from the remnants of feudal land ownership to the treatment of land as a marketable commodity. For several centuries, this transformation progressed and was influenced by economic forces and opportunities. By the time the settlers had arrived in North America, the scenario presented the most favorable circumstances as laying on the frontier, where the land was free from the royal authority, for example (Blackburn, 2007; Foster et al., 2007). Land tenure provided economic freedom, security and social status for the settlers. Because of that and free from the restraints from feudalism, the settlers developed a keen attitude to become landholders in North America. In contrast, the western concept of ownership of the land doesn't exist for Indigenous Peoples. For them, the relationship to the land is collective rather than individualistic. The entire community is bound to their territory (Molintas, 2004). For these communities, the deep spiritual linkages with the land are an essential element of the Indigenous identity and concept of community. It cannot be conceived in monetary terms but as a view of connection to the Indigenous culture and tradition (Molintas, 2004).

This study presents a number of examples using case law to show how courts across Canada have helped shape our mutual understanding of the rights and responsibilities of all stakeholders when it comes to the overall objective of reconciliation. The choice of cases presented is based

on their effect on Indigenous rights, landmark rulings which defined the role of the Crown in all manners of dealings with Indigenous People including resource development.

5.1 *Calder Case*

5.1.1 Background

The establishment of the border between the United States and British North America in 1846 was a response from the British Crown to prevent an American expansion into their territory. LaBoucan (2018) points out that this in turn encouraged British settlement in that area. By 1849, Vancouver Island was already a colony established by the British Crown. One of the oldest companies in Canada, the Hudson's Bay Company (HBC), had received from the Crown land and rights for trading for a period of ten years. The grant contained the condition that it had to create a colony of British settlers within five years or it would lose the grant, as LaBoucan (2018) narrates. Some agreements started to be discussed near Vancouver Island by James Douglas, HBC chief factor, and first Governor of the Colony of British Columbia. His personal view was that the First Nations would surrender their traditional land but agree to preserving their Aboriginal rights like hunting, fishing, and gathering. On the contrary, these communities did not confirm that these negotiations would lead to the sale or the surrendering of their lands. LaBoucan (2018) notes that besides the many misinterpretations about the agreements, the purchase of the land was seen as a foundation of British settlement and the displacement of the Indigenous communities to isolated areas considered less proper for agriculture. Further, if the Indigenous communities that were moved to the other areas wanted to sell their land they could only sell to the Crown.

In 1871, British Columbia joined Confederation. This new province maintained that Aboriginal title had been extinguished prior to Confederation. The "gold rush" to the West Coast of Canada, in 1858, led to an increase in conflicts between the gold miners and Indigenous communities. Because of that, in 1899, Treaty 8 was signed by Canada and the First Nations in order to facilitate settlement and ease tensions in the region but the Crown still continued to deny the Aboriginal titles. According to Tesar (2018), this was the largest treaty by area in Canadian history. Terms and boundaries of the treaty were designed to exclude mining areas and those where prospectors were present with a view to create harmony between First Nation and existing settler communities. The conditions were drawn up prior to the actual negotiations, but finalized during discussions, in that they provided reserves, annual cash payments, and other promises in exchange for the surrender of the land. Tesar (2018) describes that the written terms also included the right to pursue activities such as hunting, trapping and fishing, subject to certain regulations. It also excluded tracts that could be required for settlement, mining, lumbering, trading or other initiatives. For Indigenous communities, this was unacceptable and they started campaigning against this assertion.

In this context, the *Calder* case originates from the land claim of the Nisga'a Nation. The importance of this case is that it recognizes the concept of the Aboriginal title in the Canadian law. This Indigenous community sought for a recognition of their ancestral lands. The claim was pursued for ninety years, beginning when the first British settlers arrived in that region primarily interested in exploiting forestry and logging (Blackburn, 2007; Foster et al., 2011). For this community, it was not only about the land claim itself but to make sure that, through resistance, they would never lose their right to the lands that was theirs to occupy and defend. The main objective of their case was that the government would recognize their rights under law and as a

result, their territorial rights too. To understand this case, it's necessary to comprehend how Indigenous views consider he concept of "property rights". The Indigenous Peoples employed a customary view based on usage and traditional occupation of the land long before the arrival of the Europeans. These systems supported their cultural beliefs and practices.

The Calder case began within the context of the Nisga'a Land Question, in 1887. The First Nisga'a Land Committee was established in 1890 and in 1910, they received a guarantee from the Crown that their land demand was going to be settled. Despite the broken promises the Nisga'a continued to demand a treaty that would recognize their ownership of the land. So, they continued to lobby with the provincial and federal governments for their demands. Considering this scenario, in 1955, the Nisga'a Land Committee was reestablished as the Nisga'a Tribal Council and Frank Calder was elected its first president.

5.1.2 Decisions of the Lower Courts

In 1969, following a long wait for an agreement with the Crown, the First Nation brought their case to the BC Supreme Court, requesting a declaration that their land title was never lawfully extinguished. Weir (2013) explains that this declaration was based on the common law of possession and on a recognition that the title held by the Nisga'a prior to Crown sovereignty still prevailed in contemporary common law and that there was no proof of extinguishment.

In 1973, after losing in all levels of provincial court in British Columbia, the Nisga'a Tribal Council, in a very resilient way, appealed their concern to the Supreme Court of Canada hoping for a better outcome.

5.1.3 The Supreme Court Decision

The Supreme Court of Canada didn't confirm the existence of the Aboriginal title for the Nisga'a Nation. The Court ruled that Aboriginal title is a right that should be recognized in common law, and it belongs to the Indigenous Peoples based on their occupation, use, and control of ancestral lands prior to colonization. Justice Hall, then one of the judges on the SCC, decided in favor of the Nisga'a's demands. He recognized their interest in the lands which their ancestors inhabited before the settlers disembarked in Canada. Weir (2013) notes the community's argument that they had never been conquered and that they did not enter into a treaty or a surrender with the Crown at any time. Also, Beynon (2004) highlights that the SCC acknowledged the history of occupation of the lands by the ancestors of the Nisga'a community since time immemorial.

For Judson J, in deciding the Calder case, there were three criteria to establish the Aboriginal title. Firstly, the land must have been occupied preceding the assertion of European sovereignty. As part of that, the reliance of the community on Aboriginal law was to be considered in this process. Secondly, there must have been continuity from pre-sovereignty to present times related to the occupation of the land. As the third and final criteria, the possession of the territory must have been exclusive (Imai, 2016). The *Nisga'a* treaty was the first treaty to be signed and recognized in recent history times since the conclusion of Treaty 8 in BC.

5.1.4 Significance to Reconciliation

One of the pillars of Reconciliation is to acknowledge the strong and diverse culture of the Indigenous Peoples. In this case, the Nisga'a Nation constantly relied upon oral traditions and histories to demonstrate their accounts of land ownership which the Canadian judiciary had difficulty in translating into the settler legal system. In the *Calder* case, the Nisga'a argument

exposed that their rights to use the territory for their own practice were being violated due to the government's inability to make a treaty and also, represents the failure of the Crown in reconciling with the Indigenous Peoples. This is significant to my argument, because the case opens the discussion not only for the concept of Aboriginal title, but to all aspects of Indigenous rights. This case highlights the significance of Indigenous rights as a major pillar of the reconciliation framework established in the study, underpinning the importance of Aboriginal title.

Aboriginal title cannot be sold or purchased by any individual. Legally speaking, it can only be voluntarily surrendered to the Crown by the Indigenous community through an agreement such as to treaty. In this context, land title includes both surface and subsurface resources, such as mineral rights, oil and gas developments. This concept too helps the reconciliation process by legally recognizing Indigenous rights to their traditional land. According to the Supreme Court's ruling, the Aboriginal title can be applied to a larger territory if the Indigenous community can prove by documents or oral history that the occupation of their land began prior to European settlement in the region of the dispute. While Aboriginal title gives rights to the Indigenous Peoples, it doesn't invalidate the Crown's sovereignty to the land.

Even though the judges on the case were divided on whether the Nisga'a land claim was valid or not, the *Calder* case created an important precedent for future Indigenous demands. It pressured the federal government to establish a mechanism to deal with land claims where treaties had never been made with Indigenous communities. In my view, this case is not only a landmark for Indigenous Peoples but it was also a precedent used to discuss matters like the "duty to consult". In this way, it helped to set the foundation of Indigenous rights in Canada. It set the stage for the "duty to consult" and guided the Crown to expand their awareness and to fulfill its

responsibilities with the communities. In terms of reconciliation, achieving more treaties and agreements still remains an enormous challenge. It could be successful if the Canadian government could make an effort to reach consensus with the Indigenous communities, with due consideration of their demands and respecting their traditions.

The case not only introduced the Aboriginal title concept as a judicial term, but it also made significant advance in establishing the legal foundation of Aboriginal rights and enhancing their voices in the social and political arena. It helped to project and reinforce a better social understanding of Indigenous culture and traditions as well. On another note, Hogg (2009) concludes that Indigenous Peoples could finally celebrate that the common law of Canada recognized and incorporated Aboriginal rights into their legal system.

5.2 *Haida Nation Case*

5.2.1 Background to the decision

The Haida Nation live on Haida Gwaii (Queen Charlotte Islands) off the coast of British Columbia and have inhabited their land since at least 1776. Their culture focuses on craftsmanship, trading skills, and seamanship. This Indigenous community has never surrendered their territory to the settlers or signed a treaty with the Crown. For centuries, the Haida people have claimed title to all the lands and surrounding waters of the Queen Charlotte Islands and they had legally sufficient evidence of exclusive occupation of their traditional territory that indicated Aboriginal title. They also claimed their Indigenous right to harvest red cedar in that area which is considered an old and important tradition. In 1999, the Minister of Forests, without consultation with the Haida Nation, authorized a transfer of the logging license from the MacMillan Bloedel Limited – which held this license since 1961- to the Weyerhauser Company

to harvest quantities of timber on the Queen Charlotte Islands. Mandell (2002) highlights that the procedure was authorized under the *Forest Act* but made without any approval of the community. Later, the Haida challenged the Minister's decision and initiated litigation requesting that the replacement and transfer be set aside.

Unfortunately, the B.C. provincial government proceeded with the transfer of the license to the company without any regard for its legal obligations to the Indigenous communities. The Weyerhauser Company had determined to harvest a stand of old-growth cedar trees that hold enormous cultural significance for the Haida (Mandell, 2002). For a community as bound to nature as this nation, there was already enough apprehension that the current percentage of logging was unsustainable. Mandell (2002) explains that continuing logging at this level would be harmful to the existence of the natural environment for the vitality of the next generations. The old-growth cedar plays a vital part in Haida culture. This community has used the towering red cedar trees to build elaborated pieces of carved wood objects for their survival, carrying on this tradition for centuries. They already have witnessed the damage caused by resource extraction and expressed their concern in regards to the consequently devastation of their territory.

The Tree Farm Licenses (TFL) are area-based forest licenses, which authorize an exclusive right to the license holder to cut the trees in the designated area. The TFL39, issued to the company by the Government contained several areas of old-growth red cedar that were considered culturally significant trees used for traditional purposes for the community like totem poles, canoes, log houses and etc. (Imai, 2016). B.C. issued the logging licenses and confirmed that it did not have to consult unless the community had judicial confirmation of the existence of their Aboriginal rights. The provincial government affirmed that it would not change their understanding until a

decisive endorsement from the judiciary or a signature of a treaty that declared the rights pleaded by the Haida Nation.

As believed by Mandell (2002), the Haida community had no treaties and on that basis, it had contested the Crown claims to their waters and the validity of all licenses issued by the authorities for the use of their lands. Without a legal treaty, it's even more challenging to follow an agenda that would explain where Indigenous nations agree to share some of their interests in their traditional lands in return for various payments and promises. For many members of the Haida Nation, they believe that government over the decades had facilitated enterprises to come and wipe out one resource after another from their traditional territory without any consultation or financial compensation.

5.2.2 Decisions of the Lower Courts

The provincial governments' argument was successful at the first level of the Provincial Court, affirming that the Indigenous community, rather than challenging the appropriateness of the consultation, should directly have brought an interlocutory injunction to restrain Weyerhaeuser's operations. The Haida appealed and the British Columbia Court of Appeal overturned the lower court's decision. It found that there was to be a "duty to consult" with the Nation and both the Crown and Weyerhaeuser did not do so. Also, it disagreed with the Province's arguments, suggesting that there may be several reasons for the community to raise the issues considering their imminent rights to their land. Combining judicial interpretation and facts, the Court found clear evidence that the Provincial Crown should have consulted and accommodated the interests of the Haida Nation, before issuing licenses for logging. Upon this result, the company requested reconsideration of the obligation of the "duty to consult" but the Court understood that the enterprise also had the supplementary duty to fulfill the demands of the Indigenous community.

The content of this consultation could vary according to unique circumstances, but the focus should be on building a satisfactory relationship in a good way with the communities (Mandell, 2002).

Finally, after the Council of the Haida Nation brought an application for judicial review that challenged the Crown and Weyerhaeuser for not properly consulting with them regarding the TFL on their territory, it was decided that the community would be able to establish the Aboriginal title - in some parts of their coastal and inland areas. The old-growth of cedar was a key element of Haida culture and had to be protected from clear-cutting and its environmental impact on the land. The Court held that the Crown had failed to follow its own internal guidelines for early consultation with the community. Imai (2016) goes further to explain that Crown had a "moral duty" to consult even before the Indigenous right had been established in court proceedings.

5.2.3 The Supreme Court Decision

The verdict of the B.C. Court of Appeal was upheld by the Supreme Court of Canada. In consequence, the Supreme Court decided that it's the Crown's "duty to consult" with the Indigenous communities - this was considered part of the Crown's fiduciary duty towards Indigenous Peoples - and procedural aspects may be delegated to third parties.

5.2.4 Significance to Reconciliation

During the trials and following decisions in the *Haida Nation* case, the existing doctrine was challenged by the judiciary that delineated the consultation as a requirement prior to the commencement of any resource extraction activity. The Supreme Court considered it crucial that Indigenous communities are consulted by the government so their demands will not be disturbed

during the process of proving and resolving a claim especially in uncertain situations or before the establishment of the Aboriginal title, for example (Newman, 2014). When the governments have this proactive attitude, it will build trust and foundation in order to advocate for Aboriginal rights. The Supreme Court established a three-part test approach in the *Haida* case deciding that the Crown has a "duty to consult" and where possible accommodate when the Crown has knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might affect it adversely. The case brought the "duty to consult" into the limelight and explained this duty in greater detail than in any legal precedence at the time. The Haida Nation case is relevant to this study because it illustrates the potential of the Crown to disregard their moral duty of consultation with the Haida Nation. In this event the "duty to consult" was more fully explained as a framework for the legal duty of the federal and provincial governments to consult with the Indigenous Peoples. In the governments' view, they were not legally compelled to justify violations against Aboriginal rights and Aboriginal title when conceding to third-party tenures (Imai, 2016). However, the Supreme Court challenged this view and instead set up a strong precedence for the "duty to consult". This case also raises the discussion of the province's violations over Aboriginal title and rights, and where that line of legal jurisdiction should be drawn. "Duty to consult" is one of the pillars of the reconciliation framework suggested here as a model for a renewed relationship between Indigenous Peoples and governments.

At the same time, the Supreme Court made it clear that the "duty to consult" is an obligation solely of the Crown, due to its honorable duties. If there are other parties involved they cannot be penalized for the Crown's absence. On one hand, this can be seen as a victory for the concept of "duty to consult" whereas on the other hand, it appears to absolve third parties of any requirement for consultation. This could be construed as a limitation of this case but,

nevertheless the case advanced the cause of consultation while putting the onus on the Crown. The forestry company could not be forced to undertake the "duty to consult" with the community. The ultimate legal responsibility for consultation and accommodations of Indigenous concerns rests with the Canadian authorities. Newman (2014) elaborates that the purpose of this duty must be to reconcile the Crown's governance authority with the rights of Indigenous Nations. For consultation to be effective, it should be respectful, timely, and reflective of the "honour of the Crown", regarding potential violations of Aboriginal rights. While the "duty to consult" is an important tool, an important fact to keep in mind is that it does not extend to a duty to reach an overall consensus or a power of veto from the community. In other words, such a duty is not an obligation to accommodate, rather to "accommodate if possible".

5.3 *Mikisew Cree Case*

5.3.1 Background

This is yet another case which serves as an important example of the absence of the consultation process. In this case, the Crown exercised its Treaty right and the "taking up" mechanism to the surrendered lands to build a winter road to meet regional transportation needs. This project would reduce Mikisew Cree First Nation's lands. This community has rights to hunt, fish and trap under their Treaty rights. Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered part of their territory to the Crown. In exchange for this surrender, the First Nations were promised reserves and some other benefits, key among them rights to hunt, trap and fish throughout the land surrendered to the Crown. In 2000, the federal government approved a winter road project, without any consultation, that would be built through the

Mikisew's reserve. After this episode, the community protested and the government decided that the road would be realigned, but unfortunately this decision happened without any proper consultation with the community. For the Crown to exercise its Treaty rights, like the right to "take up," it has first to evaluate if this process will be compatible with the "honour of the Crown" and also, how this action will affect the communities (Lawson Lundell LLP, 2005; Schwartz & Rettie, 2006).

In my view, the most relevant point in this case is that the Government decided unilaterally that it had a Treaty right to "take up" surrendered lands, but it didn't assume that it had a duty for consultation and to inform on the impact its project could have on the community. In a reconciliation framework, the Crown must engage with the Indigenous Peoples in good faith and with the intention to address and accommodate all their concerns.

5.3.2 Decisions of the Lower Courts

The decision of the Federal Court ruled that the standard notifications to the community were not sufficient and did not align with a proper consultation process. For this court, this First Nation was entitled to a proper consultation process which had not happened. Also, the Crown did not show the will to minimize the impacts of this project on the community. This decision confirmed that the community was not consulted nor had their Indigenous rights been considered in regards to the environmental footprint that this project would leave in their community. With this, the Court allowed the application for judicial review and set aside the Minister's approval.

In 2004, the Federal Court of Appeal allowed the appeal and restored the Minister's approval. The Attorney General of Alberta brought the argument that Treaty 8 expressly considered the "taking up" of surrendered lands for various purposes which included roads. In fact, the winter

road was seen as a “taking up” under the Treaty rather than an infringement of it. For this Court, there was an understanding that there was no obligation on the Minister to consult with the community about the road project, but if it had been done it would be considered good to engage in meaningful consultation with this Indigenous community. This decision just brought more judicial uncertainty to the community and it was evident that the Government did not act in a transparent way nor did it consider the Mikisew’s concerns. No good faith effort was put forth by the Government understanding and addressing the issues that could possibly affect the livelihood of the community.

5.3.3 The Supreme Court Decision

When this case reached the SCC, the trial judge’s findings of fact made it clear that the Crown failed to demonstrate the intent to address Indigenous concerns in a fulsome way and did not engage in a meaningful process of consultation. As an outcome, the appeal was accepted and the Court also set aside the decision of the Court of Appeal. The winter road project was remitted to the Minister for further consultation and consideration.

The most significant impact of this decision was that it was decided that the "duty to consult" applied to Indigenous Nations who had treaties with the Crown. With this, the "duty to consult" applies to Treaty rights, not just Aboriginal rights. This duty exists independently from Treaty rights, because it flows from the "honour of the Crown”, a source of obligations independent from rights articulated in a treaty. In this case, they stated that although treaties are infused with the "honour of the Crown", it gives rise to distinct process rights as opposed to the substantive rights as promised in a treaty.

5.3.4 Significance to Reconciliation

The Supreme Court of Canada ruled that the Crown is required to provide notice and to engage directly with the Indigenous community. This engagement should include the provision of information about the future project, addressing what the Crown knew to be the community's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was also advised to listen intently to the Mikisew's concerns, and attempt to reduce any adverse impacts on their Treaty rights. This case, just a while after Haida case, confirmed the obligations of the Crown in terms of consultation. It cemented the role of "duty to consult" as being a legal duty of both federal and provincial governments. It was further understood from court proceedings that the Crown cannot discharge its obligations unilaterally.

It is of central importance to the Indigenous-Crown relations that consultations begin in advance of any interference with existing Treaty rights. The Government did not think it was necessary to engage in consultation directly with the First Nation or that the community would be adversely affected. This decision for the construction of the road may not seem very drastic. But in the context of a remote northern community, it is significant. In the SCC decision, Justice Binnie, stressed that the primary objective of the modern law of Aboriginal and Treaty rights is the reconciliation of Indigenous Peoples and non-Indigenous Peoples including their respective claims, interests and ambitions (Lawson Lundell LLP, 2005; Schwartz & Rettie, 2006). The case also provides context noting that the management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. A horde of smaller injustices created by the apathy of some government officials to Indigenous People's concerns, and the lack of respect inherent in that apathy has been destructive towards the process of reconciliation.

This case exemplifies how important understanding Indigenous worldviews is towards the common objective of reconciliation.

The case particularly facilitated this study in development of proposed reconciliatory framework as it encompassed most elements described in it. This was echoed by Supreme Court's encouragement of the Crown for consultation and accommodation with Indigenous communities. The Crown's "duty to consult" is understood to be a positive obligation upon them. In doing so, they are expected to ensure that all Indigenous Peoples are given information that is necessary and in a timely manner so as to give them an opportunity to express their opinions, complaints etc. Such a strong emphasis laid down by a court seriously improves the prospect for reconciliation. In essence, the case helped establish the foundation of the "duty to consult" as well.

5.4 *Kitchenuhmaykoosib Inninuwug First Nation Case*

5.4.1 Background

The *Kitchenuhmaykoosib Inninuwug First Nation v. Platinex Inc* case is one of the many examples that shows how the current *Ontario Mining Act*, still can create opportunities for conflict of interests between Indigenous Peoples and the mining sector. This case illustrates how a failure to adequately consult with First Nations may result and specifically highlights the disagreement between the Kitchenuhmaykoosib Inninuwug ("K.I.") First Nation, a community located in northwest Ontario that has around 1,200 members, and Platinex Inc., a junior mining exploration company, that is responsible for the exploration and analysis of mining resources. The K.I. First Nation was a party to the *Treaty 9* agreement, also known as the *James Bay Treaty*, which got its name from the fact that its original territory was defined by the river

systems draining into the James Bay, up to and including the Albany River - at the time the northern boundary of Ontario (Archives of Ontario, 2015). K.I. was a part of the Big Trout Lake First Nation that signed *Treaty 9* in 1929. By consenting with this treaty, the K.I. ceded most of its traditional territory (23,000 km^2) consequently for rights (Murphy et al., 2008).

In accordance with this treaty, those rights over the remainder of its traditional territory are limited to the right to seek their usual vocations of hunting, trapping and fishing subject to government regulation and the right of the Crown to "take up" lands for settlement, mining, lumbering, trading, or other purposes (Murphy et al., 2008). The "taking up" clause can be seen as a mechanism that allows the Canadian government to require or deprive the land of Indigenous communities for certain purposes in the future, making those lands unavailable for hunting, trapping, and fishing (Imai, 2001). In 1999, the K.I. First Nation notified Ontario and Platinex of its objective to file a Treaty Land Entitlement ("TLE") claim. In 2000, the First Nation registered its TLE claim, through which it asserts that it is entitled to a reserve 510 km^2 larger than the present one. Ontario contradicted K.I.'s demand and, rather, considers that it fulfilled its reserve obligations in the 1970s when additional territory was ceded and incorporated into the K.I.'s traditional land.

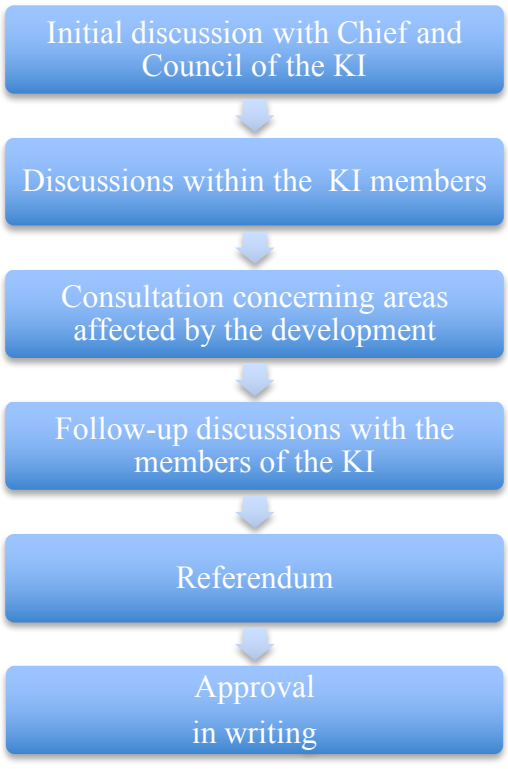
Unfortunately, as noted by Leslie (2020), the K.I. First Nation did not have the singular authority to determine which part of the area should be incorporated or not to their territory, and also the government authorities did not consent to that. If this TLE claim made by the K.I. First Nation considering their expansion of territory was accepted, then it would be discussed with the responsible authorities to decide where the new reserve lands would be located, which could include any of K.I.'s traditional territory, together with the existing area. This context of yet to be

determined Treaty rights and their scope, provides the background for how the *Kitchenuhmaykoosib Inninuwug First Nation v. Platinex Inc.* case arose (Murphy et al., 2008).

In this case, the Ministry of Northern Development and Mines displayed few attempts to consult with the First Nation about the series of approvals, exemptions for mining activity and other actions. Initially, the K.I. was favorable on the operation of the mining development. But, over time, it became progressively opposed to the continued exploration activities. So, in 2001, K.I. issued a suspension of activity, a "moratorium" on all mining activities on its traditional lands until consultation and negotiations had taken place, and also outlined a protocol for reaching negotiation with Platinex (Murphy et al., 2008). Below represents the protocol design:

Figure 3

The KI Development Protocol



Note. Adapted for illustration purposes from Murphy et al. (2008).

The issue with Platinex arose as the K.I. community became more informed about the *Ontario Mining Act* and its negative application in other communities. These negative experiences have generated disagreement with the land claims settlements, an obstacle to the cultural and heritage preservation, etc. which increases the conflicts between Indigenous Peoples and rapid mineral development. They may have perceived that permitting further Platinex activity on their land could unfavorably influence their future capacity to add new reserve land to their territory. Murphy et al. (2008) argues that there is a possibility that K.I. used this dispute with Platinex as a way to pressure the government towards negotiation regarding the Treaty Land Entitlement claim. Without the appropriate consultation with the K.I., Platinex continued with the mining exploration and search for investment for its activity. In 2005, Platinex became a publicly-traded company, stating that the Kitchenuhmaykoosib Inninuwug First Nation had agreed with its reduced impact mining operation.

After some months, the First Nation demanded, through documents addressed to Platinex, that the company would be prohibited from all exploratory drilling and transportation of equipment from and to their territory. Along with this and the disapproval of Platinex's operational behavior, some members of the community blockaded the access road and protested at the airport. Because of this, all Platinex's staff members left the area. This scenario demonstrated that the K.I. asserted their right and prerogative to make land-use decisions with regard to its traditional territory. This led Platinex to initiate a lawsuit seeking $10 billion damages and a court order to support and secure its legal right to continue the mining activity in the region.

5.4.2 Decisions of the Courts

For Murphy et al. (2008), this case is a combination of decisions to arbitrate temporary rights and responsibilities of the First Nation, Platinex, and the Crown until the court provides a resolution for Platinex's initial suit. The Ministry of Energy, Northern Development and Mines failed regarding the "duty to consult" with the Kitchenuhmaykoosib Inninuwug First Nation from 1999 to 2006. Despite the fact that the disagreement was between the First Nation and Platinex, it was the government's failure which was the starting point for the case. In the first judgment, Justice Smith granted the community an interim injunction, denying Platinex to continue with the mining activity. He quoted lack of due process with regards to consultation with the Indigenous community as his reason for the decision. This temporary injunction was granted so a consultation with Platinex and representatives from the Ontario Crown could reach an agreement that would meet the Crown's "duty to consult" with K.I. and ultimately, allow the company to restart it operations, but not necessarily within the TLE claim land (Murphy et al., 2008). This measure was intended by the judiciary to promote meaningful consultation over the following months. However, when the Court reconvened following the next months, nothing had changed for the First Nation. Again, Platinex had pursued legal proceedings to ensure its operation due to exterior pressure from investors.

On the subsequent decisions, K.I.'s request for an extension of the interim injunction was rejected by the court. Likewise, a number of legally binding documents were imposed on both parties giving Platinex authorization to proceed with its exploration activities for specific drilling (Murphy et al., 2008). In the end, the litigation was summarized only as a matter of the "duty to consult", and not considering the importance and connection to the land for the K.I. First Nation and its right to require protection from the Canadian law. After this, the animosity between the

parties intensified (Ariss, 2017). As a result, the members of the First Nation announced that they would not allow Platinex to operate in their territory. This attitude was supported by other First Nations across *Treaty 9*, north-western Ontario. Also, some institutions for environmental and social justice groups, such as the Canadian Wildlands League, Mining Watch, and Eco-justice endorsed their position (Ariss, 2017). Platinex then petitioned the court to authorize a resumption of drilling and an injunction prohibiting the community's opposition. The First Nation affirmed that it could not afford to defend the motion, then released its lawyer and left the court. With that, the court made the order as Platinex requested (Ariss, 2017).

Again, in 2007, Platinex brought the First Nation to court for being disrespectful toward a court of law and its officers in the form of behavior that opposes or defies the authority, justice, and dignity of the court – contempt of court. The K.I. in response, had communicated that it would not allow Platinex into their territory. On this basis, the judge found Chief Donny Morris and five band councilors in contempt of court. This finding was not contested by the K.I. and the Chief clarified that it was not his intention to disrespect the court, but he was following the K.I.'s law as its understanding of rights under the *Treaty 9*. In 2008, they were sent to jail for two months and one week. For the judge, the rule of law that the court had to follow and protect was the Canadian law. In his decision, he mentioned that a court order should be obeyed and failure to do so could not go unpunished. Also, he stated that it was not possible to follow a dual system with "two laws" - one for aboriginals and one for non-aboriginals - considering that the judiciary would turn into chaos (Ariss, 2017).

The next key legal event was the appeal of the sentence, heard at the Ontario Court of Appeal. The episode of jailing led to political mobilization across Indigenous and non-Indigenous communities in favor of the K.I. community members that were sent to jail. During the appeal

hearing, Platinex affirmed that they would not be opposing the appeal because the appellants had already spent enough time in jail and their disagreement would be settled through negotiation with the community. In the end, the Court of Appeal ruling came, releasing the jailed leadership members, declaring that their sentence was too strict.

According to Ariss (2017), after the Court of Appeal decision, Platinex tried once again to access their mining claims but the K.I. community again did not accept it. So, in the area of the Nemeguisabins Lake, the community members circled in boats and canoes, to prevent their floatplane from landing. Again, this led Platinex to sue the Ontario government for damages, ultimately agreeing to a $5 million payout and a clause that would guarantee future royalties to Platinex, if any mine was ever operated in the area. Lastly, the Ontario government pulled back the zone of Platinex's former claims from open staking. For the time being these areas are protected from claim staking, but this scenario can be changed in the near future by a legal decision. In 2009, a settlement was reached that closed the *Platinex vs. K.I.* case.

5.4.3 Significance to Reconciliation

As believed by Ariss (2017) Platinex's departure from the K.I.'s territory was the result of the resilience and continued commitment from the community to defend their land and stand firm on their exercise of jurisdiction. In this case, the absence of consultation led to innumerous events that could have been avoided if the consultation process had taken place earlier on with the community. The KI sought as a last resource the "interference" of the judiciary in stopping the company's project.

In summary, this case law points out how crucial it is to effectively engage with Indigenous communities addressing the requirements of consultation before any exploration and

development projects proceed in their traditional territory (Ariss, 2017). In addition, this case contributes to an understanding of how these obligations bind corporations or the Crown and its consequences. It also confirms the high social and economic risks if none of these commitments are met. Ariss (2017) concludes that the "duty to consult" must be performed during all the processes of consultation with the Indigenous Peoples.

This case in particular is significant as it related to mining and the "duty to consult". It is one of the examples where the Indigenous Peoples had a favorable outcome without needing to reach the Supreme Court of Canada. Judiciary acted in favor of the First Nation by taking into account Indigenous rights and respecting the Indigenous values. While the case was significant to emphasize the requirement of consultation it was also a win for the Indigenous Peoples when Platinex suspended their operations, before ultimate closure. On the path to reconciliation, this serves as another example of the will of Indigenous communities in reaching agreements with the Crown. At the same time, it puts the onus on government to ensure future consultations are done and in a dutiful manner. This way, they too, can avoid costly litigations and monetary loss.

5.5 *Tsilhqot'in Nation Case*

5.5.1 Background

The Tsilhqot'in Nation is a community whose traditional territory is in the "Chilcotin" region of British Columbia and it has never entered into a treaty with the Crown. In 1983, the British Columbia government granted a commercial logging license on land considered to be part of the Tsilhqot'in traditional territory. The community immediately objected to the logging license and sought a declaration that would prohibit commercial logging on their ancestral lands. This First Nation filed a claim seeking a confirmation of their Aboriginal title from the Canadian judiciary.

Also, as Millen et al. (2014) points out, the community also sought confirmation that they had Aboriginal rights to hunt and trap in their traditional territories.

5.5.2 Decisions of the Lower Courts

The Provincial government could not decide this deadlock between the two parties and so the case went to the BC Supreme Court where the claim - that included a declaration of the Aboriginal title - was not accepted. The court did not find enough evidence to establish Aboriginal title over the entire area claimed by the Tsilhqot'in (Millen et al., 2014).

The BC Supreme Court, issued a non-binding "opinion" that the Tsilhqot'in had demonstrated Aboriginal title over approximately 30 per cent of the claimed area. It was necessary to prove a certain degree of occupation to establish the Aboriginal title, that could be demonstrated by showing that the Tsilhqot'in moved throughout the land and occupied various sites for parts of each year. This Court understood that the Tsilhqot'in indeed had Aboriginal rights to hunt and trap that were a protected by s.35 (1) of the *Constitution Act, 1982* (Millen et al., 2014). In this decision, unfortunately a declaration that could confirm their Aboriginal title was not issued and the Tsilhqot'in appealed. The federal and provincial governments also opposed the title claim and appealed as well.

The BC Court of Appeal upheld the Tsilhqot'in's Aboriginal rights and title. It stated that Aboriginal title had to be demonstrated on a site-specific basis. The Tsilhqot'in, in order to win a declaration of the Aboriginal title, had to prove that they intensively used a definite tract of the land at the time of sovereignty, and they had not done so. The community's claim to title was not established. The Court believed that, in the future, the Tsilhqot'in could prove title to specific sites within the area claimed. This decision was not favorable to the community. For the

Tsilhqot'in it meant that their rights and concerns were not taken seriously by the Crown. It represented a completely disregard of the principles of reconciliation that were established by the same government that was questioning their claims over their traditional territory. Once again, reconciliation was being postponed. This decision was appealed to the Supreme Court of Canada.

5.5.3 The Supreme Court Decision

The Supreme Court of Canada reversed the BC Court of Appeal's view of the Aboriginal title. The limited approach to Aboriginal title taken by the lower courts was dismissed as a result. Finally, in 2014 their Aboriginal title was confirmed and established on a territorial basis.

The SCC, in this verdict, applied both Indigenous and common law contexts. It established that Canadian law can acknowledge traditional territories that precede settlers' arrival. Regarding the method used to determine an Aboriginal title, the Supreme Court confirmed that the test articulated in the *Delgamuukw* case remains based on "occupation" before the assertion of the sovereignty of the settlers. The criteria of Aboriginal title were further explained by the Supreme Court. Millen et al. (2014) mention that to confirm Aboriginal title to the land, occupation must hold three characteristics: it must be sufficient, continuous and exclusive. Also, according to Borrows (2015), in *Tsilqot'in*, the Supreme Court confirmed that Indigenous law and governance were one of the pillars of Canada's constitutional framework. This case presented the significance of Indigenous Peoples' own legal processes and demands in the path for reconciliation.

5.5.4 Significance to Reconciliation

In deciding this case, SCC maintained that the Indigenous communities had the right to decide how their land should be used, occupied, managed, and benefited economically from. Legal cases like this challenge and encourage the courts to establish Indigenous land interests, recognize broad rights of land use and control, and build mechanisms for consultation with the communities especially if there is a resource development project proposed on their claimed land. The jurisprudential context of this case sets the stage for a strong recognition that Indigenous forms of social organization, like Indigenous governance, over their lands are also protected as rights under subsection 35(1) of the *Constitution Act, 1982* (Borrows, 2015). This social arrangement provided that the Tsilhqot'in possessed their territory with exclusiveness and continuity by proving their strong presence on the land claimed to secure its lands and resources.

Overall this case asserted that the government authorities and civil society must always engage in good faith with Indigenous communities in order to reconcile. Moreover, this decision removed the provincial authority to authorize logging without the consent of the Aboriginal title holders. The *Tsilqot'in* decision further instructs that consultation obligations may be triggered by decisions that are still on the project level and prior to the licensing stage. This is important as it helps in establishing an order for the consultation process which is deemed a pre-requisite. It was agreed that there needs to be a collective acceptance over the need to change the old assertions of Crown title and sovereignty, replaced by ones which are based on respect for Indigenous rights and worldviews. For Morse (2017), this decision enhanced the position of the Indigenous communities in negotiations for comprehensive claim settlements. Also, this sets a precedent to all communities in Canada, where Aboriginal title has not clearly been extinguished. For other like Borrows (2015), this decision has established a legal framework and

acknowledged a wider interpretation of Aboriginal title. Now, it would be broadly construed under the Canadian judicial system. This particular case endeavors to erase the concept of *terra nullius* in Canadian legal doctrine. It also created a precedent for future Indigenous claims to the land in a judicial dispute, securing the protection of their rights in the Canadian courts (Borrows, 2015).

Chapter 6

Finding common ground: "Duty to consult" and the United Nations Declaration on the Rights of Indigenous Peoples

6.1 Consultation in the context of International Law

The instrument of the "duty to consult" contains the seeds of a future reconciliation with the Indigenous Peoples. Considering the spectrum of reconciliation, the case law on "duty to consult" should be followed closely. This concept can be seen as way to eliminate the present social inequalities. International law provides support to the concept of "duty to consult''. For example, Canada is also influenced by the adoption of social and ethical approaches employed by other countries in dealing with similar issues. While Canada has its own domestic lens on the "duty to consult", it is also a signatory to international legal obligations towards Indigenous communities. In practice, however, Canada does not fully satisfy the such legal obligations.

For a better understanding of the significance of the International law on Indigenous issues generally, there are two major instruments: the ILO Convention No.169 and UNDRIP, which are helpful to initiate discussions around such matters. These instruments have paved the way for similar legal steps to be taken by countries around the world. However, the fact remains that there is no authoritative international legislative body or a court system that can replace the legislative change a domestic legal system can bring about. In practice, it is difficult to enforce or internalize international norms at a domestic level. It is also important to understand what methods exist to bring International law to a domestic situation. Newman (2014) mentions two ways this can be achieved. The first would be through International Treaties and Conventions where a country is a signatory and later ratifies the document. Second, by "customary

international law" which is developed from internationally acceptable practices. Challenge remains with respect to issue of sovereignty and the extent to which international law could be applied at a domestic level.

The instrument of ILO Convention No. 169 was an important document that emanated from the Indigenous and Tribal Peoples Convention in 1989. It put forth 'consultation' as a primary tool to bring Indigenous communities directly affected out into the decision-making process. Many countries around the world made this part of their legislation by signing and ratifying the document. On many fronts, this document has been used collaboratively to initiate discussions evolving Indigenous rights and law. According to the Article 6 (1) of this convention, governments must:

- Consult with the concerned communities through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
- Establish means by which these peoples can freely participate in all levels of decision making, to the same degree as other groups of population and across the public and private sector;
- Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose (International Labour Organization, 1989).

Moreover, Article 15 (2) of the Convention highlights State responsibilities in the context of natural resources, a relevant example for the purpose of this study. It lays out a specific duty upon the government to establish ways in which to consult with Indigenous communities

directly. Along with participating in benefits of any resource based activities, communities are also to receive compensation for any damages they suffered as a result of those activities.

The effect of International law on Canadian domestic law is still complex. However, as we have seen, the rights of Indigenous Peoples, are general human rights that have been incorporated into a number of specific international instruments over the history. But it must be clarified that while Canada is a signatory to international treaties and conventions, merely signing international treaties does not immediately change Canadian domestic law unless legislators implement them through specific statutes. Having said that, customary international law can become part of Canadian common law but has to follow the domestic protocol for changes in legislation. There are encouraging signs in the recent developments around the introduction of Bill C-15, also called the *United Nations Declaration on the Rights of Indigenous Peoples.*

On an international level, therefore, Canada might be bound by responsibility for general principles and protocols. This study explores UNDRIP further.

6.2 The United Nations Declarations on the Rights of Indigenous Peoples & Indigenous rights

The United Nation Declarations on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on Thursday, 13 September 2007, by a majority of 144 states in favor. Only four votes were against it (Australia, Canada, New Zealand and the United States) and 11 had abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Thirteen years have passed since the UNDRIP was adopted by the General Assembly. Since then, the four countries that voted against, all with significant Indigenous populations, have reversed their position and now support this

international document. According to the UN, this Declaration is the most comprehensive international instrument on the rights of Indigenous peoples. However, it does not inherently any legal force. It only establishes a universal framework of minimum standards for the survival, dignity, and well-being of the Indigenous Peoples all around the globe. It elaborated on existing human rights standards and fundamental freedoms as they also apply to the specific situation of Indigenous peoples.

Over the years, through rulings of the Canadian Supreme Court, it is clear that Indigenous peoples have rights and interests over their ancestral lands and resources. Consultation and accommodation of their matters are required as is the spirit of consultation under UNDRIP. In these rulings, the judiciary points out that part of an ideal consultation process is to provide information and discussion over all aspects of the resource extraction process, for example. For Morales (2019), UNDRIP is the most comprehensive international law document on these rights at this time.

This Declaration acknowledges and reiterate that Indigenous individuals are entitled without discrimination to all human rights recognized in International law, and they possess collective rights which are indispensable for their existence, well-being and integral development as peoples, one of the key pillars of the reconciliatory framework developed to aid this study. In this manner, UNDRIP goes beyond any instrument's scope that came before it. The Declaration also protects Indigenous Peoples' individual and communal rights and is largely a restatement of customary international human rights laws relating to individuals and collectives. The following discussion centers on the articles of this Declaration that are most relevant to informing meaningful relations with Indigenous Peoples when it comes to resource development. They

include provisions about property rights, cultural preservation, economic impact, participatory decision-making, and informed consent.

a. Indigenous rights to property:

New resource development projects have several impacts on Indigenous property rights. According to UNDRIP Article 26, Indigenous Peoples have the right to the lands, territories and resources which they have traditionally occupied. The communities have the right to own, use, develop and control the lands and resources that they possess by reason of traditional ownership. Resource development industries pose direct risks to the communities and because of this States must give legal recognition and protection to these lands and resources. According to the UNDRIP, such recognition shall be conducted with due respect to the traditions, customs and land tenure systems of the Indigenous Peoples concerned.

There is a diverse group of Indigenous Peoples around the globe but they do share similarities such as the strong connection with the land and natural resources. Those communities feel deeply spiritually and emotionally connected with the earth. It is known that those elements are essential for the survival of Indigenous cultures, traditions, and knowledge. These communities have relied all their lives on the land and natural resources to ensure their sustenance and living. As believed by Morales (2019), the right to property not only protects traditional and sacred territory from extractive development projects, but also all the other rights that rely upon land and natural resources and can be harmed by the industries. By not following regulations, the mining industry can cause an irreversible impact on the natural environment. Project infrastructure can disturb the natural habitat by harming the quality of the life of the communities that rely on this environment for their livelihood.

According to Morales (2019), International law recognizes that Indigenous property rights exist entirely on the basis of customary patterns of land use and occupancy. International legal instruments like the UNDRIP can be used to protect property rights and interests of Indigenous Peoples, regardless of whether or not these rights are recognized by Aboriginal title, for example. Morales (2019) provides an example that if Indigenous Peoples can establish that the areas of land impacted by extractive industry are part of their traditional territories, as determined by their own legal traditions, then these rights should be protected through international human rights law. This is a major development to the reconciliation path as it promotes Indigenous sovereignty on moral and ethical grounds.

b. Indigenous rights to culture on the UNDRIP:

For many Indigenous communities, the connection between land and culture is paramount. With this, the extractive industry development can have harmful effects for many Indigenous cultural practices. Articles 11 and 13 of the UNDRIP, acknowledge that Indigenous Peoples have the right to practice and revitalize their cultural traditions and customs including the right to maintain, protect, and develop the past, present, and future manifestations of their cultures. The Declaration speaks in greater length about the importance of cultural preservation and independence for the Indigenous Peoples. The cultural traditions of Indigenous Peoples need to be fully respected and their worldviews not questioned on the path towards reconciliation. Imposition of 'other' systems that have inherent conflict with such worldviews need to be questioned. Only this way, a deeper mutual respect may be developed.

When it comes to mining, there is a risk that any extractive activities that take place without proper consultation with the Indigenous communities could result in the disappearance of traditional knowledge. For example, resource extraction can disrupt Indigenous traditions and

cultural practices by blocking their access to their lands and has been connected to violations of cultural and Treaty rights with unsustainable development. Morales (2019) considers this contrary to the idea of reciprocity within the relationship that exists related to the care for their traditional territory.

Indigenous rights to culture are projected by this Declaration in social settings as well. Morales (2019) gives an example. The author concludes that with the increase in resource activities in the Indigenous territories, there is a deterioration in inter-community relationships as well as erosion of traditional leadership. This happens when there are opposing views regarding the perceived benefits of such resource extraction activities. With the adoption of UNDRIP, roles and responsibilities could be more clearly defined by the Indigenous communities themselves rather than the current authority structures. While this adoption may be transformative, full acknowledgement of the desire of Indigenous Peoples to govern themselves, as has been the tradition for many years, remains critical to reconciliation.

c. Indigenous rights and economic impacts in the UNDRIP:

UNDRIP Article 21 states that "Indigenous Peoples have the right, without discrimination, to the improvement of their economic and social condition in the areas of education, employment, vocational training and retraining, housing, sanitation, health, and social security" (United Nations, 2007). Notably, this compels States to take effective and/or special measures to ensure the improvement of economic and social conditions, with particular attention "paid to the rights and special needs of indigenous elders, women, youth, children, and persons with disabilities." (United Nations, 2007).

UNDRIP's position on the economic independence of Indigenous people is echoed in Article 3 which puts self-determination at the core of the freedoms Indigenous Peoples hold to pursue any type of economic development. Of course, this idea differs from the usual commercial nature of economic relationships that exist today. Differing opinions exist with regard to the economic benefits of extractive industries, both within and outside of the communities. Morales (2019) notes that there is a tendency to overstress the economic benefits to Indigenous Peoples resulting from natural resource extraction projects. One of the ways this is done is by pointing to the financial income opportunities such projects create for Indigenous Peoples.

UNDRIP brings Indigenous government structures closer to the State when it comes to decision making. By bringing this Declaration into legislation, government can establish ways in which to conduct consultations that really are in good faith and equally represent the interest of stakeholders involved. At the same time, economic interests should not become a tool for any authority to negotiate terms with the Indigenous groups that are agreed to without fully transparent information. Such information must be fully understood and all economic benefits be visibly quantified for the communities to make the best decisions for themselves.

d. Indigenous rights to participate in decision-making in the UNDRIP:

Another important right recognized by the UNDRIP is the right for Indigenous Peoples to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions (United Nations, 2007).

Indigenous Peoples also have the "right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." Furthermore, States are

required to "consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" (United Nations, 2007).

Extractive industry projects impact all members of a community. They can have unique ecological, monetary, and spiritual impact on the Indigenous groups in their role as "traditional caretaker" of the environment according to Morales (2019). This is an important observation as decision-making processes under traditional authority structures of Indigenous Peoples are markedly different from the process such projects often undertake. For example, moving ahead without consultation seriously undermines the leadership of the community seniors and their role as caretakers.

What UNDRIP does for Indigenous Peoples is that it provides an equal voice in the decision-making process for matters that pertain to them and so, adopting this across various levels of government could truly establish workable models for projects in the mining industry. When all stakeholders are on equal footing, a *win-win* situation is possible. When mining companies see Indigenous voice raised at an equal level, a more respectful relationship can be established. For the companies, this provides for a better opportunity to connect with their larger community and contribute to equitable sustainable development. Not only is this a best practice, but it is also a right enshrined within the UNDRIP.

One important consideration remains that shared decision making is not the same as veto. It could be explained by an example of a unionized workplace where decisions on all key matters affecting employees such as hours, compensation, benefits etc. are negotiated directly by the representative party. This, when replicated, could look like governments involving Indigenous

representatives in the decision on resources, health, education, economy etc., for example. And if this collaborative effort fails in decision making, escalation channels could be developed where dispute is resolved prior to cases moving towards litigation. Such efforts to maintain trust in the consultation process will go a long way in the ultimate goal of reconciliation.

e) "Free, Prior and Informed Consent" (FPIC) introduced by the UNDRIP:

The notion of "free, prior, and informed consent" inaugurated by the UNDRIP presented one of the fundamental aspects of this UN Declaration and is included in six Articles. In Article 32.1, the importance of States to consult and cooperate in good faith with the Indigenous communities and institutions is shown. Free and informed consent must be obtained prior to the approval of any project, utilization and exploitation that can affect their lands and resources. Much of the materials derived by the mining industry comes from the lands and waters of traditional lands of the Indigenous Peoples. Thus, it is very important that the right to free, prior, informed consent be understood if the UNDRIP is to be honored. Canada's ongoing interaction with the UNDRIP on the "duty to consult" is part of an ongoing conversation in the international legal arena. According to Newman (2014), international organizations aim to hold Canada accountable for a "duty to consult" principle that meets some progressive outcomes and requires a degree of consultation with the Indigenous communities.

According to the UNDRIP, consultations or discussions leading up to consent must be done within a timeframe that allows ample time for information gathering and consultation within the community in order for an informed decision to be made. Consent to an agreement for a project to proceed must be reached via a decision-making process that is consistent with the community's understanding following the consultation process. However, the challenge in the Canadian context is the difference between "consent" in FPIC and "consultation" as in the "duty

to consult". In this, “duty to consult,” the concept adopted by the judiciary in Canada, prevails, such that there is no power of veto for the Indigenous communities. This doctrine does not provide for the obtaining of free, prior, and informed consent to resource projects on the traditional territories. On the other hand, “consent” can be interpreted as a form of veto from Indigenous Peoples to resource extraction activities in their traditional territory. In my analysis, FPIC may be a more precise instrument and much clearer to adopt than “duty to consult” which does not accommodate consent. It is interesting to see how countries adopting UNDRIP might deal with the consent aspect of FPIC in their legislative understanding or implementation. With the introduction of Bill C-15, the government of Canada may have benefited from the “duty to consult” concept. It could be that this Bill in turn pushes the scope of the “duty to consult” to include consent which still remains challenged.

Chapter 7

Conclusions

Over the centuries, we have seen that Indigenous Peoples have faced social exclusion, poverty, and suffering with the displacement from their own lands. Most scholars referenced in this study have linked such effects to the "colonial project" that many empires like the British, Spanish, and Portuguese Crowns pursued beginning in the late 15th century. In the American Continent specifically, State governments have been negligent towards the plight of Indigenous communities historically who in turn continue to face prejudice and violence. For instance, Brazil has consistently abdicated their legal duty of protection for Indigenous Peoples and their lands. Also, the lack of legislation and representation of Indigenous issues in government agencies are some of the issues experienced by Indigenous communities. This relative invisibility explains the weakness of the social structures that created economic dependence and unwilling submission from marginalized groups in the Brazilian society.

In Canada, we see a similar scenario where the government can sometimes revert to deep colonialist roots in their actions causing a negative social impact on the Indigenous communities. In both countries, we can see that Indigenous Peoples do not fully enjoy economic and social development and are frequently deprived of their Indigenous rights causing social exclusion and marginalization. This dynamic with the Indigenous Peoples has created an unprivileged position in the social hierarchy in comparison with the other groups of the society. In everyday life, Indigenous groups face racism, unemployment, poverty, constraints on their Indigenous rights – including access to land, clean water, lack of self-governance, and so on.

Another consequence of colonialism is that States often exclude groups that do not fit in the pattern of supposed "racial superiority." Among these are Indigenous communities that consistently suffer from ethnic invisibility and no real recognition of Indigenous cultures in Canada. Even when legal systems point to a unifying direction, real life experience of Indigenous Peoples are different and they often point towards the continued perpetration of a colonial mindset in today's society. Cultural suppression and imposed assimilation were some of the instruments that the settlers forced upon Indigenous communities and remains a legacy of colonialism. They led to episodes of violence, displacement, human rights violations, and disruption of community ties. After all this, it's important for Indigenous Peoples to reclaim their heritage standing for self-determination by decolonizing political institutions and advocating for Indigenous rights. This process is considered to be an aspect of reasserting control over traditional lands and natural resources. Land is the foundation of their lives and cultures. Survival of their distinctive culture and norms is endangered and any effort to ensure it has to begin with recognition of their civil and land based rights.

In regards to resource extraction, more precisely in the mining industry, reconciliation should be a key focus whenever a political or economic relationship is being developed between various stakeholders including Indigenous communities. When it comes to projects, early dialogue, active listening and equitable engagement is crucial in determining the best way forward. When communities are made aware of their options, possible benefits, potential opportunities and impacts, Indigenous communities can decide for themselves the extent of their involvement.

Tools such as IBAs can be beneficial but in their current form are not drawn up in a way that requires better understanding of the social injustice implications of these types of agreements.

The standardized approach IBAs take does not account for the diversity of Indigenous experience and so negotiating IBAs that are so routine is in itself can be undemocratic.

Reconciliation serves as a mechanism combined with the Crown's "duty to consult" to facilitate self-determination for the Indigenous communities. To consolidate this view, legal cases were brought forward in this study as examples to reinforce the discussion of the importance of the "duty to consult" with Indigenous communities. In the *Calder* case, it's evident that broken promises were made by the Crown in exchange for the surrender of the Indigenous land. In this particular case, the concept of "Aboriginal title" was first acknowledged under Canadian law and recognized by the Supreme Court of Canada. This Indigenous right was recognized in common law, conceding an entitlement to the land to the Indigenous Peoples based on their occupation, use, and control of ancestral lands prior to colonization. Its outcome was to pressure the government to establish a mechanism that would deal with Indigenous land claims where there is a lack of formal agreements with the communities. The *Calder* decision reinforced a better understanding of Indigenous culture and heritage enhancing Indigenous voices and self-governance by establishing a legal foundation of Aboriginal rights within the Canadian legal system. The case presents a strong example for the Brazilian government to consider in establishing the concept of Aboriginal title of the Indigenous communities in that country's legal system.

Another example is the *Haida Nation* case whose significance is in its articulation of the foundational elements of the "duty to consult" and the proposed design of a framework for consultation. After some years of disagreements, the Haida Nation succeeded in invalidating the Minister's decision on the Tree Farm License and winning a formal declaration of their Aboriginal title. Further refinement of the concept of the "duty to consult" has also emerged

from this case delineating the legal framework requiring the Crown to act in good faith and having reconciliation as an ultimately goal. Brazil can adopt a similar system of consultation as refined further in this case. The *Mikisew Cree* case is yet another example of where the Supreme Court of Canada held that the First Nation had the right to consultation and accommodation at a 'preliminary' stage of project consideration.

The *Kitchenuhmaykoosib Inninuwug First Nation* (K.I.) case was chosen as it was yet another example where the "duty to consult" had not been honored. The case is particularly relevant as it featured the disagreement between the K.I. community and a junior mining company (Platinex Inc.) that was responsible for the exploration and analysis of mining resources in the K.I.'s ancestral land. In the legal outcome, the Canadian courts agreed that the process of the "duty to consult" had failed and importance of the land to the K.I. community was not considered. A key lesson that can be drawn for governments in Canada and Brazil is that by utilizing "duty to consult" as a comprehensive tool, in its true spirit, costly litigation could be avoided. The real cost shown in this case was that of the mistrust that was created when members of the community were jailed. Proactive consultation and inclusion of Indigenous communities in projects that affect them directly is paramount to building confidence in Indigenous-Settler relationships.

Another legal example presented in this study was the *Tsilhqot'in* Nation case. This decision has built up a legitimate system and recognition of a more extensive understanding of Aboriginal title. In this case, the Court endorsed the right of the Indigenous community to choose how their lands should be utilized, managed, and profited from. The jurisprudential setting of this case built a solid acknowledgment of Indigenous forms of social association and rights. This case is relevant to the Brazilian context where logging and forestry are a large business. This decision

also removed the power of the provincial government to authorize logging without the consent of the Aboriginal titleholders, unless it could justify the action under the *Constitution Act.* Such clear decisions by the Court are useful for governments.

Mining-related activities have increased exponentially over the last decades and so has the significant environmental impact of natural resource exploitation. Brazil and Canada have both experienced this increase and also the issues with the Indigenous Peoples having to negotiate demands due to their sovereign and environmental concerns. Legislation referring to resource development normally varies among different sovereign States. As we could see from this study, Canada is ahead of Brazil when it comes to environmental measures and laws. That could be linked to the fact that Brazil, still a developing country, faces a lot of economic instability which reflects in its limited commitment to environment protection measures. Limited economic resources and political fiascos in Brazilian history have long diverted government attention from the cause of the Indigenous Peoples there. The international arena has put a lot of pressure on governments and mining companies to encourage a more respectful and inclusive relationship with the Indigenous Peoples which also serves to address environmental issues. Most pro-environment movements include support for the Indigenous cause, which has gathered larger audiences and has created more awareness among the public at large.

Canada and Brazil have still not yet fully embraced resolutions such as UNDRIP which is a global framework by the United Nations to which both Canada and Brazil are now signatories. In Canada, more progress has been made in terms of Indigenous rights than in Brazil. In doing so, in 2010, Canada expressed its commitment to implementing the UNDRIP as part of its overall process of achieving a nation-to-nation relation with the Indigenous Peoples. Prior to becoming a signatory to the UNDRIP, the Canadian government had already implemented the concept of the

"duty to consult" in its legal system. It was recognized in section 35(1) of the *Constitution Act, 1982*. This mechanism represents the Constitutional recognition of the obligation to protect the "honour of the Crown" which requires that the federal government and its departments, agencies, and officials act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous Peoples.

Following the examination of some watershed constitutional rulings, the methodology of this thesis was based on an instrumental doctrinal study to present how the Canadian judiciary is addressing Indigenous matters in relation to the mining industry. By combining all these elements, this research has found that the strong roots of colonialism still prevail in the social structures directly affecting the Indigenous Peoples. But instruments like the "duty to consult" can change this scenario in the mining industry, especially if conducted in accordance with international conventions like the UNDRIP. This study introduces a reconciliation framework as a model that can inform the discussion and understanding of the impacts of colonization and at the same time help draw a mutually beneficial future together. It is understood that advocating for the application of this framework to the mining industry is even more challenging where the agreements between the Indigenous Peoples and the mining industry often are not yet following a mutual direction.

By involving Indigenous communities in the decision-making of matters that affect them (on an equitable basis) as UNDRIP recommends, governments in Canada and Brazil can improve the prospect for everyone. Consultation should be the first step for the reestablishment of trust and partnership between Indigenous Peoples and governments. Consequently, this idea should also be expanded to the civil society at large, beginning with corporate mining interests. The recent introduction of Bill C-15 by the Canadian government aims to implement UNDRIP into a

legislation. This is a great step in expanding rights and responsibilities of the State as well as Indigenous communities and sets a reconciliatory tone for the future.

Chapter 8

Recommendations

- Strengthening of relationships with Indigenous Peoples and advancing the commitment to a renewed nation-to-nation on recognition of rights, respect, co-operation and partnership. What this means is that States consider Indigenous communities and their sovereignty and form equitable partnerships.
- Both provincial and federal governments should work together to ensure that in any proposed mining and extraction developments, the consultation process has occurred and in a good faith. This is important as cases in Canadian legal history show the adverse effects of unilateral actions in a resource extraction environment. In the case of Brazil, only the federal government deals with the matters of Indigenous Peoples so provinces are able to grant permissions for resource extraction without dealing with the Indigenous leadership. Hence, the collaborative and equally accountable mandate towards Indigenous Peoples for all levels of government is key. Implementing a concept similar to the "duty to consult" can be a starting point for Brazil.
- Working closely with Indigenous Peoples in the development of policy on such matters as climate change and environmental assessment reform. This is drawn from UNDRIP's right to decision-making and at the same time acknowledges the importance of land ecology to Indigenous Peoples. For example, unlike Canada, many more Indigenous communities in Brazil are susceptible to environmental hazards as a result of mining. This has been seen in the recent past with collapse of mine structures, dams etc.

- States should support better conditions for Indigenous Peoples to reclaim their social, cultural, linguistic, spiritual, political, economic, environmental, and legal autonomy. For example, it should be acknowledged that the conditions of Indigenous communities in both Brazil and Canada are dire when compared to settler communities. Issues like loss of culture, tradition and belief systems as well weaker structures of authority caused by a colonial past must be understood.
- Legislation should also support policies for the strengthening of Indigenous matters. What this means is that judicial support is not sufficient in moving towards reconciliation. Action must be taken by governments in both countries in bringing clarity to commercial Indigenous settler relationships. It is important to understand that at present no legislation exists in either countries which outright binds the actions of governments when pushing ahead with projects.
- Both Canada and Brazil, having signed the UNDRIP, and should implement it comprehensively in their domestic legal systems following the guidelines. Bill C-15 by Canada can be considered transformative in this regard, Brazil can follow Canada's lead.

References

Act, I. (1876). Indian Act, RSC 1985, c I-5.

Archives of Ontario. (2015). The James Bay Treaty turns 100. Archives of Ontario. Retrieved from http://www.archives.gov.on.ca/en/explore/online/james_bay_treaty/index.aspx.

Ariss, R. (2017). Platinex V Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI's struggle for self-determination. *Contours Journal, 7*. http://www.sfu.ca/humanities-institute/contours/issue7/extraction/1.html

Asch, M. (2000). First Nations and the derivation of Canada's underlying title: Comparing perspectives on legal ideology. In C. Cook & J. D. Lindau (Eds.), *Aboriginal rights and self-government: The Canadian and Mexican experience in North American perspective* (pp. 148-67). McGill-Queen's University Press. 10.2307/j.ctt814cn

Asch, M., Borrows, J., & Tully, J. (Eds). (2018). *Resurgence and reconciliation: Indigenous-settler relations and earth teachings*. University of Toronto Press.

Barreto, M. L. (2001). Mineração e desenvolvimento sustentável: desafios para o Brasil. Rio de Janeiro: CETEM/MCT.

Beaudoin, G. A. (2006). Sparrow case. In *The Canadian Encyclopedia*. Retrieved July 29, 2020, from https://www.thecanadianencyclopedia.ca/en/article/sparrow-case

Beynon, A. (2004). The Nisga's Land Question. Int'l J. on Minority & Group Rts., 11, 259.

Blackburn, C. (2007). Producing legitimacy: Reconciliation and the negotiation of aboriginal rights in Canada. *Journal of the Royal Anthropological Institute, 13*(3), 621-638. https://doi.org/10.1111/j.1467-9655.2007.00447.x

Borrows, J. (2015). The durability of terra nullius: Tsilhqot'in nation v. British Columbia. *U.B.C. L. Rev., 48*, 701.

Borrows, J., Chartrand, L., Fitzgerald, O. E., & Schwartz, R. (Eds.). (2019). Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples. CIGI.

Borrows, J. L., & Rotman, L. I. (2018). Aboriginal legal issues – Cases, materials and commentary (5th ed.). LexisNexis.

Brasil. (1988). Constituição da República Federativa do Brasil.

Brown, K. G., Doucette, M. B., & Tulk, J. E. (Eds.). (2016). *Indigenous business in Canada: Principles and practices*. Cape Breton University Press.

Caine, K. J., & Krogman, N. (2010). Powerful or just plain power-full? A power analysis of impact and benefit agreements in Canada's north. *Organization & Environment, 23*(1), 76-98.

Canadian Business Ethics Research Network. (2011, September 22). *K.I. vs. Platinex: A 'worst case' example of community relations*. Republic of Mining. https://republicofmining.com/2011/09/22/k-i-vs-platinex-a-'worst-case'-example-of-community-relations-canadian-business-ethics-research-network/

Government of Canada. (2015, July 13). *Comprehensive claims*. Government of Canada. https://www.rcaanc-cirnac.gc.ca/eng/1100100030577/1551196153650

Chilisa, B. (2019). *Indigenous research methodologies*. SAGE Publications.

Corntassel, J. (2012). Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination. *Decolonization: Indigeneity, Education & Society, 1*(1), 86-101. https://jps.library.utoronto.ca/index.php/des/article/view/18627/15550

Curi, M.V. (2007). Aspectos legais da mineração em terras indígenas. Revista de Estudos e Pesquisas, 4(2), 221-252. Retrieved from http://www.funai.gov.br/arquivos/conteudo/cogedi/pdf/Revista-Estudos-e-Pesquisas/revista_estudos_pesquisas_v4_n2/Artigo_6_Melissa_Volpato_Aspectos_legais_da_mineracao.pdf.

Department of Justice (2018, February 14). *Principles respecting the Government of Canada's relationship with Indigenous peoples*. Government of Canada. https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html

Duarte, M.P. (2017). Colonialismo interno e a invisibilidade das mulheres indígenas na rede prisional no Brasil [Undergraduate thesis]. Brasília, DF: Centro Universitário de Brasília. Retrieved from https://repositorio.uniceub.br/jspui/handle/235/11241.

Eichler, J. (2019). *Reconciling Indigenous Peoples' Individual and Collective Rights: Participation, Prior Consultation and Self-Determination in Latin America.* Routledge.

Flanagan, T., Alcantara, C., & Le Dressay, A. (2010). *Beyond the Indian Act: Restoring aboriginal property rights*. McGill-Queen's University Press.

Fisher, R. (1992). Contact and conflict: *Indian-European relations in British Columbia, 1774-1890* (2nd ed.). UBC Press.

FitzMaurice, K. (2007). *Bkaan Zhi-gnawaabndan-daa Gshki'ewziwin / Decolonizing power: Indigenous knowledge, western philosophy, and the politics of peace* [Unpublished doctoral dissertation]. University of Toronto.

Godlewska, C., & Webber, J. (2007). The Calder decision, aboriginal title, treaties, and the Nisga'a. In H. Foster, H. Raven, & J. Webber (Eds.), *Let right be done: Aboriginal title, the Calder case, and the future of Indigenous rights* (pp. 1-36). UBC Press.

Henderson, P. (2017) Imagoed communities: The psychosocial space of settler colonialism. *Settler Colonial Studies, 7*(1), 40–56. https://doi.org/10.1080/2201473X.2015.1092194

Henderson, W. (2018). Indian Act. In *The Canadian Encyclopedia*. Retrieved July 29, 2020, from https://www.thecanadianencyclopedia.ca/en/article/indian-act

Hogg, P. W. (2009). The constitutional basis of aboriginal rights. In M. Morellato (Ed.), *Aboriginal law since Delgamuukw* (pp. 177-196). Canada Law Book.

Horowitz, L. S., Keeling, A., Lévesque, F., Rodon, T., Schott, S., & Thériault, S. (2018). Indigenous peoples' relationships to large-scale mining in post/colonial contexts: Toward multidisciplinary comparative perspectives. *The Extractive Industries and Society, 5*(3), 404-414. https://doi.org/10.1016/j.exis.2018.05.004

Imai, S. (2001). Treaty lands and Crown obligations: The "tracts taken up" provision. *Queen's Law Journal, 27*(1), 1-50.

Imai, S. (2016). *Annotated Aboriginal law: The constitution, legislation and treaties 2017*. Thomson Reuters Canada Limited.

International Labor Organization. (1989). C169-Indigenous and Tribal Peoples Convention. Convention concerning Indigenous and Tribal Peoples in Independent Countries.

International Council on Mining & Metals (2010). *Indigenous peoples and mining good practice guide*. Retrieved July 29, 2020, from https://www.icmm.com/en-gb/publications/mining-and-communities/indigenous-peoples-and-mining-good-practice-guide

Isaac, T. (2016). *Aboriginal law: Supreme Court of Canada decisions*. Carswell.

Kirmayer, L. J., Gone, J. P., & Moses, J. (2014). Rethinking historical trauma. *Transcultural Psychiatry, 51*(3), 299–319. https://doi.org/10.1177/1363461514536358

Kovach, M. (2009). *Indigenous methodologies: Characteristics, conversations, and contexts*. University of Toronto Press.

LaBoucan, G. (2018, April 30). *Nations in waiting*. Canada's History Society. https://www.canadashistory.ca/explore/politics-law/nations-in-waiting

Lawson Lundell LLP. (2005). *The Mikisew Cree Decision: Balancing Government's Power to Manage Lands and Resources with Consultation Obligations under Historic Treaties. Lawson Lundell LLP*. https://www.lawsonlundell.com/media/news/214_Mikisew-Cree-Decision-Nov.-2005.pdf

Leslie, J. F. (2020). Treaty 9. In *The Canadian Encyclopedia*. Retrieved July 29, 2020, from https://www.thecanadianencyclopedia.ca/en/article/treaty-9

Mandell, L. (2002). Getting on with reconciliation: Council of the Haida Nation v British Columbia and Weyerhaeuser Company. *Indigenous Law Bulletin, 5*(20), 18. http://classic.austlii.edu.au/au/journals/IndigLawB/2002/61.html

Manitowabi, S. (2018). *Historical and contemporary realities: Movement towards reconciliation*. Open Library | Pressbooks. https://ecampusontario.pressbooks.pub/movementtowardsreconciliation/

McConville, S. (2017). The Calder case: Setting a precedent for Indigenous Canadian constitutional relations. *The Corvette, 4*(1), 43-51. https://journals.uvic.ca/index.php/corvette/article/view/17064

McNeil, K. (2016). Indigenous territorial rights in the common law. *Osgoode Legal Studies Research Paper Series, 173*. https://digitalcommons.osgoode.yorku.ca/olsrps/173/

Milioli, G. (2004). Sustentabilidade da mineração: oportunidades para Canadá e Brasil/Geraldo Milioli; Mary Louise McAllister. Rio de Janeiro: CETEM/MCT.

Millen, R., Carpenter, S., & Cundari, L. (2014). Environmental & Aboriginal Law Bulletin.

Miller, J. R. (1996). *Shingwauk's vision: A history of Native Residential schools*. University of Toronto Press.

Miller, R. J., Ruru, J., Behrendt, L., & Lindberg, T. (2010). *Discovering indigenous lands: The doctrine of discovery in the English colonies*. Oxford University Press. 10.1093/acprof:oso/9780199579815.001.0001

Ministry of Energy, Northern Development and Mines. (2020, January 7). *Mining Act*. Ministry of Energy, Northern Development and Mines. https://www.mndm.gov.on.ca/en/mines-and-minerals/mining-act

Molintas, J. M. (2004). The Philippine indigenous peoples' struggle for land and life: Challenging legal texts. *Arizona Journal of International and Comparative Law, 21*(1), 269-306. http://arizonajournal.org/wp-content/uploads/2015/11/Molintas.pdf

Morales, F. (2018). Regulação e mineração em Terras Indígenas. Brasil: Brasil: Editora Bibliomundi.

Morales, S. (2019). Digging for rights: How can international human rights law better protect indigenous women from extractive industries? *Canadian Journal of Women and the Law,* 31(1), 58-89.

Morse, B. W. (2017). Tsilhqot'in Nation v. British Columbia: Is It a Game Changer in Canadian Aboriginal Title Law and Crown-Indigenous Relations?. *Lakehead Law Journal*, *2*(2), 65-88.

Mota, L.T. (2017). A invasão dos territórios do povo Xetá na Serra dos Dourados/PR em meados do século XX. *Dialogos (14159945),* [s. l.], v. 21, n. 3, p. 4–25. Retrieved from https://search.ebscohost.com/login.aspx?direct=true&db=hia&AN=129676440&site=ehost-live.

Murphy, A., Duncan, G., & Hsu, S. (2008). The Canadian Constitutional Duty to Consult Aboriginal Peoples: Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation. Unpublished. University of British Columbia Faculty of Law.

Newman, D. G. (2014). *Revisiting the duty to consult Aboriginal peoples*. UBC Press, Purich Publishing.

Newman, D. G., & Schweitzer, D. (2008). Between reconciliation and the rule(s) of law: Tsilhqot'in Nation v. British Columbia. *UBC Law Review, 41*(2), 249-276.

O'Faircheallaigh, C. (2018). Mining, development and Indigenous peoples. In *Mining and Sustainable Development* (pp. 124-142). Routledge.

O'Faircheallaigh, C. (2012). International Recognition of Indigenous Rights, Indigenous Control of Development and Domestic Political Mobilization. *Australian Journal of Political Science, 47*(4), 531-545.

Olynyk, J. M. (2005). The Haida Nation and Taku River Tlingit decisions: Clarifying roles and responsibilities for Aboriginal consultation and accommodation. *Lawson Lundell LLP*. https://www.lawsonlundell.com/media/news/236_Negotiatorarticle.pdf

Quijano, A. (2000). Colonialidad del poder y clasificacion social. IN: Jounal of Word-Systm Research. Vol. XI, n° 2. Verão/outono.

Royal Commission on Aboriginal Peoples. (1996). *Report of the Royal Commission on Aboriginal Peoples*. Canada Communication Group. https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx

Rozo, E., & Del Cairo, C. (2017). Indigenismo desarrollista: Estado y diferencia cultural en una frontera amazónica (1959-1980). *Historia Critica*, [s. l.], n. 65, p. 163–182. Retrieved from https://search.ebscohost.com/login.aspx?direct=true&db=hia&AN=124127998&site=ehost-live.

Schwartz, B. P., & Rettie, D. L. (2006). The Long and Winding Road: Case Comment on Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage). In *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference (Vol. 34, No. 1, p. 17).*

Senate of Canada. (2019). *Senate procedural notes, number 6. Royal assent* Act. https://sencanada.ca/media/106259/procedural-note-6.pdf

Simons, P. C., & Collins, L. M. (2010). Participatory rights in the Ontario mining sector: An international human rights perspective. *McGill International Journal of Sustainable Development Law & Policy, 6*(2), 177-216. https://ssrn.com/abstract=1775422

Simpson, L. B. (2014). Land as pedagogy: Nishnaabeg intelligence and rebellious transformation. *Decolonization: Indigeneity, Education & Society, 3*(3), 1-25. https://jps.library.utoronto.ca/index.php/des/article/view/22170/17985

Smith, L. T. (2012). *Decolonizing methodologies: Research and Indigenous peoples* (2nd ed.). Zed Books.

Tesar, A. (2016). Treaty 8. In *The Canadian Encyclopedia*. Retrieved July 29, 2020, from https://www.thecanadianencyclopedia.ca/en/article/treaty-8

The Truth and Reconciliation Commission of Canada. (2015). *Honoring the truth, reconciling for the future: Summary of the final report of the Truth and Reconciliation Commission of Canada*. Truth and Reconciliation Commission of Canada. http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf

Tushnet, M. (1999). The possibilities of comparative constitutional Law. *The Yale Law Journal*, 108(6), 1225-1309. https://digitalcommons.law.yale.edu/ylj/vol108/iss6/2

United Nations. (2007). United Nations Declaration on the Rights of Indigenous Peoples.

Waziyatawin (2012). The paradox of Indigenous resurgence at the end of empire. *Decolonization: Indigeneity, Education & Society*, *1*(1), 68-85. https://jps.library.utoronto.ca/index.php/des/article/view/18629

Weir, L. (2013). "Time Immemorial" and Indigenous rights: A genealogy and three case studies (Calder, Van der Peet, Tsilhqot'in) from British Columbia. *Journal of Historical Sociology*, *26*(3), 383-411. https://doi.org/10.1111/johs.12028

Wilson, S. (2008). *Research is ceremony: Indigenous research methods*. Fernwood.

Wolfe, P. (2006). Settler colonialism and the elimination of the native. *Journal of Genocide Research*, *8*(4), n. 4, 387–409. https://doi.org/10.1080/14623520601056240