Dignity Takings and Dignity Restoration of Indigenous Peoples in Settler Colonial Canada

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A qualitative analysis of the transformative potential of free, prior and informed consent

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Abstract

The ongoing reconciliation process in Canada has been criticized for failing to recognize the larger project of ongoing settler colonialism and for its inability to meaningfully respond to the aspirations and demands of Indigenous peoples for self-determination. However, in the Truth and Reconciliation Commission's final report, the important recommendation was made for Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples, the most accomplished proclamation of Indigenous peoples' rights, especially their right to self-determination, as the framework for reconciliation in the country. Following the Commission's recommendation, the Canadian government committed itself to implementing the Declaration, including its free, prior and informed consent requirement, into the country's legislation. This is significant for settler colonial violence in Canada continues to manifest itself in a multitude of ways, including through imposed resource extraction projects and environmental violence, which dispossesses Indigenous peoples of their land, violating their right to self-determined social, cultural and economic development, and thus, denying them their dignity.

Through an application of Atuahene's theoretical framework of *Dignity Takings and Dignity Restoration,* this dissertation conceptualizes eliminatory resource exploitation projects and associated environmental violence as dignity takings in a settler colonial context, whereby Indigenous peoples are dispossessed of their land, as well as their right to self-determination. It then explores the potential role the implementation of the United Nations Declaration on the Rights of Indigenous Peoples free, prior and informed consent requirement, which affirms that Indigenous people should make decisions on matters affecting their lands and/or people, can have for meaningfully restoring Indigenous peoples' dignity, and thereby affirming their unqualified right to self-determination in settler colonial Canada. The findings demonstrate that while the free, prior and informed consent requirement's regulatory and normative framework at the international level has the potential to meaningfully restore dignity to Indigenous peoples in theory, an assessment of the requirement's implementation in the Canadian context reveals the considerable influence national politics and institutional norms have in shaping the requirement's effective implementation, operationalization and dignity restoring potential.

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Lastly, I would like to acknowledge the important and relentless efforts of Indigenous peoples, academics and advocates among others who continue to work towards the realization of Indigenous rights and to disrupt ongoing settler colonial practices and narratives in Canada.

List of Acronyms

AFN	Assembly of First Nations
ACHPR	African Commission on Human and Peoples' Rights
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
EIA	Environmental Impact Assessment
FN	First Nations
FPIC	Free, Prior and Informed Consent
HRC	Human Rights Committee
IBA	Impact Benefit Agreement
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
IRS	Indian Residential Schools
IRSSA	Indian Residential Schools Settlement Agreement
NCFNG	National Centre for First Nations Governance
RCAP	Royal Commission on Aboriginal Peoples
SCC	Supreme Court of Canada
TJ	Transitional Justice
TMX	Kinder Morgan Trans Mountain Pipeline Expansion Project
TRC	Truth and Reconciliation Commission of Canada
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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1. Introduction

1.1 Identification of Problem and Research Question

This research project emanates from reflection and questioning of the expansion of the Transitional Justice (TJ) field to settler colonial states. More specifically, it emanates from interrogation of Canada's ongoing reconciliation process with Indigenous peoples and the limitations of such an approach in a settler colonial context. The reconciliation process in Canada has predominantly focused on harms and abuse inflicted on Indigenous peoples through the Indian Residential School (IRS) system, which operated from 1870 to 1996, and the harmful legacy of those institutions (James, 2010; Alfred, 2013; Park, 2015; Woolford & Gacek, 2016). The Truth and Reconciliation Commission of Canada (TRC), established in 2008 as a component of the *IRS Settlement Agreement*, the largest class action settlement in the history of the country, had the mandate to investigate and disseminate the truth about the IRS system (Akhtar, 2010; Park, 2015; Truth and Reconciliation Commission of Canada: Calls to Action Report [TRC], 2015). In 2015, the TRC published an official 'Calls to Action' report detailing 94 recommendations in a wide range of areas from health, education, language and culture, child welfare to justice for federal, provincial, territorial and municipal governments, in addition to other actors such as church parties and social justice groups (TRC of Canada, 2015). A key recommendation made by the Commission that this dissertation will focus on is the recommendation to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the framework for reconciliation in the country (TRC, 2015; Nosek, 2017; Hoekstra & Isaac, 2018). This recommendation is significant not only due to Canada's highly contested position on UNDRIP in the past, but for the potential the Declaration's free, prior and informed consent (FPIC) standard could have for addressing ongoing Indigenous dispossession of land due to environmental resource exploitation and extraction.

Although settler colonialism constitues a broad apparatus with varying impacts, this dissertation specifically explores how settler colonialism's inherent logic of elimination and dispossession continues to manifest itself in contemporary Canada through resource exploitation projects and related environmental violence (Alfred & Corntassel, 2005; Wolfe, 2006; Huseman & Short, 2012; Alfred, 2013; Atiles-Osoria, 2014; Lowman & Barker, 2015;

Willow, 2016; Short, 2016). While there are countless examples of such dispossession, especially since Canada's economy relies heavily on resource extraction, with its natural resource sector accounting for 16 percent of the country's nominal Gross Domestic Product (GDP) in 2016 and with over 470 major resource projects underway or planned over the next 10 years, the primary project this dissertation will highlight is the 'tar sands' mega-oil production project in the Peace River, Cold Lake and Athabasca regions in the province of Alberta, which is the territory of many First Nations and Métis communities (Preston, 2013; Natural Resource Canada, 2017; Konsmo & Pacheco, 2016). This project is often referred to as the most destructive industrial project on earth, "the poster child of extreme energy and ecocide" and has had detrimental consequences for nearby Indigenous communities (Short, 2016: 111). Short (2016) explains that ecocidal tar sands extraction and processing are destroying local ecosystems of which Indigenous groups are a part of, curtailing their ability to hunt, trap, fish and drink from their water sources. The health community has also brought attention to the disturbingly disproportionate levels of diseases like leukemia, lymphoma, lupus, colon cancer, graves disease and even an extremely rare cancer of the bile duct in nearby Indigenous communities as "the direct consequence of steadily rising carcinogens in the sediments and waterways emanating from industrial activities associated with tar sands mining" (Huseman & Short, 2012: 225). Furthermore, this dispossession also threatens Indigenous identities, which are inextricably linked to the land and/or specific geographical locations. This highlighta how elimination does not solely mean physical death, but also social, cultural and economic death of Indigenous peoples (Windsor & Mcvey, 2005; Lowman & Barker, 2015; Park 2015).

Therefore, this dissertation seeks to demonstrate that the elimination and dispossession of Indigenous peoples persists in contemporary Canada by way of large-scale resource exploitation and environmental violence by not only physically alienating Indigenous people from their land, but also via environmental destruction and contamination to the point of critically threatening the lives, identities, cultures, health, economies and overall autonomy of their communities who depend on the land and its resources for their continued physical and social existence (Alfred, 2013; Huseman & Short, 2012; Short, 2016).

In order to gain a deeper, more nuanced understanding into the continuity of settler colonial logic in Canada and to explore potential meaningful responses to Indigenous peoples' assertions of self-determination, this dissertation will apply Bernadette Atuahene's theoretical framework of *Dignity Takings and Dignity Restoration* to this context of a settler colonial state

undergoing a reconciliation process. The framework will conceptualize eliminatory extraction and environmental violence as a dignity taking, since they result in the dehumanization, infantilization and community destruction of the dispossessed (Atuahene, 2016; Pils, 2016; Kedar, 2016; Veraart, 2016). This will be supported by a definition and theorization of what dignity means and how the dignity of Indigenous peoples is linked to their inherent right to self-determination and therefore requires consent for any activities that may impact their well-being and/or existence (Alfred, 2013; Doyle, 2015). The understanding of a dignity taking will move beyond just material and economic considerations of land to highlight the centrality of dignity as the "autonomy of self and self-worth that is found in every human being's right to self-determination", as affirmed under common Article 1 of the Human Rights Covenants and other sources of human rights law, as well as emerging international standards (Richland, 2016: 4). Therefore, if an indignity in this context is simultaneously the dispossession of land and the denial of self-determination (i.e. the material and immaterial dimensions of Indigenous land dispossession) resulting in dehumanization, infantilization and community destruction, the remedy to restoring the dignity of Indigenous peoples cannot solely be material compensation and it certainly cannot be a nation-building approach to reconciliation that seeks to integrate Indigenous peoples into the social fabric of the settler state (Short, 2005; Atuahene, 2016). It will be argued that restoring dignity to Indigenous peoples in Canada will require a process that affirms their humanity, reinforces their agency and strengthens their inherent right to self-determination. Additionally, it will be argued that restoring dignity to Indigenous peoples in Canada can also require seeing dignity through an environmental lense, since human dignity can be impaired when the surrounding natural environment is in jeopardy, especially when a peoples' physical and and social existence depends on it (Daly & May, 2016).

Indigenous people are supposed to enjoy all rights recognized in the normative framework of Indigenous peoples' rights, as well as in international and human rights law without discrimination, such as the right to self-determination to determine their own social, cultural and economic development. In theory, these frameworks should protect Indigenous people from dispossession (Doyle, 2015). The most accomplished affirmation of the Indigenous contemporary rights framework and where Indigenous peoples' right to unqualified self-determination is most clearly articulated, is in the UNDRIP, adopted in 2007 (Doyle, 2015; United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP], 2007). Some of the other rights outlined in the Declaration, which embody the right to self-determination are "the rights of Indigenous peoples [...] to their lands and resources, and to consultation in good faith in

order to obtain their free and informed consent prior to any large-scale economic activities that might affect their communities" (Burger, 2014: 6). Hinging on this, it can be said that recognizing the right of Indigenous peoples to self-determination is to affirm that they should make decisions on all matters that take place on or would affect their lands and/or people (Burger, 2014). Conversely, if no consent seeking process takes place by the state or by extractive industry companies prior to large-scale exploitative activities, which could affect the rights or interests of Indigenous peoples, this would be a violation of the free, prior and informed consent requirement and a denial of Indigenous peoples' right of self-determination.

In line with this and in response to the Canadian TRC's recommendation for all levels of government to implement the UNDRIP as the framework for reconciliation, the government has agreed to commit itself to this recommendation. This was demonstrated by Justice Minister Jody-Wilson Raybould's announcement in 2017 of the government's support for Bill C-262, the *United Nations Declaration on the Rights of Indigenous Peoples Act,* which acknowledges the application of the Declaration and calls for Canadian laws to be harmonized with it, including the stipulated FPIC standard (Tasker, 2017; Wilt, 2017; Hoekstra & Isaac, 2018).

It is based on this context that this dissertation seeks to investigate the transformative potential for the international principle of free, prior and informed consent, a central tenet of the United Nations Declaration on the Rights of Indigenous Peoples, to restore dignity to Indigenous peoples and thereby affirm their unqualified right to self-determination within the Canadian settler colonial state.

1.2 The Aim and Rationale for the Study

While the topic of reconciliation, which will be further discussed in chapter three, has permeated Canadian politics and news in recent years and has been embraced by all bodies of government, the process has been limited and slow in its capacity to meaningfully respond to the TRC's Calls to Actions and to assertions of self-determination from Indigenous peoples (NetNewsLedger, 2017). Some of the limitations and criticisms of Canada's reconciliation approach have been the neglect to realize the prevailing order of settler colonialism and the violence it continues to inflict upon Indigenous peoples in a multitude of ways, as well as the underpinning nation-building framework of reconciliation that often tries to restore justice by

including Indigenous peoples in the social and cultural fabric of the settler-state, undermining Indigenous peoples' assertions of inherent self-determination and autonomy from settler-culture (Short, 2005; Jacobs, 2010; Balint, Evans & McMillan, 2014; Lowman & Barker, 2015; Henry, 2015; Park, 2015; Matsunaga, 2016). Additionally, Canada's persistent commitment to extractive economic activities, which continue to eliminate and dispossess Indigenous peoples from their land, indicates that the relationship between the Canadian settler-state and Indigenous communities remains one based on dispossession, dehumanization and infantilization (Huseman & Short, 2012; Klein, 2013; Dhillon, 2016). Therefore, given the well documented limitations of reconciliation as of yet in the country, Canada's ongoing dispossession of Indigenous peoples and the government's recent commitment to align its national legislation with the UNDRIP, questioning and analysing the transformative potential of the FPIC standard to affirm the right to self-determination of Indigenous peoples in the Canadian context is pertinent and compelling.

While there is substantial literature on the role, potential and limitations of reconciliation in settler colonial states like Canada (Maddison, 2012; Coulthard, 2014; Winter, 2014; Balint, Evans & McMillan, 2014; Lowman & Barker, 2015; Henry, 2015; Park, 2015; Matsunaga, 2016; Macdonald, 2016) and while the continuity of settler colonialism as manifested through resource extraction and exploitation has been explored (Windsor & Mcvey, 2005; Jacobs, 2010; Huseman & Short, 2012; Hall, 2012; Preston, 2013; Atiles-Osoria, 2014; Willow, 2015; Barker, 2015; Willow, 2016; Short, 2016), I believe these two phenomena need to be more explicitly connected in order to highlight that the reconciliation process in Canada cannot be meaningful without addressing and redressing the ongoing indignity that is the dispossession and elimination of Indigenous peoples via resource extraction and exploitation, through a process that affirms and respects Indigenous peoples' unqualified right to self-determination. Therefore, by bringing these two phenomena into critical dialogue through an application of Atuahene's theoretical framework of *Dignity Takings and Dignity Restoration,* this dissertation will offer a deeper exploration of the potential role the FPIC requirement under the UNDRIP can have in restoring dignity to Indigenous peoples and therefore, transforming the prevailing settler colonial order in Canada.

1.3 Theoretical Framework

The framework of *Dignity Takings and Dignity Restoration* was introduced by Bernadette Atuahene based on her extensive ethnographic study, '*We Want What's Ours: Learning from South Africa's Land Restitution Program',* (2014) in order to help "better understand the material and immaterial dimensions of involuntary property loss, as well as what is required to fully remedy the loss" (Atuahene, 2016: 798). The framework has been applied to various contexts beyond South Africa and therefore has been modified and further developed to account for the particularities of those contexts (Richland, 2016; Veraart, 2016; Kedar, 2016; Pils, 2016).

The theoretical underpinnings which form the basis of Atuahene's framework stem from a combination of two areas of legal scholarship, which inform questions of metaphysical and material human worth (Richland, 2016). The first area pertains to Atuahene's use of the term '**takings'**, rooted in social contract theory questions of the rights of individuals to their material property, especially in relation to the protection by, and against, practices of state power (Richland, 2016). The second area reflects the concept of **'dignity'**, which refocuses the understanding of the infringement of individual and community property rights as having to do with more than just economic and material considerations, but rather extends towards the significance of "autonomy of self and self-worth that is reflected in every human being's right to individual self-determination" (Richland, 2016: 4). Thus, when these two concepts are combined it is understood that a taking of land can simultaneously be a violation of individual and collective rights to self-determination and therefore, a violation of an individual's or group's dignity (Richland, 2016).

In order to comprehend why Atuahene's framework is useful for conceptualizing the reality of Indigenous peoples' ongoing dispossession in Canada, some key terms need to be defined. Atuahene (2016) acknowledges that there are many different definitions of the term **'dignity';** however, the definition she employs is "that people have equal worth, which gives them the right to live as autonomous beings not under the authority of another" (800-801). This resonates with the above statement that dignity and self-determination are intimately connected.

For property confiscation to result in dignity takings, the process must involve dehumanization, infantilization and/or community destruction of the dispossessed (Atuahene, 2016). The first of these three concepts, **'dehumanization**', is defined as "the failure to

recognize an individual's or group's humanity" (Atuahene, 2016: 801), such as when the colonizers deemed the Indigenous peoples of what is now Canada, 'uncivilized savages', resulting in their loss of two-thirds of their land base since Confederation in 1867 (Nickerson, 2017).

'Infantilization' is defined as a dignity deprivation that is not an individual's or group's absence of human worth but a lack of autonomy, whereby their autonomy is limited due to a failure to recognize and respect their full capacity to reason and to self-govern (Atuahene, 2016). An example of this is the fiduciary relationship between the Canadian settler state and Indigenous peoples, whereby the *Indian Act*, a colonizing legal instrument, gave the federal government of Canada "exclusive jurisdiction over Indians and lands reserved for Indians [...] [as well as] the legal authority to replace traditional aboriginal forms of government with elected chiefs and band councils, with limited, delegated powers set out in the Act" (McNeil & the National Centre for First Nations Governance [NCFNG], 2011).

Lastly, '**community destruction'** is defined as when a "community of people is dehumanized or infantilized, involuntarily uprooted, and deprived of emotional and social ties that define and sustain them" (Atuahene, 2016:801). Atuahene (2016) goes on to explain that community destruction understood as such recognizes that when people are removed from their roots, such as cultural roots, spiritual roots, families, environment and learning systems they are deprived of essential sources of interdependence, and thus autonomy. There are many such examples of community destruction in Canadian settler society, such as instances involving state sanctioned industrial encroachment and extractive resource projects on Indigenous lands (Hall, 2012; Preston, 2013; Atiles-Osoria, 2013; Willow, 2016; Amnesty International, 2016; Barcia, 2017). A well known example of this was the construction of British Columbia's Kemano water diversion project in the 1950s, which was approved without any input from the Cheslatta T'En, the Indigenous community the most affected by the project (Windsor & Mcvey, 2005). The project resulted in the flooding of their ancestral lands and burial grounds, which displaced them and forced them to relocate to new reservations (Windsor & Mcvey, 2005). This is devastating not only due to the loss of land but for the importance of 'sense of place' to the Cheslatta T'En's, and most other Indigenous peoples alike, whereby Indigenous identity, language, emotional, cultural and spiritual well-being and overall existence are described as dependent, and even inseparable from their lands (Windsor & Mcvey, 2005). This 'place-based existence' and 'sense of place' will be further explained in the following chapter; however, for the purpose of this

definition it can be said that this project not only deprived the Cheslatta T'En of their land, but it deprived them of their ability and right to make decisions regarding what takes place on their lands and affects their peoples, thereby resulting in community destruction and depriving them of their dignity and right to self-determination.

Atuahene (2016) explains that in certain instances where state or non-state actors have seized land or property from an individual or a group, material repayment can be an appropriate response. However, if and when the appropriation of land by the state or non-state actors brings about dehumanization, infantilization and/or community destruction of the dispossessed, a response of material compensation is insufficient since both property and dignity have been taken (Atuahene, 2016). When this dual depriving harm, called 'dignity takings' takes place, a remedy of 'dignity restoration' "that seeks to provide the dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency", are necessary (Atuahene 2016: 818).

Veraart (2016) explains in their application of the framework to the case of confiscation of Jewish property in France and the Netherlands during World War Two, that Atuahene's concept of 'dignity taking' is context dependent and therefore can include, but are not limited to solutions that propose mechanisms of property restitution or other forms of compensation; it can be efforts to integrate and include dispossessed individuals or groups into the polity; or it can be participation and exercise of agency in the restoration process, therefore allowing the dispossessed to define the parameters of how they are made whole again (957; Richland, 2016).

The latter option resonates with Richland's (2016) application of the framework to the case of the separation of the Hopi Tribe in northeastern Arizona and western New Mexico from their sacred lands. It is argued that restoring dignity to the Hopi will not entail their integration into the polity because they, like many other Native American Nations, have always asserted their inherent sovereignty and political autonomy from the American settler state (Richland, 2016). Logically, Richland (2016) contends that restoring dignity to the Hopi will require processes that affirm and support their assertions of their sovereign right to self-determination as peoples, on their own terms, necessitating the Hopi to "define the terms of their dignity and how it needs to be restored" (19). The Hopi case, as well as the examples provided for the concepts of dehumanization, infantilization and community destruction above, also highlight that in the context of a settler colonial state, the indignities experienced by Indigenous peoples are

not once-off, unrelated events of dispossession, but rather inherent to the ongoing eliminatory logic and prevailing order of settler colonialism (Short, 2005; Wolfe, 2006; Park, 2015; Richland, 2016).

Mirroring the Canadian context and the ongoing reconciliation process, restoring dignity to Indigenous communities in a country where they have been continuously dispossessed of their land and dignity will not entail their integration into the social and cultural fabric of the Canadian settler state, nor financial compensation, because these outcomes undermine the aspirations and assertions of Indigenous peoples to self-determination and autonomy from settler society (Short, 2005). Additionally, these outcomes also neglect to acknowledge and address the ongoing settler colonial status quo that continues to dispossess Indigenous peoples of their land and their right to self-determination (Jacobs, 2010; Klein, 2013). A primary way this elimination and dispossession persist is through large-scale resource exploitation and environmental violence, as briefly demonstrated with the case of the Cheslatta T'En (Windsor & Mcvey, 2005; Alfred, 2013; Huseman & Short, 2012; Willow, 2016). Although there are many examples of resource exploitation projects that have proceeded without the consultation or consent of Indigenous groups in Canada, the 'tar sands' project, as mentioned earlier, will be highlighted, due to its sheer size and devastating impact on affected Indigenous communities (Preston, 2013; Short, 2016) The project will be discussed in more depth in the following chapter; however, for now, understanding that dispossession of land through large-scale resource exploitation not only physically deprives or removes Indigenous peoples from their land but also deprives them of their dignity, which is grounded in their self-determined right to make decisions on all matters that take place on, or would affect their lands and people (Willow, 2013; Alfred, 2013; Lowman & Barker, 2015; Doyle, 2015).

Indigenous peoples' right to unqualified self-determination is well evinced in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted by the General Assembly in 2007, and it is this Declaration that the Truth and Reconciliation Commission of Canada (TRC) recommended be implemented as the framework for reconciliation in the country (TRC, 2015; Doyle, 2015). As a critical part of Indigenous peoples' right to self-determination, the Declaration outlines the requirement of "consultation in good faith in order to obtain their free and informed consent prior to any large-scale economic activities that might affect their communities" (Burger, 2014: 6). This free, prior and informed consent (FPIC) requirement has come to be recognized as the standard of compliance for states and

industry seeking to carry out resource exploitation projects affecting the lands, territories and resources of Indigenous peoples to abide by, regardless of whether or not Indigenous people hold formal title over them (Doyle, 2015). Doyle (2015) highlights that the Declaration mentions FPIC six times, reflecting the recognition by states who signed the UNDRIP, that FPIC is, in principle (if not yet in practice), the minimum standard to be respected 'for the survival, dignity, and well-being of Indigenous peoples...” (142). In other words, in the context of resource exploitation projects on Indigenous peoples' lands, the FPIC requirement is imperative for the respect and restoration of Indigenous peoples' dignity and right to self-determination.

Therefore, this dissertation utilizes Atuahene's framework to conceptualize eliminatory resource exploitation projects and associated environmental violence as dignity takings in a settler colonial context, whereby Indigenous peoples are dispossessed of land, as well as their right to self-determination. Based on this, restoration of Indigenous peoples' dignity needs to consist of a process that affirms their humanity, reinforces their agency and therefore, strengthens their inherent right to self-determination. This dissertation will explore to what extent the UNDRIP's FPIC requirement, which affirms that Indigenous peoples should make decisions on all matters that take place on or would affect their lands and people, will meaningfully restore dignity to Indigenous peoples in the Canadian settler colonial context.

1.4 Methodology and Limitations

This dissertation consists of a narrative literature review with elements of empirical analysis to form a desk-based qualitative study, using a combination of primary and secondary sources. According to Griffith University's library guide (2018), narrative reviews “critique and summarise a body of literature about the thesis topic [... in order] to highlight significant areas of research, [... and] help to identify gaps in the research and help to refine and define research questions” (np). Chapters one to four of the dissertation consist predominantly of a narrative literature review, while chapter four will also make use of secondary empirical data from the Canadian context where the politics of UNDRIP's FPIC implementation is currently unfolding amidst the country's reconciliation process. The goal is to analyze whether UNDRIP'S FPIC requirement is an effective and meaningful solution to dignity takings in the context of imposed resource extraction activities. This will be based on overview of its regulatory and normative framework, as well as an analysis of its implementation and operationalization in practice in order to identify the strengths and limitations to its dignity restoring potential to Indigenous

peoples in Canada[1] (Given, 2008). The primary sources used come from, amongst others: government and organization publications, policy documents, speeches, research data and video recordings. The secondary sources include mainly scholarly books, journals and news articles. The sources and data included in the dissertation were deemed the most relevant due to how frequently they were cited in the literature and/or for their contribution of unique insight to the study.

A common limitation with desk-based qualitative studies and literature review methods, which apply to this dissertation, are that they consist of and depend entirely on previous publications and existing research, which can contain bias due to the specific positionalities and objectives of authors, researchers and contributors[2] (Bhattacherjee,2012). The subjective nature of these methods also influence the selection and exclusion process through which information is subsequently analyzed and conclusions drawn (Griffith University, 2018). Therefore, it is likely that some information has been excluded from this study; however it is necessary to realize that the subject of the dissertation is extensive and could draw on many broader arguments, such as the disproportionate violence extractive industry causes to Indigenous women and youth (Konsmo & Pacheco, 2016). While this conversation, and others alike are strongly connected to Indigenous peoples' continued dispossession of their land, the dissertation does not have adequate space to meaningfully engage with them. However, all sources included in this dissertation, the analysis produced and conclusions drawn were attempted in the utmost critical manner with the aim of fairly representing all views and arguments and to be as comprehensive as possible.

There is also a risk of over generalizing the analysis and conclusions in the dissertation. Therefore, it is important to remember that Indigenous peoples around the globe, as well as within Canada are not a homogenous group and have experienced and continue to experience the violence of settler colonialism in myriad ways, therefore how and whether FPIC restores dignity and affirms their self-determination right will certainly vary (Alfred & Corntassel, 2005).

[1] This is in line with the *SAGE encyclopedia of qualitative research methods* definition of empirical

[2] Bhattacherjee explains that qualitative analysis is 'heavily dependent on the researcher's analytic and integrative skills' and it is influenced by the researcher's predispositions and personal contextual knowledge' (2012:113)

Additionally, the final limitation that needs to be acknowledged and considered is my own subjectivity and positionality[3] as a settler-Canadian (Bhattacherjee, 2012). As a settler-Canadian, my identity has been significantly molded by the logic and structures of settler colonialism. Like many settler-Canadians, I uncritically thought of Canada as a fairly inclusive society with good intentions that prides itself on being a 'benevolent peacemaker', cooperative and multicultural (Regan, 2010). However, the truth about how Canada was built on the displacement, marginalization and destruction of the First Nations (FNs) was not a prominent part of the mainstream national narrative. The more I have read and the more I have learned, the more I have come to understand how settler colonial logic and violence persists in contemporary Canada and how the average settler-Canadian is complicit in maintaining the structures of settler colonialism. In other words, the more I have opened my eyes to the reality of the settler-Indigenous relationship in Canada, the more compelled I am to unpack and reject the myths that carry on shaping settler-Canada. While I continue to unlearn the false narratives settler colonialism has perpetuated; my interpretations, understandings, assumptions and analysis are nevertheless influenced by my subjectivity and positionality. However, emphasis and utilization of evidence and critical analysis guided the research and writing process, therefore the study should produce a certain level of reliable knowledge that can contribute important insight to the conversation of restoring dignity and affirming Indigenous peoples' right to self-determination in Canada.

1.5 Chapter Outline

The following chapter will discuss the key elements of settler colonialism, such as its underpinning logic of elimination and preoccupation with land acquisition (Wolfe, 2006). With an understanding of settler colonial logic, the chapter will highlight how this logic continues to eliminate Indigenous peoples through resource extraction projects in contemporary Canada (Huseman & Short, 2012; Willow, 2016). Before demonstrating Indigenous peoples' ongoing elimination and dispossession of their lands via resource extraction projects, specifically with an example of the Alberta tar sands project, the chapter will first discuss the importance of 'sense of place' to Indigenous peoples and how Indigenous peoples and settlers have very different worldviews, and thus different relationships to land (Windsor & Mcvey, 2005; Lowman & Barker, 2015). After an overview of the Alberta tar sands project, including its history and cultural, physical and environmental consequences, the chapter will conclude by arguing that imposed

[3] Ibid.

resource extraction projects continue to eliminate Indigenous peoples from their lands, and thus robs them of their dignity and right to self-determination, which can only be restored through a process that affirms and supports their inherent right to self-determination to make decisions on all matters that affect their land and people (Preston, 2013; Richland, 2016).

The third chapter will discuss the ongoing reconciliation process in Canada in order to highlight its onset and focus on the IRS system, as well as its limitations in terms of meeting Indigenous peoples' aspirations of self-determination due to its compartmentalization of the IRS system, the lack of engagement from non-Indigenous Canadians and its nation-building tendencies (Short, 2005; Park, 2015). The chapter will then highlight the TRC's important recommendation for Canada to adopt the UNDRIP as the framework for reconciliation in the country and will discuss the significance of the UNDRIP's FPIC requirement for its potential to realize Indigenous peoples' inherent right to self-determination and thus its potential for restoring their dignity in a settler colonial context (Morin, 2017; Gilmore, 2018). The chapter will then conclude by briefly discussing the current government's recent commitments to implement the UNDRIP, including its FPIC principle, into the national legislation, as well as discussing some of the contradictions and contestations that have arisen since the pronouncement of this commitment in order to consider what this could mean for the FPIC requirement's dignity restoring potential (Tasker, 2017; Morin, 2017; De Souza, 2018).

The final chapter of the thesis will explore the dignity restoring potential of FPIC by analyzing its parameters, substance and debates through an overview of its regulatory and normative framework at the international and regional levels, with a particular focus on the UNDRIP (Ward, 2011; Doyle, 2015). The final section of the chapter will analyze and discuss FPIC's implementation and operationalization in the Canadian context and will consider the influence of the local socio-political and legal context in shaping the FPIC requirement's interpretation and implementation in practice (Papillon & Rodon, 2017b; Schilling-Vacaflor, 2017). This will ultimately lead to a judgment on what the potential is for the UNDRIP's FPIC requirement to restore dignity to Indigenous peoples in Canada in the final conclusion.

2. Settler Colonialism and Resource Exploitation

2.1 Dispossession and the 'Logic of Elimination'

The settler colonial context is one that is consistently described as being dynamic across time and space; however, its specific and essential feature is territoriality (Wolfe, 2006; Park, 2015). Settler colonialism is understood to operate via a 'logic of elimination', a concept coined by Patrick Wolfe (2006) to explain the relationship between genocide and settler colonial inclinations. He argues that while settler colonialism has had and can have genocidal outcomes, it is not simply just another form of genocide because while it requires the 'elimination' of the owners of a territory in order for settlers to secure and maintain that territory, it does not specify how this elimination is to take place (Wolfe, 2006). It is in this way that settler colonialism is deemed to be a larger category than genocide and therefore the two should be differentiated (Wolfe, 2006). Settler colonialism's logic of elimination works to 'eliminate' and dispossess Indigenous peoples from their land in order to acquire permanent title and control over their territory (Park, 2015; Willow, 2016). This statement touches on two important points; the first is the notion of 'permanence', highlighting that settlers 'come to stay' and therefore, the invasion of settlers on Indigenous territory is not just a singular event when foreign European forces committed frontier killings, but rather a structural phenomenon, consisting of social, political and economic formations which endure and develop continuously over time (Lowman & Barker, 2015; Short, 2016). The second important point is the centrality of gaining control over land to the settler colonial project (Wolfe, 2006; Park, 2015; Grande, San Pedro & Windchief, 2015; Barker, 2015; Short 2016). This clarifies that the main reason for elimination is not "race (or religion, ethnicity, grade of civilization, etc.) but access to territory" (Wolfe, 2006: 388). Grande, San Pedro and Windchief (2015) explain that the logic of elimination differs from approaches of racial domination by highlighting Wolfe's (2006) comparison of the opposing ways Indigenous and Black peoples were racialized in the forming of the United States. While Black slaves were subject to an expansive taxonomy whereby any amount of genetic African ancestry made them Black, as well as their offspring, and therefore subject to slavery, which increased their owner's wealth; the opposite was true for Indigenous peoples (Wolfe, 2006; Grande, San Pedro & Windchief, 2015). For Indigenous people, "where they are *is* who they are" and thus "to get in the way of settler colonization, all the native has to do is stay at home" (Wolfe, 2006: 388). Therefore, their reproduction was unfavorable because it hindered settlers' access to land, in

which case ‘a calculus of elimination’ was formulated whereby, the more non-Indigenous ancestry one had, the more this threatened their indigeneity and the less they were considered to be Indigenous (Wolfe, 2006; Grande, San Pedro & Windchief, 2015).

While the elimination of Indigenous peoples can manifest as physical death, the logic of elimination “takes myriad guises at different historical moments and in different geographical spaces” (Park, 2015: 277). In other words, it does not function evenly and consistently across or even within a given time and space. Wolfe (2006) explains that settler colonialism has negative and positive elements, which Park (2015) specifies respectively as meaning destructive and creative. In its negative or destructive dimension, it aims to bring an end to Indigenous societies (Wolfe, 2006). In its positive or creative dimension, it works to organize the environment in order to build settler society on the expropriated land (Wolfe, 2006). Simply put, “[s]ettler colonialism destroys to replace” (Wolfe, 2006: 388). The positive dimension of settler colonialism’s logic of elimination highlights that settlers come to stay and that ““invasion” (to use Wolfe’s term (2006, p. 402)) is not an *event* with a definite historical end wherein destruction-replacement is either total or complete, but a *structure* that continuously organises settler society” (Park, 2015: 278).

Outcomes of this eliminatory organizing principle can include numerous associated biocultural assimilations (i.e. “encouraged miscegenation, the breaking-down of native title into alienable individual freeholds, native citizenship, child abduction, religious conversion, resocialization in total institutions such as missions or boarding schools”), as well as strategies of warfare, like the frontier killings, which can and have resulted in Indigenous peoples’ physical, social, spiritual, cultural and/or economic death (Wolfe, 2006: 388). Therefore, once settler colonialism is seen as a structure rather than an event, its historical continuity into the present becomes evident (Wolfe, 2006; Alfred, 2013). The logic of elimination, which once informed the frontier killings in early settlement years, has evolved and taken on different approaches, processes and institutional structures that continue to maintain and reinforce settler society’s development, practices and continued existence on the land, to their benefit and to the detriment of remaining Indigenous peoples (Wolfe, 2006; Alfred, 2013).

2.2 Eliminatory Resource Extraction

With an understanding that Indigenous peoples in North America were dispossessed of their lands by settlers looking to obtain and maintain permanent access to territory, it is equally

important to recognize the role international capitalist market forces played and continue to play in motivating this land-centered project (Wolfe, 2006; Willow, 2016). Huseman and Short (2012) explain that in the post-frontier era in the late 19th century, and following the Industrial Revolution (approximately 1760-1840), settlement remained very important; however, settler colonialism's eliminatory logic "became increasingly focused on the elimination of Indian peoples in order to gain access to their territory for the purpose of *resource extraction*" (222-emphasis in original). Settler colonies satisfied both capital's need for 'unoccupied' 'empty' land and labour to produce raw resource materials and settlers' pursuit of land as livelihood, linking the frontiers to their colonial metropoles and paving the way for fruitful extractive industry (Wolfe, 2006; Willow, 2016). Therefore, Indigenous peoples' lands across North America were seen as resource rich (i.e. profitable) and thus considered essential for the 'greater good' of economic expansion and at times, national security, subsequently resulting in their degradation and dispossession from Indigenous peoples (Willow, 2016).

Settler colonialism's logic of elimination and dispossession, as manifested through resource extraction, has been described as 'environmental colonialism' (Atiles-Osoria, 2014), 'extractivism' (Willow, 2016), 'invasive industrial interventions' (Huseman & Short, 2012), 'extractive imperialism' (Willow, 2016), 'ecocide' (Short, 2016; Lay et al., 2015; Higgins, 2015; Sheehan, 2016) and 'environmental violence' (Dhillon, 2016; Konsmo & Pacheco, 2016), among others. Regardless of the label used to describe this phenomenon, the literature generally agrees that despite shifts and variations in colonial strategies used over time, the primary manifestation of colonialism has been "the plunder and exploitation of the resources of the colonized territories", as well as the destruction of the environment and accompanying epistemologies (Atiles-Osoria, 2014: 7). Hall (2012) and Atiles-Osoria (2014) explain that resource extraction and exploitation have intensified and grown in the neoliberal era (approximately 1970s -1980s), where neoliberalism sees natural resources as 'consumer goods' or 'ecological commodities' in the market economy.

With a "western propagated largely fossil fuel dependent neoliberal economic model", the regarded need for more energy resources, which are almost always found on Indigenous peoples' lands, is deemed necessary by settler colonial states like Canada (Short, 2016: 40). A persistent global demand for energy resources has led the Canadian government, at the municipal, provincial and federal levels, to believe that the country "must rely more on natural resource extraction for the future of its economy" (Korteweg & Russell, 2012: 40) despite

Indigenous peoples' inevitable dispossession, the risk this poses to their physical, cultural and spiritual existence and the accompanying externalities of pollution and environmental contamination and degradation (Short, 2016). This speaks to the continuity of the settler colonial logic of elimination into the present, where it carries on organizing the Canadian settler-state and its connection to the land and its resources (Jacobs, 2010; Preston, 2013).

Understanding how settlers and Indigenous peoples relate to land differently is important for grasping what is at stake for Indigenous peoples and their lands as a result of settler colonialism's eliminatory resource extraction activities (Short, 2016; Jacobs, 2010). The following section will expand on certain principles of Indigenous, as well as settler social and cultural identity, specifically the significance of sense of place to Indigenous peoples' identity and existence (Alfred and Corntassel, 2005; Lowman & Barker, 2015).

2.3 'Sense of Place'- Differing Relationships to Land

All societies depend on place and a sense of place to form and sustain individual and collective identity and to understand the complexities of their surrounding reality (Windsor & Mcvey, 2005; Lowman & Barker, 2015). Windsor and Mcvey (2005) explain that 'place' signifies a powerful connection between an individual or group and a specific area, that has deep roots beyond present generations, making it central to human meaning, purpose and principles. In other words, "there is no possibility of understanding human existence except through an understanding of place" (Windsor and Mcvey, 2005: 147). 'Place', as akin to land, is important to both Indigenous peoples and settlers; however, the attachment and relationships each group has to land are critically different and it is this difference that impedes straightforward political or economic solutions to settler colonial dispossession and exploitation (Lowman & Barker, 2015).

Indigenous identities and nations are rooted, historically and currently, on living, dynamic connections with land and place (Lowman & Barker, 2015). Lowman and Barker (2015) explain that this is not a trope but a firm reality that is key to appreciating and respecting how Indigenous peoples understand themselves and how they make everyday choices. Indigenous peoples' relationships to land are far from simple, as they inform "intricate systems of thought and vast stores of knowledge, dynamic and durable structures of governance, ecological and resource management systems, and cultural and spiritual traditions of incredible power and profound meaning" (Lowman & Barker, 2015: 140). In other words, this land-based or 'place-based' relationship is the source of who Indigenous peoples are, as peoples, as it informs their

social practices and traditions, as well as their socioeconomic and political group cohesion, thus sustaining them physically, emotionally, spiritually and culturally (Windsor & Mcvey, 2005; Lowman & Barker, 2015). Additionally, while deep-rooted and profound connections to specific lands and sacred sites are common to Indigenous peoples throughout North America, Lowman and Barker (2015) explain that it is “particular relationships with land and specific places that differentiates Indigenous peoples from one another and also differentiates them from other groups in settler societies”(141). In other words, Indigenous peoples are not homogenous and the relationship one group shares with a specific place is unique to them and cannot be replicated by another group.

Therefore, it can be said that for Indigenous peoples in Canada and beyond, the way they think about the land and their experience of being on the land and relating to it are one and the same (Lowman & Barker, 2015). Essentially, there is no separation between ontology (nature of being) and epistemology (theory of knowledge) as they recognize the inherent and inseparable connection between land, mind and spirit (Lowman & Barker, 2015; Sium, Desai & Ritskes, 2012). Sium, Desai and Ritskes (2012) explain that a separation of land, mind and spirit or a divide between ontology and epistemology have been essential to the colonial project and to the way settler colonists relate to land. Settlers’ way of thinking about the land as disconnected from ontology has been referred to as ‘the settler problem’, which reflects a belief of superiority to nature, whereby use and exploitation of it is deemed acceptable (Windsor & Mcvey, 2005; Willow, 2012; Lowman and Barker, 2015). This has led some to argue that settlers’ sense of place is either seriously impaired or simply absent, especially in western contemporary societies (Windsor & Mcvey, 2005; Willow, 2012; Lowman & Barker, 2015).

The lack or absence of sense of place for settler western society is attributed to their culture of ‘instability, migration, and change’, which has made them “modernizers, creators of placeless deathscapes, [and] destroyers of wilderness in pursuit of profit” (Windsor & Mcvey, 2005: 149). Instead of having a sense of place, settlers are described to have more of a ‘sense of space’ since their relationship to land is more indirect, expressed through concepts like ‘property’ and understood as a foundation for security and source of opportunity (Windsor & Mcvey, 2005; Lowman & Barker, 2015). In other words, settlers have a more human-centric relationship to land, seeing it as a resource that can be made to give and provide material satisfaction through different methods and processes (Lowman & Barker, 2015; Klein, 2013).

This view is in complete opposition to Indigenous peoples' place-based existence of living with the land as a large community of diverse beings by balancing "what the people give to, and do for, the land, and how the land cares for and provides for the people" (Lowman & Barker, 2015: 153). Simply put, the key difference between how Indigenous peoples and settlers relate and function with regards to land and place is that Indigenous peoples are integrated into the land and hence have a relationship *with* it, versus settlers who are imposed upon the land and therefore have a relationship *to* it (Lowman & Barker, 2015).

It is the settler relationship to land that assists in producing and reproducing the settler colonial status quo in Canada. As seen by the state's resource exploitation and extraction projects, which threaten Indigenous peoples' 'placed-based' existence, it dispossesses them of their lands and obstructs their ability and right to make decisions regarding their land in the present and for the future (Alfred & Corntassel, 2005; Lowman & Barker, 2015; Willow, 2016).

A loss of place or sense of place for Indigenous peoples cannot be remedied by monetary compensation or replacement land because of what Windsor and Mcvey (2005) call 'constitutive incommensurable' value and 'high asset specificity' (158). This means that the value attributed to a specific place or land is unique to an Indigenous people and that "no one else can derive the same value from that land, nor can the displaced natives derive similar value from replacement land" (Windsor & Mcvey, 2005: 158-159). To assume otherwise would be to completely misunderstand or ignore the powerful relationship Indigenous peoples have with the land (Windsor & Mcvey, 2005). If the fact that Indigenous peoples' identities, as well as their physical, cultural and spiritual well-being are intimately connected to their relationship with the land is taken seriously, estrangement, degradation and/or destruction of that place, due to resource extraction and exploitation projects inevitably results in Indigenous peoples' physical, spiritual, cultural, and economic 'elimination' (Windsor & Mcvey, 2005; Wolfe, 2006; Park, 2015; Short, 2016).

While there are many examples of eliminatory resource extraction and exploitative projects in settler colonial Canada, the 'tar sands' project in the province of Alberta is a particularly illustrative and acute example of ongoing Indigenous dispossession of land, which the following section will discuss.

2.4 The Alberta Tar Sands

The ‘tar sands’ project is located in the Peace River, Cold Lake and Athabasca regions of northern Alberta, which is also part of the Treaty 8 region (Jacobs, 2010; Preston, 2013; Short, 2016). The Treaty 8 region extends over 840,000 km covering northern Alberta, northeastern British Columbia, western Saskatchewan, sections of the Northwest Territories and the Yukon (Preston, 2013; Willow, 2016). Treaty 8 was signed in 1899 by the Cree and Dene peoples and the Canadian government, motivated by the potential for hydrocarbon extraction, informed by reports that oil existed in the region (Preston, 2013; Willow, 2016). Before delving deeper into the history of the region, and of Treaty 8 specifically, it is important to discuss the history of the treaty-making process in Canada in order to draw attention to the different interpretations of treaties to Indigenous peoples and to settlers and to highlight the ensuing dispossession of land from Indigenous peoples that occured (Short, 2016; Huseman & Short, 2012).

The signing of the Treaty of Paris in 1763 ended the Seven Years War between Great Britain and France, which resulted in France having to hand over their claimed territory in North America to the British (Huseman & Short, 2012; McNeil, 2013; Akhtar, 2010). In the following months, the British created the Royal Proclamation, a document outlining the Crown’s intention to ‘protect’ Indigenous peoples’ land rights from settlement activity (Land, 2017; McNeil & NCFNG, 2011; McNeil, 2013). A primary stipulation of the Proclamation was the prohibition of sale or surrender of Indigenous peoples’ lands for settlement without their full consent and the transfer of land could only be on a nation-to-nation basis, from a specific Indigenous nation to the British Crown (Land, 2017; Iacobucci et al., 2016). In other words, only the British Crown could obtain more territory from Indigenous nations and the Proclamation essentially created a formal process for such land transfers, sometimes referred to as ‘land surrender treaties’ or the ‘numbered treaties’ (Huseman & Short, 2012; McNeil & NCFNG, 2011; McNeil, 2013). However, Indigenous nations and the Crown were already well accustomed to the use of treaties for the formalization of nation-to-nation relations prior to the Royal Proclamation (McNeil & NCFNG, 2011; Doyle, 2015). Doyle (2015) explains that prior to 1763, treaties recognized each signing party’s sovereign independence, without interference from the other and were based on Indigenous legal traditions “premised on principles of good faith, justice, friendship, solidarity, equality, and unity, mandating respect for indigenous territories, while guaranteeing mutual support and cooperation in times of need among treaty parties bonded together as brothers in

perpetuity" (40). This highlights that for Indigenous peoples, treaties embodied and established sacred and intergenerational, mutually beneficial trust-based relationships rather than isolated, one-off agreements (Doyle, 2015).

Throughout the history of treaty agreements, Indigenous peoples always held that any consensual treaty agreement they entered into, signified an assertion of their inherent self-determination and sovereignty rights and definitely did not constitute a surrender or transfer of their sovereignty over their lands and resources (Doyle, 2015; McNeil & NCFNG, 2011). However, according to McNeil and the NCFNG (2011) and Doyle (2015), after 1763 and the defeat of the French in the Seven Years War, the British no longer required the allyship of Indigenous nations, which led them to make drastic changes to their 'indian policy', and reduced the significance they previously accorded to Indigenous perspectives on treaty obligations. After 1763, the British Crown began to interpret treaties as the extinguishment of Indigenous peoples' underlying title to their lands and a cession of their sovereignty, thus looking upon them as subjects who were under Crown jurisdiction, even if this interpretation was not shared by the Indigenous treaty parties (McNeil & NCFNG 2011; Doyle, 2015). The Crown typically sought the signing of treaties when settlement to a particular area had started or was planned for the near future, and when they wanted to clear the land for 'development' and exploitation purposes (Huseman & Short, 2012). As previously mentioned, the latter motivation reflects the Crown's reasoning for initiating the signing of Treaty 8, which is the treaty region where the 'tar sands' project is located.

2.4.1 Treaty 8

The existence of oil in northern Alberta has been known since as early as 1793, indicated by remarks of explorers stating that "tar and oil could be found oozing from the banks of the Athabasca" (Daniel, 1999: 58 quoted in Huseman & Short, 2012: 218). However, it was not until the 1870s that the Department of Interior and the Geological Survey Department confirmed its existence in the region, which convinced the government that a treaty was needed to secure the territory (Huseman & Short, 2012; Preston, 2013; Willow, 2016). According to Preston (2013) while the discovery of gold in the Klondike region of north-western Canada also contributed to the government's eagerness to secure control of the area, it was predominantly the reports of the 'inexhaustible supplies' of oil from the tar sands that prompted them to commence treaty negotiations with the Indigenous Cree and Dene peoples of the Athabasca region- thus initiating efforts to extinguish these peoples' title to their traditional territories.

It is documented that negotiations for Treaty 8 began in 1870, yet it was not signed until 1899 (Huseman & Short, 2012; Preston, 2013; Willow, 2016). Negotiations were a drawn out process for a number of reasons, one of them being that the prairie treaties were already a costly burden to the government, so they were not in a rush to enter into yet another potentially expensive treaty (Huseman & Short, 2012). However, this became less relevant over time as the government came to conclude that Treaty 8 would not be nearly as costly as the numbered treaties in the prairie regions (Huseman & Short, 2012). This position was based on the opinion that the Cree and Dene peoples of the North would not be required to give up most of their land, unlike the Indigenous peoples from the prairies, and it was therefore thought that they would still be able to live and carry out their hunting, fishing and trapping lifestyle on the remaining lands of the north (Huseman & Short, 2012). This meant that the government would not have to establish a welfare safety net, nor would it have to pay a great deal in terms of compensation to the affected Cree and Dene peoples for their ceded land (Huseman & Short, 2012).

Another reason for the lengthy Treaty 8 negotiations was that the affected Cree and Dene peoples refused to sign the treaty out of fear that they would lose their ability to hunt, fish and trap and asserted that they "refused to be treated like Prairie Indians, and to be parked on reserves" (Huseman & Short, 2012: 219). This led the government negotiators and treaty commissioners to make an array of false promises, 'reassuring' the affected Cree and Dene that their Indigenous ways of life would be protected, that they would be guarded from settlers and that the reserves would not confine them (Preston, 2013). Essentially, it was promised that they would remain as free after they signed the treaty as they were before entering into it and that signing the treaty was really in their own interest and to their advantage (Huseman & Short, 2012). Commissioners who were reporting on the treaty negotiations admitted that the Indigenous groups would have never signed the treaty if these false assurances had not been made (Huseman & Short, 2012). The Cree and Dene signatories took these manipulative assurances at face value and did not understand the treaty to mean an extinguishment and surrender of their land title and rights (Huseman & Short, 2012). Even the reserves that they were subsequently confined to were subject to encroachment, as they could be "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes", highlighting the British Crown's assertion of underlying sovereignty of all land (Short, 2016: 125). In other words, settlers' property and economic interests were always prioritized over Indigenous peoples' interests to maintain their traditional practices and connections to their lands (Short, 2016). The utilization of Treaty 8 to extinguish and dispossess the affected Cree

and Dene peoples of their lands and rights, as well as the stipulated authority to appropriate designated reserve land, enabled the expansive tar sands resource development to grow in this region (Huseman & Short, 2012).

2.4.2 Cultural and Environmental Consequences

Research and development of the tar sands began in the 1900s with production officially commencing in 1967 by Suncor Energy Inc. who were producing an estimated 12,000 barrels per day at the time (Huseman & Short, 2012). However, it was not until the late 1990s and early 2000s that the tar sands became a significant source and viable option for American energy security and reliance (Short, 2016). Initially, the sands were comparably more expensive than other oil sources due to their related arduous extraction and production processes; however, when the price of oil was reaching almost $150 per barrel, its high cost was no longer an impediment (Short, 2016). Today, Canada has strategically become the largest foreign oil source for the United States, which has led to an increase and expansion in oil sands production activities and therefore, an acceleration of elimination and dispossession of Indigenous peoples and environmental degradation (Short, 2016; Willow, 2016).

The tar sands project is an unparalleled case of eliminatory extraction, which has earned it the title of ‘the most destructive project on earth’ (Willow, 2016: 10). The use of the term ‘tar sands’ rather than ‘oil sands’ (the latter typically employed by government and industry) is intentional in order to accurately characterize the sands for their bituminous consistency (Huseman & Short, 2012). Huseman and Short (2012) explain that the sands are “a naturally occurring mixture of sand, clay, water and bitumen- an exceptionally viscous and dense form of petroleum [... where] oil must be extracted by strip mining or [...] by ‘in situ’ techniques, which reduce the viscosity by injecting steam, solvents, and/or hot air into the sands” (220-221). This kind of oil production yields immense environmental damage and ecosystem destruction due to the massive amounts of natural gas used in the production stages, which generates significantly higher levels of greenhouse gas emissions compared to the amount emitted during regular oil production processes (Huseman & Short, 2012; Willow, 2016). Additionally, this unconventional method of oil production also requires substantially more fresh water, drained from the Athabasca River system in this case, in order to create the steam necessary for thinning-out the extracted oil (Huseman & Short, 2012; Willow, 2016). This process creates enormous, generally unlined, ‘tailings ponds’ or ‘waste lakes’ that cover an area so large they can be seen from space, and they are where “over 480 million gallons of contaminated toxic waste are dumped

daily" (Huseman & Short, 2012: 221). These tailings ponds have been leaking oil and contaminated discharge into the Athabasca river since early production stages, where Suncor even admitted in 1997 "that their Tar Island Pond 'leaks approximately 1,600 cubic metres of toxic fluid into the Athabasca River everyday'" (Huseman & Short, 2012: 224). This constant leakage, in addition to the periodic breaking and spilling of pipelines that are connected to the project, have consequently resulted in chronic pollution and poisoning of the lower Athabasca River, Lake Athabasca and surrounding land base (Huseman & Short, 2012). The devastating ramifications of this poisoning and pollution is only compounded by the physical depletion and alteration of the environment with the draining, as well as diversion of fresh water sources, the removal of trees and vegetation from the Boreal forest, and the creation of massive 60 metre open mining pits (Huseman & Short, 2012).

The physical transformation and pollution of the area due to tar sands extraction activities have had and continue to have devastating consequences for the Indigenous peoples nearby (Jacobs, 2010; Willow, 2016). Surrounding Indigenous communities have persistently vocalized that the water quality, meat quality and the availability of wild fish and game have all been compromised and that their surrounding ecosystem, of which they are a part of, is being destroyed (Jacobs, 2010; Huseman & Short, 2012). Occurring alongside the destruction of their ecosystem has been the inevitable deterioration of their peoples' health and well-being (Tyas, 2014). There have been several medical and scientific studies conducted that prove the direct connection between the oil sands created environmental contamination and the rapid increase of serious illnesses in surrounding Indigenous communities (Tyas, 2014; Alook, Hill & Hussey, 2017). The first health professional to draw public attention to the "disturbingly disproportionate levels of diseases such as leukemia, lymphoma, lupus, colon cancer, and Graves disease" was Doctor John O'Connor, a local family physician in the Fort Chipewyan area, in 2006 (Huseman & Short, 2012). According to his report, the abnormally high occurrence of these diseases in nearby Indigenous communities were a direct result of tar sands related industrial activities, such as bitumen extraction, which is a serious emitter of contaminants like "carcinogenic PAHs (polycyclic aromatic hydrocarbons), and heavy metal arsenic, mercury, cadmium, and selenium" (Tyas, 2014: np). These contaminants have found their way into the surrounding sediments and waterways, thus contaminating water sources and traditional food sources (Huseman & Short, 2012).

Doctor O'Connor's report received considerable backlash from the federal and provincial government, which ultimately led the contents and findings of his report to be dismissed and his credibility to be attacked for 'causing undue alarm' (Huseman & Short, 2012: 225). However, thanks to the persistent lobbying of health officials and community members in Fort Chipewyan, Alberta Health Services eventually conducted a new study investigating cancer rates in the area and confirmed Doctor O'Connor's original findings that the "the number of cancer cases observed in Fort Chipewyan were in fact 'higher than expected for all cancers combined and for specific types of cancer, such as biliary tract cancer and cancers in the blood and lymphatic system'" (Huseman & Short, 2012: 225). Despite this, the study did not conclude that the increase in cancer and other disease levels were due to tar sands related pollution and contamination (Huseman & Short, 2012). Instead, the study attributed the observed increase of such diseases to mere 'chance', increased detection, and/or an increase in risky lifestyle and occupational choices in the community, which were argued not to warrant trepidation or require immediate action, but rather, ongoing monitoring and analysis (Huseman & Short, 2012). These findings were criticized and largely rejected by the affected Indigenous communities for failing to consult them about their experiences, their local knowledge about their ecosystems and for employing questionable research methods (Huseman & Short, 2012; Tyas, 2014).

Huseman and Short (2012) inform that since Doctor O'Connor's 2006 report, there have been several other publications such as a 2007 report by Kevin Timoney's, an ecologist who represented the Nunee Health Board Society, and a 2010 report published in the *Proceedings of the National Academy of Sciences* by Kelly et al.'s, a group of biologists, that confirmed Doctor O'Connor's initial findings and supported the position that both Alberta's provincial government and the federal government have continuously and intentionally ignored scientific and medical proof that rising levels of diseases in nearby Indigenous communities are directly associated with environmental pollution and contamination from oil sands production. Willow (2016) explains that while many of the surrounding Indigenous people continue to hunt, fish and trap despite the risk of contamination, the tar sands project has been steadily forcing the affected First Nations to cease their now life threatening traditional subsistence practices and diets, as well as their related cultural values. This ultimately prevents them from having their necessary relationships with the land and thus, preventing them from being who they are as Indigenous peoples.

2.5 Resource Extraction as Dignity Taking

It can therefore be argued that settler colonialism's 'logic of elimination' continues to inform the elimination and dispossession of Indigenous peoples from their land in present day Canada, through large-scale resource extraction and exploitation, like it once informed the frontier killings and assimilation policies (Huseman & Short, 2012; Short, 2016). The tar sands case has demonstrated that elimination and dispossession not only means the physical removal of Indigenous peoples from their land, in order to clear space for the extractive projects, "but also by way of the concomitant toxic by-products that put water supplies, land cover and wildlife at serious risk" (Huseman & Short, 2012: 223). Both of these dimensions of elimination and dispossession critically threaten the lives, identities, cultures, health, and general autonomy of Indigenous peoples due to the unique and specific relationships they have to their lands, which sustain them physically, culturally and spiritually (Huseman & Short, 2012; Lowman & Barker, 2015). It is in this way that elimination and dispossession via resource extraction and exploitation not only means physical death but also social, cultural and spiritual death of Indigenous peoples (Park, 2015).

The Indigenous peoples of Treaty 8, like many other Indigenous peoples throughout Canada, who are suffering ensuing physical and cultural destruction due to the dispossession and environmental devastation of resource extraction activities, did not consent to the vast majority of these eliminatory projects (Huseman & Short, 2012; Willow, 2016). When the Cree and Dene peoples signed the Treaty in 1899, they did not understand or agree for it to mean an extinguishment of their title and sovereign rights to make independent decisions on matters affecting their lands, livelihoods, and future generations (Willow, 2013). To them, their signing of the treaty, and any treaty for that matter, indicated their assertion of inherent self-determination and sovereign rights (Doyle, 2015). The tar sands project and its associated consequences, like most other government and industry imposed resource extraction projects, "have all been made possible by the outright dismissal of Indigenous treaty rights, self-determination and sovereignty" (Preston, 2013: 46-47).

Therefore, when Indigenous people are dispossessed of their land through government and industry imposed resource extraction projects, they experience more than just economic and material deprivation, and more than political injustice (Alfred, 2013; Richland, 2016). This dispossession literally prevents them from being who they are as Indigenous peoples and therefore, deprives them of their dignity, which is rooted in their equal worth and right to self-

determination (Alfred, 2013; Atuahene, 2016). In other words, externally imposed resource extraction projects not only deprive Indigenous peoples of their land; they simultaneously violate their rights to self-determination by dehumanizing them (e.g. poisoning them and their land bases) and by infantilizing them (e.g. by not meaningfully consulting or obtaining their consent prior to commencing resource extraction development) and therefore, robbing them of their dignity (Atuahene, 2016; Richland, 2016).

In order for dignity to be restored to Indigenous peoples in Canada, a process that affirms and supports their assertions of their inherent right to self-determination as peoples to make decisions on all matters that take place on, or would affect their lands, resources and peoples is required (Willow, 2013; Richland, 2016). The following chapter will discuss the ongoing reconciliation process in settler colonial Canada in order to reveal its priorities, limitations and potential for restoring dignity to Indigenous peoples in the country. It will also introduce the potentially transformative free, prior and informed consent requirement stipulated in the United Nations Declaration on the Rights of Indigenous Peoples.

3. Reconciliation in Canada

Initially, the political concept of reconciliation surfaced in countries undergoing transition from authoritarian rule towards democratization (Johnson, 2011; Clark, De Costa & Maddison, 2016); however, it has since emerged as a key political term in settler colonial states seeking to "secure harmonious relationships and to resolve historical and ongoing conflict between Indigenous and non-Indigenous peoples" (Sheppard, 2013:3). Since reconciliation related projects and efforts have and continue to take place in different contexts internationally (e.g. Uganda, South Africa, Australia, Colombia, Canada, among others), the concept remains ambiguous and lacks definitional consensus (Schaap, 2008; Clark, De Costa & Maddison, 2016). It is for this reason that having an understanding of the specific context of where a reconciliation process is taking place is crucial because, the process' significance and purpose will inevitably vary depending on the context (Seils, 2017). However, despite contextual differences, there is a general consensus that in order for a society to reconcile, "they must uncover in precise detail, who did what to whom and why and under whose orders" (Short, 2005: 268). The most prevalent institutional mechanism used to uncover and disseminate these truths have been truth commissions (Short, 2005). Canada's commission, officially known as the Truth and Reconciliation Commission of Canada (TRC), was not initiated due to political

transition, since the country is already an established liberal democracy. The commission was created rather, by cause of the overwhelming amount of lawsuits brought forward by Indian Residential School (IRS) survivors against those who created and administered the 'school' system (i.e. the federal government of Canada and Christian churches), which ultimately resulted in the negotiation of a class-action settlement (Stanton, 2011).

3.1 The Indian Residential Schools System

The IRS system in Canada was an institutional system and policy created to obstruct Indigenous peoples' abilities to maintain and transfer their distinct cultural, spiritual and governing practices by aiming to assimilate them into the cultural fabric of the settler state (James, 2010; Stanton, 2011; Park, 2015). The schools were in operation for over a century (mid-1880s to 1996) throughout all of Canada, with the exceptions of Prince Edward Island, New Brunswick and Newfoundland (Stanton, 2011; Park, 2015). An estimated 150,000 Indigenous children were separated from their families and communities and were forced to attend these government funded, church run institutions that forbade them to speak their native tongues, or to maintain their spiritual and cultural connections and practices (James, 2010; Stanton, 2011). Additionally, widespread disease and malnutrition, as well as physical and sexual abuse, were rampant in these schools, which resulted in disturbingly high mortality rates whereby some schools had death rates of over 60 percent (James, 2010; Stanton, 2011; Park, 2015). Even though the IRS system is no longer in operation, the repercussions of these institutions continue to have intergenerational consequences for Indigenous communities "including the loss of culture, language and traditions, the destruction of parenting skills, family breakdown and abuse, high rates of suicide and substance abuse" (Park, 2015: 275). The IRS has been condemned as an institution and policy of cultural genocide and is considered to be the country's greatest national shame (Park, 2015; Stanton, 2011). However, it is important to highlight that IRS is not an isolated or exceptional shameful incident in Canadian history. The IRS is but one part of Canadian settler society's wider agenda of colonial destruction and logic of elimination, as discussed in the previous chapter (Wolfe, 2006; James, 2010; Nagy, 2013; Park, 2015). Despite this fact, the IRS system and its legacy have been the focus of the reconciliation process in Canada (Sheppard, 2013; Matsunaga, 2016).

3.2 The Indian Residential Schools Settlement Agreement

Press reports and police investigations related to the widespread violence and abuse taking place in the IRS began in the late 1980s and increased in the 1990s when Chief Phil Fontaine, then Grand Chief of the Assembly of Manitoba's Chiefs and later, the National Chief of the Assembly of First Nations, shared his IRS abuse experience with the public (Henderson & Wakeham, 2009; Stanton, 2011). Henderson and Wakeham (2009) explain that this led the Assembly of First Nations (AFN) to begin speaking and working with IRS survivors in order to develop the collaborative report on approaches to healing for Indigenous peoples and their communities. The report was called *Breaking the Silence: An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals*, and was eventually published in 1994 (Henderson & Wakeham, 2009). The detailed breadth of what happened at IRS and its ongoing calamitous intergenerational effects on Indigenous communities also became increasingly documented and acknowledged with the creation of the Royal Commission on Aboriginal Peoples (RCAP) in 1991 and their large-scale project to thoroughly review the relationship between the Canadian settler state and the Indigenous peoples in the country (Henderson & Wakeham, 2009; Stanton, 2011). Stanton (2011) explains that RCAP conducted public hearings in 96 communities, where many IRS survivors came forward throughout the 178 day hearing period to give their testimonies about their experiences at the schools and the abuses they suffered. RCAP's work thus preceded the TRC of Canada at being the first country-wide attempt to listen and document IRS survivor experiences, which proved to be very important for the many older IRS survivors who did not live to share their experiences with the TRC (Henderson & Wakeham, 2009).

RCAP published their final report in 1996, in which they called for a public inquiry into IRS (Henderson & Wakeham, 2009; Stanton, 2011). However, rather than meeting RCAP's demands for a public inquiry, in 1998 the federal government responded instead by developing the *Gathering Strength: Canada's Aboriginal Action Plan* and giving a 'Statement of Reconciliation', (Henderson & Wakeham 2009; Stanton, 2011). The plan was essentially an allocation of $350 million for the creation of an organization called the Aboriginal Healing Foundation (no longer in operation), dedicated to mobilizing and encouraging community healing projects (Henderson & Wakeham, 2009; Park, 2015). The 'Statement of Reconciliation', Henderson and Wakeham (2009) explain, was made at a luncheon on Parliament Hill by former Minister of Aboriginal Affairs Jane Stewart, where she expressed regret on behalf of the

government of Canada for their past actions and treatment of all Indigenous peoples and for the consequences this has had on their peoples. This statement was found to be an incomplete apology and many Indigenous rights advocates and organizations, such as the Native Women's Alliance of Canada, formally refused to accept it (Henderson & Wakeham, 2009; Stanton, 2011).

The government's limited response to RCAP's recommendation for a public inquiry into IRS resulted in deep and growing frustration by IRS survivors and their families, which led many of them to pursue legal action for redress against the government and responsible churches for the abuse they endured (Henderson & Wakeham, 2009; Stanton, 2011). The overwhelming amount of lawsuits the government and the church were facing led them to negotiate an alternative class action settlement with IRS survivor representatives, Inuit leaders and the AFN (Henderson & Wakeham, 2009; Stanton, 2011). *The Indian Residential Schools Settlement Agreement* (IRSSA) was officially established in late summer of 2007, by which point 14,903 IRS survivors had filed lawsuits against the government and responsible churches (Henderson & Wakeham, 2009; Stanton, 2011; De Costa, 2009). IRSSA stands as Canada's largest class action settlement and aimed to address and remedy the legacy of IRS and to support "healing, education, truth and reconciliation and commemoration" (IRSSA Preamble C quoted in Park, 2015: 275). IRSSA comprised of several components, beginning with the Common Experience Payment, which was "an individual reparations mechanism that compensated survivors at a rate of $10,000 for the first year of IRS attendance and $3000 for each subsequent year of attendance for harms that would not normally be recognised by the courts such as loss of language and culture" (Park, 2015: 275). Next, there was an Independent Assessment Process, another individual reparations mechanism where survivors who experienced sexual or serious physical violence could apply for additional compensation (Park, 2015; Henderson & Wakeham, 2009). Furthermore, there was $125 million dedicated to healing programs for a five year period, considered to be a type of collective reparations, as well as another $20 million dedicated to commemorative community initiatives (Park, 2015). Lastly, and most relevant to this dissertation, was the establishment of the five-year long Truth and Reconciliation Commission (TRC), "to contribute to truth, healing and reconciliation" (IRSSA Schedule N quoted in Park, 2015: 275).

3.3 The TRC and a Broader Reconciliation Critique

In 2009, the TRC began its work of archival research and statement-gathering at public national and community level hearing events where testimonies of IRS survivor experiences were shared (De Costa, 2009; Denis & Bailey, 2016). Guided by the central mandate to document and make the truth about the IRS widely known and commemorated, while simultaneously participating in and encouraging reconciliation between Indigenous peoples and non-Indigenous peoples in what is now known as Canada, it is clear that the TRC's primary objectives were largely centered on the historic harms of IRS and its legacy (Sheppard, 2013).

This narrow focus of the TRC and the broader reconciliation process on IRS and its legacy led several Indigenous activists, academics, IRS survivors and other critics to emphasize that the residential schools and the reconciliation process must not be compartmentalized as something separate from the larger project of ongoing settler colonialism that continues to eliminate and dispossess Indigenous peoples of their land and therefore, rob them of their dignity (De Costa, 2009; Alfred, 2009; Nagy, 2013; Park, 2015; Atuahene, 2016). This compartmentalization of IRS, Park (2015) explains, "undermines meaningful engagement with an expansive concept of reconciliation that would address disparities between settlers and Indigenous populations and that would centrally address questions of governance and land expropriation" (276). Therefore, a broader approach to reconciliation that focuses on deep rooted and widespread societal issues of structural and systemic injustices is crucial because this would direct efforts towards meaningful decolonization and processes that strengthen Indigenous peoples' right to self-determination; thus, addressing the underlying source of Indigenous oppression, rather than requiring Indigenous peoples to become reconciled with colonialism (Schaap, 2008; Alfred, 2009; Sheppard, 2013; Denis & Bailey, 2016; Simpson, 2016). As Simpson (2016) reminds us, the IRS system was "just one part of an ugly and ongoing strategy to destroy [I]ndigenous nations that included policies such as the Indian Act, fraudulent treaty processes and land theft, the criminalization of [I]ndigenous dissent and resistance, gender violence and racism" (np). Therefore, a narrow approach to reconciliation that compartmentalizes IRS assumes that the violence and harm associated with the schools is something exceptional in Canadian history and something of the past that society has now overcome. This creates an erroneous demarcation between the past and the present, allowing settler-Canadians to retain their fabricated 'peaceful' and 'kind' identity-narrative and allowing them to ignore the continuity of settler colonialism, their complicity in its preservation and the

violence it continues to inflict on Indigenous communities (Regan, 2010; Nagy, 2013; Sheppard, 2013; Park, 2015). Furthermore, by compartmentalizing IRS and therefore disregarding the continuity of settler colonial harms perpetuated against Indigenous peoples, as evinced by imposed resource extraction projects like the tar sands, allows for settlement and colonial dispossession of land, of which Canada is founded on, to be glossed over; thus serving to legitimize the Canadian settler colonial state and to maintain the status quo (Short, 2005; Sheppard, 2013; Winter, 2014; Balint, Evans & McMillian, 2014; Henry, 2015; Park, 2015).

In 2015, the TRC published its final report in two stages (the first in June and the second in December), which details 94 'Calls to Action' for change in all societal spheres such as health, education, language and culture, child welfare, as well as the justice system, with responsibilities intended for all social positions, primarily for settler-Canadians and their governments and institutions (TRC of Canada, 2015; Denis & Bailey, 2016). However, despite six years of national and community hearings, the widely-publicized final report of the TRC, and the major influence the report and its recommendations played in the 2015 federal election campaigns, "nearly one in five settler-Canadians remain[ed] oblivious to the TRC" and its work in 2015 (Denis & Bailey, 2016: 138). This finding is even more discouraging than the 2008 nationwide benchmarking survey where over 1,500 randomly selected Canadians anonymously participated in phone interviews on the subject of awareness about the IRSSA and the TRC's work and only one-third alleged to have some kind of knowledge about the Settlement Agreement, the TRC, and issues related to its work (De Costa, 2009). Furthermore, 60 percent of the participants could not list a single consequence of the IRS system on Indigenous peoples (De Costa, 2009). This lack of awareness or engagement by non-Indigenous Canadians in the reconciliation process highlights the issue of societal engagement (Schaap, 2008; De Costa, 2009; Alfred, 2009; James, 2010; Sheppard, 2013; Henry, 2015). Even before the TRC began its work, there was an awareness by Indigenous activists, scholars, IRS survivors and other critics that there was an indispensible need for the commission to compel non-Indigenous Canadians to engage and care about the reconciliation process, a process that they did not set in motion (Regan, 2010; Stanton, 2011; Sheppard, 2013; Henry, 2015). Sheppard (2013) and Stanton (2011) explain that in other contexts where truth commissions and reconciliation processes arise out of regime change or peace accords, there is typically widespread societal engagement. However, in a context such as Canada's where the TRC and reconciliation process arose out of protracted litigation by IRS survivors, rather than by broad public societal distress about IRS survivors and their well-being, it is clear that there is less impetus from

settler-Canadians who have and continue to benefit from colonial injustices and the status quo to participate or even acknowledge the reconciliation process (James, 2010; Stanton, 2011; Sheppard, 2013). According to Alfred (2009), this persistent and intentional ignorance of settler-Canadian society about their historical and current relationship with Indigenous peoples, as well as their broad unawareness about the reconciliation process in general, diminishes the prospect of true and meaningful reconciliation between Indigenous peoples and settler-Canadians.

Another common critique of reconciliation processes and their aspired outcomes in settler colonial contexts is when they are conceptualized in terms of 'liberal social solidarity' or 'democratic reciprocity' (Short, 2005). These conceptualizations are linked to the 'politics of recognition' and 'nation-building' frameworks and are problematized and rejected for failing to transform the ongoing colonial relationship between Indigenous peoples and settler colonial states, such as Canada, by merely serving to maintain the existing settler colonial status quo (Coulthard, 2007). For example, these frameworks tend to lump Indigenous' claims against settler states, as well as their aspirations of self-determination with minority complaints; thus resulting in the response of increasing Indigenous peoples' recognition *within* the dominant liberal state, rather than necessitating processes of transformation that affirm their humanity and reinforce their right to self-determination (Short, 2005; Richland, 2016). This is problematic because Indigenous peoples, unlike minority groups, are unique culturally in terms of their defining relationship with their lands, to which, most never voluntarily ceded along with their political autonomy and sovereignty (Short, 2005). As dispossessed peoples who continue to challenge the legitimacy of the settler-state and vocalize their inherent right to self-determination, a reconciliation process that seeks to recognize and incorporate Indigenous peoples into the dominant settler state and to "achieve a shared comprehensive vision … and mutual forgiveness", only serves to further legitimize the dominant settler state and disregard Indigenous peoples' assertions of self-determination and overall autonomy from settler society (Short, 2005: 274). However, the problematic nature of these two conceptions of reconciliation were acknowledged in the TRC's final report, where it was recognized that 'good-relations' and a 'harmonious comprehensive vision' never existed between most Indigenous peoples and settler-Canadians (Short, 2005; Denis & Bailey, 2016). Therefore, the TRC expressed a more suitable goal of peaceful coexistence and healthy relations, along with the embrace of self-determination as the "remedial political right of distinct dispossessed 'peoples' and 'nations'" (Short, 2005: 273; Denis & Bailey, 2016). The TRC explicitly embraced the importance of Indigenous self-determination for the reconciliation process by making the repeated

recommendation for all levels of government and all sectors of Canadian society to adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the framework for reconciliation in the country (Morin, 2017; Tasker, 2017; Boutilier, 2017).

3.4 UNDRIP as the Framework for Reconciliation

Out of the TRC's 94 Calls to Action, 16 of them concern the UNDRIP, which highlights its key importance to the final report. Additionally, many see meaningful reconciliation and the Declaration's adoption as being interdependent and linked to restoring Indigenous peoples' dignity and ensuring their future well-being and existence as peoples (Morin, 2017). The UNDRIP stands as the most accomplished proclamation of Indigenous peoples' individual and collective rights and it is where their right to unconditional self-determination is most clearly articulated (Denis & Bailey, 2016). As discussed in the previous two chapters, Indigenous peoples' dignity is understood as being directly linked to their inherent right to self-determination. Therefore, consent for any activity that may impact their lands and/or peoples is required for their dignity to be restored and respected (Doyle, 2015). Thus, the adoption of the UNDRIP is significant for it includes the specific requirement that Indigenous peoples give their free, prior and informed consent (FPIC) for any project that could affect their lands and/or peoples, such as their consent for resource extractive activities like the Alberta tar sands discussed in chapter two (Burger, 2014; Gilmore, 2018). The primary principles of the consent requirement, which will be elaborated on in the following chapter, are that it ensures " *free*, non-coercive negotiations *prior* to any development intervention that provide full and accurate information about the proposed project and its implications with the aim to create an *informed* Indigenous population", and ultimately enabling them to have the respected choice to withhold or give *consent* to proposed projects (Dunlap, 2017: 4). Accordingly, the FPIC requirement and its specific conditions should, in theory, transform how resource extraction projects taking place on or affecting Indigenous peoples' lands will be proposed, approved and carried-out (Wilt, 2017). The UNDRIP'S FPIC requirement is now broadly understood as being the minimum benchmark to be adhered to by states and industries interested in resource extraction and exploitation activities that could affect Indigenous peoples' right to self-determination, and thus, their dignity (Doyle, 2015; Boutilier, 2017).

Owing to this, as well as the TRC's recommendation for all levels of government to adopt the UNDRIP as the framework for reconciliation in the country, in 2016 the current Liberal

government finally promised to fully endorse and implement the UNDRIP, and therefore FPIC, within Canadian legislation. This constituted a big shift from the long-time firm opposition and contention of the former Conservative government towards the Declaration and specifically, its FPIC requirement (Boutilier, 2017; Wilt, 2017). As the following chapter will explain in more depth, the Supreme Court of Canada (SCC) has already established jurisprudence on the duty to consult and accommodate from cases such as *Haida Nation v British Columbia* and *Tsilhqot'in Nation v British Columbia*, under Section 35 of the Constitution Act, 1982, which recognizes and affirms Indigenous and treaty rights (Land, 2017). However, the duty to consult and Section 35 of the constitution are often criticized for being very ambiguous and not explicit in outlining what existing Indigenous and treaty rights are, or the specific requirements of consultations, which has resulted in significant disparities in the protection of those rights (Iacobucci et al., 2016; Papillon & Rodon, 2017b; Land, 2017; Wilt, 2017). Thus, an implementation of the UNDRIP's FPIC standard could and should change the way in which federal statutes, as well as common law elements, like the duty to consult and accommodate, are understood and applied because it triggers a higher, more rights-affirming standard of consent whereby, Indigenous peoples' consent must be **obtained**, rather than simply **sought** but not necessarily obtained. Additionally, it requires Indigenous peoples to fully participate and influence decision making processes that may affect them, rather than merely being present for consultations but not being able to influence their operationalization or outcomes. This is itself an exercise in the restoration of their dignity and self-determination, because they are articulating and defining how their dignity is to be respected and restored (Richland, 2016; Doyle, 2015; Wilt, 2017; Boutilier, 2017).

In response to increased support for the implementation of UNDRIP within Canada, a private member's Bill, Bill C-262 called *The United Nations Declaration on the Rights of Indigenous Peoples Act,* was put forward in 2017 by NDP Minister of Parliament, Romeo Saganash (Tasker, 2017; Hoekstra & Isaac, 2018). Tasker (2017) and Gilmore (2018) both explain that the Bill acknowledges the implementation of the UNDRIP in Canada and guarantees the alignment of Canadian laws with the Declaration. At the time of writing, the Bill recently passed its third and final reading in the House of Commons, with a vote of 206-79, in spite of opposition from the Conservative party (Gilmore, 2018; Clarke, 2018). Moreover, earlier last year in 2017, when Justice Minister Jody Wilson-Raybould announced the Liberal government's support for the Bill, she also mentioned that a more comprehensive approach would be necessary for implementing the UNDRIP into Canadian legislation (Tasker, 2017). As

part of this more comprehensive approach to implementing the UNDRIP and harmonizing it with Canadian legislation, Prime Minister Justin Trudeau issued a statement about the establishment of the Working Group of Ministers who are now responsible for reviewing Canada's laws, policies and operational practices related to Indigenous peoples in the country in order to ensure that constitutional obligations are being met (Tasker, 2017). The Working Group's work is being guided by principles, such as the recognition that "[a]ll relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government" and "meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources", which are both rooted in the UNDRIP (Government of Canada, 2018: np).

While the government has agreed to implement the UNDRIP, and therefore its FPIC requirement, into Canadian legislation, as well as agreed to fully support Bill C-262, critics are speaking out against the extremely slow speed of the government's progress (Morin, 2017; NetNewsLedger, 2017). According to Pam Palmater, a Mi'kmaq lawyer, professor and activist, there is no substantial proof that the government is making headway with its commitment to implement the UNDRIP and that "[a]ll they have done is talk about it and set up processes to engage in more talk about it, but they have not started the legal process of implementation" (Palmater quoted in Morin, 2017: np). Palmater asserts that the greatest hindrance to the Declaration's implementation is lack of political will and that the government's constant postponing of concrete action under the pretence of more consultation will render reconciliation impossible (Morin, 2017). Similar dissatisfaction was expressed by Mohawk policy advisor Russ Diabo in an interview with DeSmog Canada, where he stated that the government's endorsement of Bill C-262 is in all likelihood just a public relations tactic since he doubts the government is ready to deal with how the implementation of UNDRIP will challenge and demand transformation of the current Canadian legal framework (Wilt, 2017).

These grievances are reinforced by the fact that despite the government's assertions of support for the implementation of the UNDRIP into Canadian legislation, some of their recent actions and decisions, such as the approval and subsequent purchase of the Kinder Morgan Trans Mountain Pipeline Expansion Project (TMX) (the construction of this pipeline extension is intended to get the Alberta tar sands' oil to Asian markets, since the United States remains the only current market) in defiance of forceful and majority opposition by affected Indigenous

peoples, have contradicted their recent commitments and UNDRIP's key FPIC standard (Boutilier, 2017; Wilt, 2017; Gilmore, 2018; De Souza, 2018; Hoekstra, Shaw & Chan, 2018). However, due to evidence that the government had finalized its approval for the project prior to the completion of consultations with the affected Indigenous communities, as well as the National Energy Board's inexcusable exclusion of increased tanker traffic from its environmental assessment review, the project's approval was challenged and subsequently rescinded by the Federal Court of Appeal (De Souza, 2018; Hoekstra, Shaw & Chan, 2018). The Court's decision to kill the approval of the TMX has led some First Nations to urge the federal government to desert the project entirely; however, neither these calls nor the Court's decision has deterred the government from its commitment to see the project through to completion and its position that the pipeline is 'in the national interest' (Hoekstra, Shaw & Chan, 2018). The federal government's recent approval and purchase of the TMX pipeline, as well as their enduring support for its construction despite the Court's decision and against affected First Nations' opposition, highlights not only the inconsistency in the government's position and commitments to reconciliation and the implementation of the UNDRIP into the country's legislation, it also highlights the continuity of settler colonial violence in contemporary Canada through the ongoing elimination and dispossession of Indigenous peoples by way of imposed large-scale resource exploitation and environmental violence, constituting a violation of Indigenous peoples' right to self-determination and thus, their dignity (Short, 2016). Moreover, these events indicate that even though UNDRIP's FPIC requirement is widely recognized internationally, and increasingly at the national level, as the minimum standard for states and industry to adhere by when undertaking resource extraction activities that could impact the survival, well-being and dignity of Indigenous peoples, this does not always translate into practice in local contexts (Ward, 2011; Mahanty & McDermott, 2013; Papillon & Rodon, 2017b).

This chapter has established that elements of the reconciliation process, such as the compartmentalization of the IRS, fail to realize the ongoing status quo of settler colonialism in contemporary Canada and how it continues to rob Indigenous peoples of their self-determination rights through their persistent elimination and dispossession, such as by way of imposed large-scale resource extraction and exploitation projects (Alfred, 2013; Park, 2015, Short, 2016). This compartmentalization allows for the ongoing violence of settler colonialism to be glossed over, thus serving to legitimize the settler colonial state and forcing Indigenous peoples to become reconciled to colonialism and their losses (Schaap, 2008, Alfred, 2009; Denis & Bailey, 2016). Therefore, in a reconciliation process between Indigenous peoples and a

settler colonial society like Canada, it is necessary to realize that Indigenous peoples' dignity is inseparable from their inherent right and assertions of self-determination; thus necessitating a process that reinforces their agency and self-determination, as well as respect for their cultural, political and economic autonomy from settler society, which is essentially the basis of the UNDRIP's FPIC requirement (Short, 2005; Richland, 2016; Boutilier, 2017). Thus, the TRC's recommendation to adopt the UNDRIP as the framework for reconciliation in Canada, as well as the subsequent government endorsement and commitment to implement the UNDRIP into Canadian legislation, are significant for the potential the UNDRIP's FPIC requirement could have for restoring dignity, and therefore, self-determination to Indigenous peoples in Canada. However, the government's inconsistent and contradictory behavior demonstrated by its recent approval and commitment to the expansion of the TMX pipeline project indicates that while FPIC may have dignity restoring potential in theory, there can be many limits and challenges to its implementation and effectiveness in practice. In line with this, the following chapter will explore the dignity restoring potential of FPIC by analyzing its parameters, substance and related challenges and debates through an overview of its regulatory and normative framework at the international and regional levels. Shifting to a national focus, the chapter will then assess the FPIC requirement's implementation and operationalization in the Canadian context, analyzing the politics surrounding its interpretation and implementation, as well as the local institutional context, shaped by factors such as the constitutional standards and existing legislation, regulations and mechanisms, and how these influence the way in which the FPIC requirement is carried out in practice. This will ultimately lead to a conclusion on the dignity restoring potential of the UNDRIP's FPIC requirement.

4. The Dignity Restoring Potential of Free, Prior and Informed Consent

4.1 Regulatory and Normative Framework

A review of the literature shows that there now exists a significant amount of international, regional and national jurisprudence, as well as policies and practices, pertaining to resource exploitation projects affecting Indigenous peoples that either relate to, and/or affirm and expand on the free, prior and informed consent requirement (FPIC) (Doyle, 2015). FPIC is understood as a standard, a requirement and a safeguard used to protect Indigenous peoples'

rights and derives from their self-determination, territorial and cultural rights (Doyle, 2015; MacInnes, Colchester & Whitmore, 2017).

4.1.1 International Labour Organization's Convention 169 on Indigenous and Tribal Peoples

The only legally binding international document to specifically recognize the rights of Indigenous peoples, such as their rights to their lands and resources and to be consulted and participate in decisions that concern them is the International Labour Organization's Convention 169 (ILO C169) on Indigenous and Tribal Peoples (Barelli, 2012; Food and Agriculture Organization of the United Nations [FAO], 2016). While this Convention has only been ratified by 22 countries, which may lead some to question its relevance, it has nevertheless been an important contributor to the normative and regulatory framework of Indigenous peoples' rights (Barelli, 2012). It arose from the decision to amend its predecessor, Convention 107 on Indigenous and Tribal Populations, which outlined an 'integration approach', of Indigenous peoples into broader national societies and was to be replaced with a 'participation approach' where Indigenous peoples would be able to participate in decisions affecting them (Rodriguez-Garavito, 2010). Throughout the drafting process of the Convention, which has been criticized for not adequately involving Indigenous peoples in its formulation, there was tension and disagreement with regards to whether governments would be required to *obtain* consent or to merely *seek* the consent of Indigenous peoples (Rodriguez-Garavito, 2010). Ultimately, the final approved text included the weaker formulation, stipulating that "consultation [...] must be, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures" (Ward: 2011: 60). The only time the Convention requires states to obtain consent from Indigenous peoples is when a project may involve their relocation (Ward, 2011). In other words, while the Convention stipulates that achieving consent should be the goal of consultations, it does not make it mandatory upon states to obtain Indigenous peoples' consent unless a project may necessitate their relocation. It is for this reason that the Convention is understood as important in terms of articulating certain substantive and procedural aspects (e.g. good faith) of the FPIC principle; however, its final formulation does not enable Indigenous peoples to have control over decisions that affect them, which ultimately prioritizes resource extraction activities and economic development more broadly over Indigenous peoples' FPIC (Rodriguez-Garavito, 2010; Doyle, 2015). According to Rodriguez-Garavito (2010), this is why so many actors, such as multilateral banks like the World

Bank (WB), as well as Transnational Corporations (TNCs) and industry, like the International Council on Mining and Metals (ICMM), have adopted safeguard policies on Indigenous issues, which are essentially lower standard FPIC policies that serve as "a useful and business-friendly mechanism for responding to growing criticisms of their operations' impact on [I]ndigenous peoples" (22). In other words, because the higher standard of FPIC, rooted in self-determination and therefore requiring consent rather than just consultation, was removed, actors invested in extractive industry were able to apply it in a way that maintained their control and legitimized their activities. This turned FPIC into a participation process where Indigenous peoples have little influence over negotiations and even less decision-making power (Rodriguez-Garavito, 2010).

However, this lesser standard of FPIC has not gone uncontested and has generated different interpretations of the Convention, as well as of international law in general. Interpretations have varied between more substantive understandings in line with consent and more procedural and restricted understandings in line with consultation (Rodriguez-Garavito, 2010). The sources of some of these interpretations, which also contribute to the normative and regulatory framework of FPIC are from the United Nations (UN) human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC) monitoring the International Covenant on Civil and Political Rights (ICCPR), and the Committee on the Elimination of Racial Discrimination (CERD) (Barelli, 2012).

4.1.2 Human Rights Treaty Bodies

Beginning with the **CESCR**, who initially held the position that states should consult and seek consent rather than explicitly stating that states are obligated to obtain the consent of Indigenous peoples prior to project development that would affect their lands (Barelli, 2012). However, after the adoption of the UNDRIP, which will be discussed shortly, the CESCR changed its position, made evident by its general comment on Article 15(a) of the International Covenant on Economic, Social and Cultural Rights, which is the *Right of Everyone to take Part in Cultural Life* (Barelli, 2012). Its general comment detailed that in order for states to properly oblige and uphold this right, that it should "allow and encourage the participation of persons belonging to minority groups, [I]ndigenous peoples or to other communities in the design and implementation of laws and policies that affect them", as well as to obtain these peoples' FPIC when the maintenance of their resources, to which their lives and cultural practices depend on,

are threatened (CESCR, General Comment No. 21, 2009 quoted in Barelli, 2012:13). This demonstrates that the CESCR holds that FPIC is a requirement particularly when an activity may severely impinge on Indigenous peoples' cultural well-being.

Next is the **HRC**, the UN treaty body that initially dealt with Indigenous issues most extensively and therefore, contributes significantly to the normative and regulatory framework of FPIC and Indigenous rights (Barelli, 2012). The HRC's General Comment on *The Rights of Minorities*, offers a progressive interpretation of Article 27, *The Right to Culture,* which includes the right of Indigenous peoples to continue their economic activities and ways of life that are culturally significant and to participate in all decisions that affect them (Barelli, 2012; Doyle, 2015). However, the HRC affirms a more dynamic FPIC interpretation which requires states to ensure Indigenous peoples' effective participation, as well as their FPIC when proposed activities could have major impacts and threaten their rights, such as their rights to self-determination, cultural rights, rights to non-discrimination and the associated right to land (Barelli, 2012; Doyle, 2015). In other words, the standard of FPIC depends on the impact that a proposed project could have on the affected Indigenous peoples (Barelli, 2012).

Similarly to the CESCR, **CERD**'s position on FPIC changed with the adoption of the UNDRIP and it now holds the most explicit interpretation of FPIC out of the three UN human rights treaty bodies (Barelli, 2012; Haugen, 2016). The CERD has frequently outlined the need for states to obtain the consent of Indigenous peoples prior to the development of projects on their lands and they stipulate that any decision regarding the rights or concerns of Indigenous peoples necessitates that those decisions only be taken with their informed consent (Barelli, 2012). The FPIC requirement for the CERD arises from the enjoyment of Indigenous peoples to their rights, such as the right to "culture, economic, social and cultural development, participation, property, including lands and natural resources, and effective remedies" without discrimination, as expressed under General Recommendation 23 on the Rights of Indigenous Peoples (Doyle, 2015: 127).

While it should be noted that the international human rights treaties that these committees oversee do not explicitly refer to FPIC or Indigenous peoples, their committees have evidently interpreted their respective conventions as necessitating a minimum duty to consult with Indigenous peoples with the goal of reaching consent, and consent sometimes being an unconditional requirement depending on the situation (Ward, 2011; FAO, 2016; Haugen, 2016).

Additionally, these bodies recognize the right to self-determination and have stipulated that it applies equally to Indigenous peoples; however, their reasoning for requiring Indigenous consultation or consent are based predominantly on rights to culture, land and non-discrimination rather than the right to self-determination specifically (Doyle, 2015; Haugen, 2016). Furthermore, it is important to acknowledge that while the international human rights treaties are themselves binding, the interpretations offered by their committees are not. The interpretations are intended as guides for how the treaties should be interpreted and applied by state parties so that they can meet their human rights obligations (Ward, 2011).

Before moving onto the contributions of regional human rights bodies, the comments offered by the former Special Rapporteur, James Anaya, on the Rights of Indigenous Peoples also make an important contribution. During his mandate he made the topic of extractive industry and their effect on Indigenous peoples his main focus. His position was that Indigenous peoples' consent is required for resource extraction projects that could have serious impacts on their lands, way of life and/or peoples (Doyle, 2015). The Special Rapporteur based this requirement on Indigenous peoples' rights to "property, to cultural integrity, to equality, to participation, to development and to self-determination" and held that resource extraction projects, by their invasive and generally large-scale and destructive nature, are guaranteed to violate any one, if not all of these rights; therefore, Indigenous peoples' FPIC should always be required for resource extraction projects that could affect them (Doyle, 2015:128). This indicates that the former Special Rapporteur's interpretation of the requirement for FPIC is at higher standard than many of the human rights treaty bodies since it holds that Indigenous peoples' consent should always be required for any resource extraction activity on their land.

4.1.3 Regional Human Rights Bodies

The contributions of regional human rights bodies to the normative and regulatory framework of FPIC and Indigenous peoples' rights, such as the Inter-American Commission and Court of Human Rights, have also been significant.

The Inter-American Commission of Human Rights (Commission) and the Inter-American Court of Human Rights (Court) make up what is known as the Inter-American Human Rights system, and the jurisprudence produced by these bodies applies to member states of the Organisation of American States, to which Canada is a party (Ward, 2011). Through important

cases addressed by both the Commission and the Court, the full right to FPIC in certain circumstances has been well articulated (Ward, 2011). The case law relating to consultation and FPIC established by these important cases are based on the rights to culture, property and judicial protection as understood in the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man (Ward, 2011).

The first case of significance to this section is the case of *Maya Communities of the Toledo District v. Belize* in 2001. The Commision found that by Belize's granting of resource concessions to foreign companies within the lands belonging to the Mayan Communities, Belize had infringed upon the community's property rights "by not fully and effectively delimiting, demarcating, and recognising the communal lands that had traditionally been occupied and used by the Maya Communities" and by not consulting or attempting to achieve their informed consent, prior to the issuing of resource concessions (Ward, 2011:63). This case essentially established that the state is required to consult with the objective of obtaining consent in order for Indigenous peoples' communal property rights to be protected and respected (Ward, 2011).

Another important case is *Saramaka People v. Suriname* in 2017, which addressed the failure of Suriname to consult or gain the consent of the Saramaka before granting mining concessions within their land (Ward, 2011; Doyle, 2015). The court found that Suriname had infringed upon the Saramaka's judicial protection and property rights and ultimately concluded that even though property rights as understood in the American Convention are not without limit, it enforced certain safeguards in order to restrict the overriding of Indigenous peoples' rights by states (Ward, 2011). These standards are that states must guarantee that the affected peoples are able to effectively participate in decisions affecting them, in a way that is consistent with their cultural customs and traditions (Ward, 2011). Other safeguards include that the affected Indigenous peoples must reasonably benefit from such projects and that independent and reliable environmental and social impact assessments must be initiated and completed in order to learn of any potential risks and how to mitigate them, prior to issuing resource concessions (Ward, 2011). Ward (2011) explains that the Court further clarified that the state is also required to "disseminate and receive information, and specifies that consultation must be in good faith, be culturally appropriate, and have the intent of reaching agreement" or FPIC, in the case of large-scale projects that could threaten the survival of the affected peoples (2011: 64). In other words, through this case, the Court established that at a minimum, the consultation of affected Indigenous groups is always required; however, in the case of large-scale projects that could be

physically and culturally threatening, then Indigenous peoples' FPIC is absolutely necessary (Ward, 2011; Doyle, 2015).

The last case this section will address is the case of the *Kichwa People of Sarayaku v. Ecuador* in 2011, which involved Ecuador granting permission for oil exploration activities in the territory of the Sarayaku (Doyle, 2015). The Court found that the government had violated the Kichwa's right to property and their right to participate in the decision making process, since the government had granted exploration permission prior to effectively consulting with them (Ward, 2011). The Court's ruling not only reiterated the requirement for state's to consult with the goal of achieving consent, they also especially stressed the importance that consultations must take place **prior** to the approval of any activity and early on in the planning stages, rather than immediately before a project is set to commence (Doyle, 2015). This requirement was deemed necessary by the court in order to guarantee Indigenous peoples' effective participation; therefore, ensuring Indigenous peoples' ability to influence decision-making processes that affect them (Doyle, 2015). Ward (2011) adds that during the proceedings of this case, there were additional efforts to further elaborate on the content and scope of the consultation requirement by highlighting the importance of Indigenous peoples' right to **information.** It was instructed "that the information provided be sufficient and complete enough to guarantee that if consent is given, it has been given free of manipulation", in order to reduce the power imbalances prevalent in consultations between states, and by extension industry, and Indigenous communities (Ward, 2011: 65).

Therefore, it can be summarised that the important cases of the Inter-American Human Rights system base their jurisprudence related to consultation and consent for natural resource activities on property rights and judicial protection (Ward, 2011). The cases establish that Indigenous peoples have the right to effectively participate in decisions affecting them through free and informed consultations, which are to be carried out in a culturally appropriate manner, prior to activities taking place on their lands. However, when proposed projects are large enough to threaten their physical and cultural existence, their full FPIC is required (Ward, 2011).

The above sources of jurisprudence demonstrate not only some of the human rights that form the bases for the FPIC requirement, but also the rights that the requirement protects, such as Indigenous peoples' right to non-discrimination, culture and property (Doyle, 2015). In other words, the FPIC requirement is derived from the same rights its purpose is to protect; therefore,

FPIC should not be abstracted from those rights (Doyle, 2015). While the above jurisprudence are key sources that articulate and support the FPIC requirement, as well as solidify the compulsory components of the consultation and consent seeking process, it is the UNDRIP that offers the clearest articulation of Indigenous peoples' rights and by extension, of the FPIC requirement (Doyle, 2015). However, as discussed in chapter one, the basis for and the nature of the FPIC requirement under the UNDRIP is explicitly tied to the right of self-determination, as affirmed under common Article 1 of the human rights covenants, the ICCPR and the ICESCR. It is also tied to the principle that all peoples are equal, and for this reason, Indigenous peoples, just like everyone else, have the right to seek out or maintain their unique social, cultural and economic development in a manner that is defined by them and that is consistent with their aspirations (Doyle, 2015; Ward, 2011; FAO, 2016)

4.1.4 UNDRIP's Self-determination Based Consent Requirement

The UNDRIP was adopted by the UN General Assembly in 2007 after a drafting and negotiation period of over 20 years (Barelli, 2012; Rodriguez- Garavito, 2010). Although the Declaration is not itself legally binding, the provisions it articulates are considered to be consistent with the provisions and interpretations of the international human rights treaties discussed above, in relation to Indigenous peoples, especially their right to self-determination (Doyle, 2015). Therefore, even though the Declaration is not technically legally binding on states, its legal weight and legitimacy are based on the fact that the core principles of international human rights law are articulated within the Declaration, and are thus expected to be upheld and respected (Doyle, 2015). The literature emphasizes that the drafting process of the UNDRIP was unique because of the process's full inclusion and participation of Indigenous peoples and their representatives, unlike the ILO C169 drafting process (Doyle, 2015; Barelli, 2012). Doyle (2015) informs that the majority of the proposals submitted during the first drafting period from 1982 to 1994 were formulated by Indigenous peoples themselves. This highlights that the drafting process was itself an exercise and culmination of Indigenous peoples' consent (Doyle, 2015). Although there were many disagreements between states and Indigenous peoples over provisions pertaining to land and natural resources, what remained central throughout the process and in the final approved text was Indigenous peoples' insistence on their authority over their land and resources and the requirement of their FPIC for any project or activity affecting those lands and/or resources (Doyle, 2015).

This demand was based on Indigenous peoples' unqualified right to self-determination and that their authority over their lands and resources was necessary for a realization of that right (Burger, 2014; Doyle, 2015). This self-determination based consent requirement was objected to by certain states who considered it to be incompatible with their national sovereignty. These states interpreted the Declaration as giving Indigenous peoples a veto power over resources development projects (Doyle, 2015; Rodriguez-Garavito, 2010). For this reason, similarly to the drafting process of ILO C169, states who interpreted the self-determined consent requirement as a veto, emphasized that the requirement should be for states to 'seek' consent rather than 'obtain' it (Barelli, 2012; Doyle, 2015). However, those who encouraged the self-determination based requirement insisted that the use of the word 'obtain' was imperative (Doyle, 2015). Barelli (2012) explains that the final agreed-upon text was a compromise between the two positions, essentially expressing that 'consultations' are to be undertaken in order to 'obtain consent'. Although a compromise was made, it is important to highlight that Indigenous peoples' unqualified right to self-determination remained the basis for the requirement of their FPIC, as they insisted throughout the drafting process (Doyle, 2015).

Prior to a discussion on UNDRIP's specific provision that clearly articulates the requirement for FPIC in the context of extractive development projects, it is useful to provide clarification on the essence of Indigenous Peoples' FPIC requirement.

4.1.4.1 Essence and Scope of the FPIC requirement

The connection between self-determination and FPIC is understood to be interdependent and mutually reinforcing (Doyle, 2015). Indigenous peoples' right to self-determined social, cultural and economic development is violated when extractive resource development projects are imposed on them and their lands (Doyle, 2015). This imposition eliminates the right of Indigenous peoples to consider and determine their own development alternatives, in a manner that is consistent with their aspirations, and stands as a dignity taking (Doyle, 2015; Richland, 2016). Therefore, in order to respect this component of the right to self-determination and to affirm and restore Indigenous peoples' dignity, they must have the genuine choice, once they are given all the information necessary, to either give or *withhold* consent on their terms, and for that decision to be respected (Doyle, 2015; Richland, 2016). In other words, "FPIC is integral to the right to self-determination, being not only necessary to prevent unwanted developments, but also essential in ensuring that Indigenous people shape developments by and for themselves" (Doyle, 2015: 130). This reinforces that FPIC is not just an end in and of

itself to exercise their right to self-determination, but it is equally a safeguard and a means for Indigenous peoples to protect a collection of their other rights, including their right to traditionally own lands (i.e. the right to property) and their right to cultural and physical survival (i.e. the right to life, to culture and to non-discrimination) (Doyle, 2015; Flemmer & Schilling-Vacaflor, 2016). It is in this way that FPIC stands as a dignity restoring solution because it is a process that affirms Indigenous peoples' humanity, reinforces their agency and strengthens their inherent right to self-determination.

While the UNDRIP refers to the FPIC requirement in several articles, specifically articles 10, 11(2), 19, 28(1), 30(1) and 32(2), it is Article 32 that stands as the most explicit confirmation of the FPIC requirement in relation to extractive industry projects (Burger, 2014). The first component of the Article affirms Indigenous peoples' right to self-determined development and priorities that correspond to their aspirations (UN, 2007). In order for the right to be respected, the second part of the article stipulates that:

> States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with development, utilization or exploitation of mineral, water or other resources (UN, 2007: 12).

It is evident that this Article differs from the jurisprudence discussed at the beginning of the chapter because it bases the requirement on Indigenous peoples' right to self-determination and it also broadens the scope of the requirement by stating that the requirement for FPIC is triggered by any project, rather than only certain projects depending on their nature or their impact (Doyle, 2015). Moreover, because the Article explicitly states that consultations have the purpose of 'obtaining' consent rather than merely 'seeking' consent, due to the key position that the FPIC requirement is an exercise of Indigenous peoples' right to self-determination, it renders the FPIC principle to not only be a requirement in the procedural sense, but also in a substantive sense that emphasizes the importance of the processes outcomes (Doyle, 2015). In other words, by being a requirement or an obligation instead of just an objective, it can be assumed that Indigenous peoples actually have the right to meaningfully participate with the

genuine option to withhold consent and for that decision to be the respected outcome (Doyle, 2015).

Doyle (2015) explains that the only limitations to Article 32 are articulated in Article 46(2) of the UNDRIP, which stipulates that those limitations are

> [d]etermined by law and in accordance with international human rights obligations [and shall be] … non discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society (UNDRIP, 2007: 14-15 quoted in Doyle, 2015: 145)

Based on this, it can be inferred that the requirement for Indigenous peoples' consent can only be overridden in extremely rare and unlikely situations - the approval and development of a resource extraction project not usually being one of those situations (Doyle, 2015). For example, the 'public interest' or 'common good' argument is often invoked by Canada as a reason to override Indigenous peoples' self-determined right to withhold consent for extractive industry projects, as mentioned in chapter three with the government's approval of the TMX pipeline (Doyle, 2015; Hoekstra, Shaw & Chan, 2018). However, this argument has been rejected at the international level, evinced by the refusal of proposals to include the 'public interest' argument to the limitations of Article 46 of the UNDRIP (Doyle, 2015). Significantly, it has also been rejected by the provincial courts in Canada who have asserted that upholding Indigenous peoples' rights are a fundamental part of the public interest, which was supported by the SCC's position who affirmed that the public interest argument "was so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification" (Doyle, 2015: 171).

Essentially, the FPIC requirement is consistent with international human rights and stands as a principle, a standard and a safeguard and it outlines both the procedural dimensions of how consultations should be carried out, as well as the requirement to respect the outcomes of those consultations. This affirms the substantive component of the requirement that Indigenous peoples have the genuine choice to give or withhold consent on their terms; thus, the requirement stands as a dignity restoring solution since it affirms Indigenous peoples'

humanity and strengthens their agency and right to self-determination (Doyle, 2015; FAO, 2016; Flemmer & Schilling-Vacaflor, 2016).

Therefore, based on what has been established and based on the broad international consensus of how FPIC is to be understood and implemented, a general understanding of FPIC's procedural and substantive elements can be summarized as :

The element of '**Free**' implies that there is no "coercion, intimidation or manipulation" in the consultation process (Barelli, 2012: 3). In other words, consent is given voluntarily through a process that is defined and conducted by the affected community themselves, while ensuring that all member of the community irrespective of age or gender, are part of this process (FAO, 2016).

The element of '**Prior**' implies that it is necessary for consent to be sought far enough in advance, based on a time-frame that is compatible with the decision making-process of the community, before the approval or start of any activity that may affect Indigenous and/or their lands (FAO, 2016). This is required so that there can be a sufficient amount of time for the affected community to comprehend and evaluate the information corresponding to all aspects and phases related to the proposed project in a manner that aligns with their traditions, as well as to consider their development alternatives (FAO, 2016).

The third element, '**Informed**', implies that the consent seeking process itself should be informed by information that is accessible, understandable, reliable, correct and transparent about the proposed project's scope, location, duration, nature and size (FAO, 2016). Additionally, it should be translated and conveyed in the relevant language of the affected community, as well as in a culturally appropriate manner, such as through culturally appropriate personnel and in culturally appropriate locations that are accessible to all those affected. It must also detail all of the potential pros and cons of the proposed project by including a preliminary economic, social, cultural and environmental impact assessment (FAO, 2016). Lastly, and crucially, information must be continuously provided on an ongoing basis throughout the process in order to improve communication and decision making processes at the community level (FAO, 2016).

The final element of '**Consent**', which the three prior elements characterise, is understood to be a "collective decision made by the rights-holders and reached through the customary decision-making processes of the affected Indigenous peoples" (FAO, 2016:16). In other words, the process of consent seeking, as well as the granting or withholding of consent, is to be carried out in a way that corresponds to the particular formal or informal practice of the respective community and is ultimately a verbalization of their rights to self-determination, culture, lands and resources, and therefore must be respected (FAO, 2016).

Doyle (2015) ads that there is a general agreement that consent should be ongoing and sought throughout the consultation process and project cycle instead of just being a once-off event. He also asserts that the outcomes of consent processes should be legally-binding agreements so as to ensure that parties are held accountable and follow through with project-benefit plans and that functional grievance mechanisms be in place in case those agreements and projects impacts end up deviating from what was is consented to in the consultations (2015).

Notwithstanding the FPIC jurisprudence, particularly found in the UNDRIP, at the international and regional levels, there remains a significant gap between this rights-consistent normative standard and regulatory jurisprudence at the international level and state legislation and practice at the national level (Szablowski, 2010; Ward, 2011; Doyle, 2015). Doyle (2015) explains that overall, states, as well as industry, have neither implemented nor aligned their consultation regimes and related mechanisms with UNDRIP's rights-consistent FPIC standard. The literature discussing FPIC implementation highlights that even in national contexts where the FPIC requirement is endorsed and is understood as the suitable standard to adhere to when engaging in resource development activities or projects that can affect Indigenous peoples' land and/ or resources, the local legal and political landscape plays a significant role in how the requirement is interpreted and consequently, how it is operationalized (Doyle, 2015; Vermeulen & Cotula, 2010; Hanna & Vanclay, 2013; Mahanty & McDermott, 2013; Flemmer & Schilling-Vacaflor, 2016; Papillon & Rodon, 2017a; Schilling-Vacaflor, 2017; Dunlap, 2017; Machado et al., 2017; MacInnes, Colchester & Whitmore, 2017). This section will now turn specifically to the Canadian context in order to analyze how and to what extent the national politics and institutional norms are shaping the FPIC requirement's effective implementation and operationalization, and correspondingly, its dignity restoring capacity.

4.2 Free, Prior and Informed Consent in Canada

Following the TRC's recommendation for Canada to adopt the UNDRIP as the framework for reconciliation in the country, the government announced its unqualified support for the Declaration, as well as its FPIC requirement, and committed itself to fully implementing it into the national legislation (Tasker, 2017). This commitment was strengthened by the government's support by voting in favor of Bill C-262, which, as discussed in chapter three, recently passed its third and final reading in the House of Commons (Gilmore, 2018; Clarke, 2018). These actions have been viewed by many Indigenous peoples as a welcomed step forward towards reconciliation and towards recognition of Indigenous peoples' rights and demands for self-determination (Morin, 2017). However, these commitments have also generated a significant amount of protest and opposition from critics who assert that the FPIC requirement, as stipulated in the UNDRIP, is not compatible with existing Canadian constitutional law because of their interpretation that it gives Indigenous peoples the right to veto resource extraction projects, which could be devastating for the country's economy that depends so heavily on such projects (Land, 2017; Tockman, 2017). This argument can be traced back to the UNDRIP's drafting process where Canada was particularly vocal about its objection to a self-determination based FPIC requirement on the grounds that it equates to giving Indigenous peoples a veto power. They were advocating instead for procedural consultation processes, requiring governments to 'seek' consent, rather than be obliged to 'obtain' it (Doyle, 2015). For instance, Canada demonstrated attempts at trying to redefine the principle, as well as its parameters, by claiming that their existing national constitutional duty to *consult and accommodate* was an ideal example of successful FPIC operationalization, and that it should be replicated by other countries (Szablowski, 2010). As will be discussed shortly, Canada's duty to consult outlines certain specific circumstances where the Crown may be required to accommodate Indigenous peoples; however, obtaining their consent is not always mandatory (Szablowski, 2010).

Interpretations of the FPIC requirement as a veto are critiqued for being reductionist and contradictory to the human rights consistent spirit of the requirement, which aims to ensure "[I]ndigenous peoples' enjoyment of their rights and their empowerment to determine their own future rather than the extent to which it infringes on state power by conferring a veto power on Indigenous peoples" (Doyle, 2015: 165). In line with this is the argument that reducing the FPIC requirement to a mere procedural obligation on the grounds that a higher, more substantive

endorsement would grant Indigenous peoples a veto power over resource extraction projects, ultimately amounts to states and industry proponents holding a veto power over the realisation of Indigenous peoples' right to self-determination, and other rights that the FPIC principle aims to protect (Doyle, 2015). Essentially, the reluctance or refusal of states and industry proponents to meaningfully recognize and implement UNDRIP's rights-consistent FPIC requirement is often attributed to their lack of political will to transfer decision-making authority and control to the Indigenous peoples concerned, since this could have serious implications on their national economies, as well as on industry prosperity (Doyle, 2015; Laplante & Spears, 2008; Szablowski, 2010).

Despite Canada's attempts to weaken the FPIC's substantive component throughout the drafting period of the UNDRIP, the final text maintained a self-determination consistent position and included the more substantive dimension of requiring states to obtain consent (i.e. giving Indigenous peoples the genuine choice to give or withhold consent), which resulted in Canada voting against the UNDRIP's adoption at the General Assembly in 2007 (Doyle, 2015). Although Canada has since changed its objector status and has fully and unconditionally agreed to endorse the Declaration, debates over whether or not the Declaration's FPIC principle amounts to a veto and if it is compatible with Canadian constitutional law persist (Wilt, 2017; Hoekstra & Isaac, 2018). Boutilier (2017) argues that such disputes are unproductive for the reconciliation process and lack legitimate rationale because while the UNDRIP's FPIC standard exceeds current Canadian constitutional law, namely the *duty to consult and accommodate*, and would require certain legislative and/or constitutional amendments, the constitution's current minimum standard "should not and do[es] not preclude the legislative or constitutional addition of stronger standards" (5). Similarly, the current constitutional norms should also reflect the country's international and regional human rights obligations, such as the upholding of the ICCPR, the ICESCR and the ICERD treaties, as well as the human rights provisions in the Organization of American States, to which Canada is party and which underpin the rights articulated in the UNDRIP, since these cannot be replaced or subdued by domestic standards (Ward, 2011).

In spite of this, there appears to be a certain degree of continuity in Canada's position with regards to maintaining the status quo by limiting the FPIC requirement to a procedural process without a substantive dimension. For example, when the Minister of Indigenous Affairs announced to the United Nations Permanent Forum on Indigenous Issues that Canada would fully implement the UNDRIP, including its FPIC standard, she also included that this

implementation is to be in line with Canada's existing 'robust' legal and constitutional framework that protects Indigenous peoples' rights through Section 35 of the constitution (Papillon & Rodon, 2017a). In other words, despite Canada's lower standard of consent compared to the UNDRIP and despite its international human rights obligations, the government has maintained that the constitution is consistent with the UNDRIP's FPIC standard and that, FPIC should therefore be interpreted consistently with prevailing practices within the country (Papillon & Rodon, 2017a). This reveals that the issue of contention in Canada is moving away from whether or not the government will adopt the UNDRIP, and towards the preoccupation of how and by whom the implementation and operationalization of its provisions, such as the FPIC principle, will be controlled (Doyle, 2015). This also highlights that while the implementation of international human rights standards, like the UNDRIP, must be suited to the particularities of local contexts rather than being treated as a one-size-fits all model, the adaptation of such international norms to the national level are generally "shaped by context-specific socio-political complexities and situated normativities and they are embedded in pre-existing relations of meaning and production" (Schilling-Vacaflor, 2017: 1061). In other words, the adaptation and implementation of such standards are socio-political processes and are highly influenced by existing norms and power relations (Schilling-Vacaflor, 2017). Therefore, the implementation and operationalization of the UNDRIP, specifically the FPIC requirement, in Canada are at risk of being controlled by a settler state with opposing interests and world views to Indigenous peoples, as well as a general interest in maintaining the settler colonial status quo. As demonstrated by the Minister's statement, there is a risk that the requirement will be contained within the boundaries of the national constitutional framework, which does not prioritize Indigenous peoples' self-determined right to effective participation and to genuinely influence and control consultation processes and outcomes; thus, abstracting the requirement from its self-determination and human rights-consistent purpose and foundation, and serving to reduce its transformative and dignity restoring potential (Doyle, 2015).

Evidently, the local socio-political and legal landscape in Canada is strongly defining and controlling how the FPIC requirement is being implemented and operationalized in practice. In order to understand to what extent Canada's existing consultation regime, which includes the laws, norms and mechanism that govern its operationalization, mirrors and differs from the UNDRIP's FPIC standard, an analysis and discussion of the regime, including its operationalization is required.

4.2.1 The Duty to Consult

The *duty to consult and accommodate* is the regulatory framework governing consultations with Indigenous peoples in Canada in relation to resource extraction and development projects (Boutilier, 2017). The duty "to consult and, if necessary, accommodate Indigenous peoples before making a decision that could unduly affect the exercise of their rights recognized in the Canadian Constitution" has developed over the last 10 years based on a number of SCC cases (Papillon & Rodon, 2017b: 218). The first case of significance is *Calder et al. v Attorney-General of British Columbia* (BC) in 1973, where the Court established that Aboriginal title to land could still exist in modern day Canada (Land, 2017). The Court established this based on 19th century evidence that articulated the demands of numerous Indigenous groups in BC, such as the Nisga'a, that their consent was required for the sale and/or acquisition of their lands (Land, 2017). Therefore, in cases where consent was not given, Aboriginal title, in theory, should remain or could be re-established (Land, 2017).

With the following case *Delgamuukw v BC* in 1997, the Court built on the principle of Aboriginal title in Canada by establishing the basis for how title could be confirmed and how it could be overridden if confirmed (Land, 2017). The Delgamuukw case was especially significant for establishing that good faith consultations with Indigenous peoples were the minimum requirement to be carried out prior to the overriding of their title by the Crown and that in some cases, consent would be required depending on the impact of the Crown decision and/or activity (Land, 2017).

The cases that followed, such as *Haida v BC (Minister of Forest)* in 2004, confirmed the minimum requirement to consult with Indigenous peoples impacted by Crown decisions. It also specified the framework, although vaguely, for these consultations and the range of potential Crown obligations related to consultations (Land, 2017). The Court explained that "[t]he extent of the required consultation and possible accommodation [...] vary along a spectrum depending on the strength of the Indigenous claim and the potential impact of the proposed measure or activity" (Papillon & Rodon, 2017b: 218). In other words, the duty to consult could range from being a mere requirement to discuss or inform the affected Indigenous group, to a requirement to obtain the Indigenous peoples' consent for activities taking place on their lands (Boutilier, 2017). In situations where the magnitude of the impact is significant and requires the accomodation of the affected Indigenous peoples, the Court clarified that such accommodations

should attempt to achieve a solution that is deemed acceptable by all those implicated (Papillon & Rodon, 2017b). During the Court ruling for this case, the SCC explicitly emphasized that the duty to consult is a process concerned with balancing interests and not to be understood as an Indigenous veto right over Crown decisions and activities (Papillon & Rodon, 2017b; Land, 2017).

The last case of significance is *Tsilhqot'in Nation v BC* in 2014, where the Court expanded upon the conditions under which the Crown is able to infringe on Aboriginal title and thus, override Indigenous peoples' consent (Papillon & Rodon, 2017b; Land, 2017). While the existing test for infringement on Aboriginal title consists of the Crown demonstrating that it has fulfilled its procedural requirement to consult and accommodate; that its decision to infringe upon Aboriginal title is supported by considerable purpose; and that the decision or action remains in line with existing fiduciary responsibilities to the affected Indigenous peoples (Boutilier, 2017). However, in the Tsilhqot'in case the Court drew from the reasonable limits clause under the *Canadian Charter of Rights and Freedoms* and added "(1) that there be 'rational connection' between the incursion and the government's goals; (2) that the incursion must take the least invasive means to achieve its objective ('minimal impairment'); and (3) that there be 'proportionality of impact'" (Boutilier, 2017:6).

A review of the SCC cases, which establish the duty to consult, reveals that the duty resembles the UNDRIP's FPIC requirement in terms of the fact that it is also triggered by any project or activity taking place on Indigenous peoples' lands (Boutilier, 2017), However, it differs from the UNDRIP's FPIC requirement in several key ways. While the duty to consult may be triggered by any project or activity, the consent requirement is only triggered when those projects take place on lands that have established Aboriginal title (Boutilier, 2017). In other words, consent is only required where the affected Indigenous peoples have formally established title over their lands. When title has not been established, the required responsibility of the government will range from simply being obliged to inform the affected Indigenous group, to obtaining their consent, depending on the magnitude of impact of the project. The UNDRIP's FPIC requirement on the other hand is triggered by all projects taking place on or affecting Indigenous peoples' lands, regardless of the project's degree of impact and regardless of whether or not the affected Indigenous peoples have established formal title over their lands (Doyle, 2015). Simply put, the UNDRIP's FPIC standard is comprehensively applicable, whereas the duty to consult is circumstantially applicable.

The duty to consult also differs from the UNDRIP's FPIC requirement in terms of the limitations that are placed on it (Boutilier, 2017). According to Boutilier (2017), contrary to the duty to consult, which provides a series of conditions under which the Crown is able to infringe on Aboriginal title and thus, override Indigenous peoples' consent, the UNDRIP, as discussed in section 4.1.4.1 of this chapter, does not provide such conditions. The UNDRIP only stipulates, under section 46(2), the guidelines on the limitations of Indigenous peoples' rights, including the FPIC requirement, which have a very high threshold and are essentially safeguards in order to restrict the overriding of Indigenous peoples' rights by states (Boutilier, 2017; Doyle, 2015). Essentially, the duty to consult outlines what the measure are in order to justify the overriding of Indigenous peoples' rights and their consent, and the UNDRIP outlines the limitations on Indigenous peoples' rights in a manner that seeks to protect the rights of Indigenous peoples from state or industry infringement.

These fundamental differences can be attributed to the fact that the duty to consult in Canada is not derived or based on international human rights principles like the UNDRIP's FPIC requirement. The duty to consult is derived from the duty of the Crown, which is the executive arm of the provincial and federal governments (Ward, 2011; Papillon & Rodon, 2017b). This is significant because it highlights that the duty to consult is a lower-standard consultation regime that is not human rights-consistent to the extent that the FPIC requirement is. Thus, to adopt the UNDRIP's FPIC requirement and subsequently confine it to the duty to consult regime reduces the UNDRIP's FPIC principle and its self-determination and human rights-consistent foundation to a procedural requirement. This disregards the FPIC requirement's crucial substantive component that prioritizes Indigenous peoples' self-determined right to effective participation on all projects affecting their lands and peoples . It also limits Indigenous peoples' right to genuinely influence and control consultation processes and their outcomes; thus, reducing the FPIC requirement's transformative and dignity restoring potential (Doyle, 2015).

The duty to consult is therefore not equivalent to UNDRIP's FPIC principle. The duty to consult has led to the establishment of a legally vague and complex legislative regulatory framework, due to the inexact and ambiguous criteria that is outlined to be respected for consultations (Papillon & Rodon, 2017b). This has engendered varied and inconsistent procedural requirements that do not meet UNDRIP's FPIC procedural or substantive standard and has resulted in the direct engagement of industry and project proponents with affected

Indigenous peoples (Papillon & Rodon, 2017b). While the duty to consult and accommodate falls to the Crown, based on the notion that the honor of the Crown cannot be passed on, nevrtheless the SCC has stipulated that the Crown is able to assign procedural responsibilities to other actors, such as industry proponents (Papillon & Rodon, 2017b). This is consistent with international mechanisms, such as the UNDRIP, which articulates that the state is responsible for upholding and obtaining consent; however procedural components can be delegated to third parties (Doyle, 2015). In Canada, this direct project proponent-Indigenous peoples engagement is in fact encouraged and has become the norm in most provinces ,due to the perception that project proponents are generally more capable of meeting affected Indigenous peoples' needs and demands (Papillon & Rodon, 2017b). Papillon and Rodon (2017b) explain that environmental impact assessment processes (EIA) are the mechanism through which consultations are carried out and that the SCC considers this mechanism, as well as impact benefit agreements (IBAs), which will be discussed shortly, to be satisfactory for meeting the duty to consult requirement. However, neither EIAs or IBAs meet the procedural and/or substantive standards of the UNDRIP's FPIC requirement for a number of reasons. In practice, these reasons continually push Indigenous peoples to seek out alternative justice from the courts; demonstrating Indigenous peoples' rejection of the legitimacy of these mechanisms as effective consultation and consent seeking processes (Papillon & Rodon, 2017b).

4.2.2 Consultation Mechanisms under the Duty to Consult Regime

Both the federal and provincial governments, as well as certain treaty areas have established their own EIA legislation, which has created convoluted and distinct EIA processes that vary from jurisdiction to jurisdiction (Papillon and Rodon, 2017b). Papillon and Rodon (2017b) inform that despite this variance, it is generally always project proponents who have the primary responsibility of putting together final reports that contain the information they collected on a project's potential impacts. In cases where treaty areas have created their own EIA processes, a specific procedure where the affected Indigenous peoples, as well as the general public, are able to voice their position on a proposed project (Papillon & Rodon, 2017b). According to Papillon and Rodon (2017b), EIA processes in Canada not only address environmental impacts, they also address social and health impacts that might arise from a proposed project. However, instead of making separate processes for social and environmental impacts, both are fused into the same procedure. This makes EIAs " the only institutional space for community engagement and debates about the potential social and cultural impacts of a given project" (Papillon & Rodon, 2017b: 219).

While the EIA process constitutes a space where Indigenous peoples can voice their concerns with regards to a project's impact, the process does not meet the FPIC procedural requirements, nor its substantive component for a number of reasons (Papillon and Rodon, 2017b). The first limitation is that EIA processes are generally passive participatory activities, where the project proponent exercises control over the proceedings and decisions (Papillon & Rodon, 2017b). This means that, even though Indigenous peoples' unique status, rights, concerns and their traditional knowledge are supposed to be factored into the EIA process, these important aspects are often overlooked. This ultimately limits Indigenous peoples' ability to meaningfully participate and shape the consultation process (Papillon & Rodon, 2017b). This highlights that EIA processes tend to be 'invited spaces' rather than 'claimed spaces' since they are created and facilitated by the project proponent and not the affected Indigenous peoples (Flemmer & Schilling-Vacaflor, 2016). In other words, the project proponent controls what is discussed, as well as where, when, how and by whom those topics are discussed (Flemmer & Schilling-Vacaflor, 2016). This is significant because "participation as freedom is not only the right to participate effectively in a given space, but the right to define and shape that space" (Hickey & Mohan, 2004: 27 quoted in Flemmer & Schilling-Vacaflor, 2016: 175). Therefore, in order for Indigenous peoples to be able to participate effectively and thus exercise their self-determination right, they have to have substantial control over the consultation's proceedings, as well as its outcomes (Doyle; 2015; Flemmer & Schilling-Vacaflor, 2016). Additionally, an important component of Indigenous peoples' effective participation and control of the consultation and consent seeking process is that these processes should be carried out in a way that follows the affected group's particular formal or informal local customs and through their representative institutions, which is not respected in the EIA process (Flemmer & Schilling-Vacaflor, 2016; FAO, 2016)

Secondly, according to Papillon and Rodon (2017b) EIA processes are typically very formal and antagonistic proceedings monopolized by information grounded in western scientific knowledge and specific industry expertise that tends to not be properly explained in a comprehensible and suitable fashion to affected Indigenous communities. This limitation reinforces that EIA processes are 'invited spaces' rather than 'claimed spaces' since the manner in which consultations are carried out, in this case formal and antagonistic, are determined by the project proponent and not the affected Indigenous group (Flemmer & Schilling-Vacaflor, 2016). This limitation also identifies that the EIA process is highly influenced by power relations,

which limits the affected Indigenous peoples' potential to substantially participate and influence the process and thus hinders their self-determination right (Flemmer & Schilling-Vacaflor, 2016). In this case, EIAs are dominated by western scientific knowledge and industry expertise which disregard Indigenous peoples' traditional knowledge and also serves to exclude the larger Indigenous community from the process, since they are not necessarily able to understand the highly technical information conveyed to them by project and industry proponents, and thus less capable of meaningfully participating and influencing decisions (Flemmer & Schilling-Vacaflor, 2016; Mahanty & McDermott, 2013). This is often referred to as the 'miscommunication effect' or 'knowledge gaps', which renders the EIA process a mechanism that strengthens and maintains the proponents domination and control over affected communities in consultations, instead of prioritizing intercultural dialogue as prescribed by the FPIC requirement (Flemmer & Schilling-Vacaflor, 2016; Rodriguez-Garavito, 2010; Mahanty & McDermott, 2013)

Lastly, EIAs tend to be once-off events and lack a grievance mechanism so that affected Indigenous peoples can address project related issues in the future once the EIA process has come to an end (Papillon & Rodon, 2017b). This limitation further reinforces that EIA's do not allow for Indigenous peoples' FPIC to be exercised and respected since it disregards the importance that consultation and consent processes should be ongoing throughout all of a project's phases, not just prior to the exploration and approval phase (Doyle, 2015; FAO, 2016). Ongoing processes are significant because they allow for new information about the project to continuously be communicated to affected Indigenous peoples, which may or may not influence their decision to give or withhold consent (Papillon & Rodon, 2017b). Similarly, it is held that grievance mechanisms should also be available to Indigenous communities throughout the length of a project in order for them to address any issues that may arise which deviate from what is agreed upon during consultations (Laplante & Spears, 2008; Doyle, 2015)

Therefore, it is clear that the EIA process, which has evolved under the duty to consult regime, fails to meet the UNDRIP's FPIC requirement on a procedural level, as well as a substantive level; thus, the EIA process does not constitute an effective mechanism for respecting and protecting Indigenous peoples' rights or for enabling their effective participation (Hanna & Vanclay, 2013). Due to the limitations of the EIA process, IBAS emerged as a different mechanism for establishing project legitimacy and confirming Indigenous peoples' consent (Hanna & Vanclay, 2013; Papillon & Rodon, 2017b). Papillon and Rodon (2017b) define IBAs as "private, and often confidential, agreements negotiated between corporations

and Indigenous representative organizations without direct government intervention" (220). These agreements are explained to typically promise measures that aim to address the negative impacts of projects, such as general monetary compensation, job creation, environmental protection and monitoring (occasionally), and social and cultural promotion (rarely), in exchange for the affected community's approval of the project (Papillon & Rodon, 2017b). Unlike EIAs, IBAs are said to allow Indigenous peoples' representatives to participate more directly and effectively, enabling them to influence the process and ensure that their demands are met, as well as for their consent to be explicit (Papillon & Rodon, 2017b). However, according to Papillon and Rodon (2017b) IBAs are rooted in cost-benefit economic logic and thus oblige Indigenous peoples to agree to a development model that is not consistent with their cultural perspectives and may have major implications over time on their cultural and spiritual existence as peoples. In other words, IBAs overlook the significant and unique relationship Indigenous peoples have with their lands and how rupture to this relationship cannot be remedied by economic compensation (Windsor & Mcvey, 2005). The other issue with IBAs is their confidential nature; while confidentiality effectively guards IBAs from government influence, it also problematically shields them from the affected community's contribution and engagement (Papillon and Rodon, 2017b). Essentially, IBA negotiations tend to take place between elites, usually lawyers, consultants or leaders, who are supposed to represent the interests of communities and negotiate on their behalf; however, in practice they are often out of touch or do not share community priorities and consent to projects despite community opposition (Papillon & Rodon, 2017b). Therefore, IBAs often fabricate community consent and thus, are not consistent with the FPIC requirement because the latter necessitates that all members of a community be part of the process (FAO, 2016). Papillon and Rodon (2017b) add that communities are typically only engaged with after an agreement between elites is reached, which is not consistent with FPIC's principle that consent should be free, prior and informed. This also reaffirms the key limitations that were offered for EIAs, which are that IBAs do not allow for the affected Indigenous communities to substantially or meaningfully participate and control the proceedings and negotiations. Therefore, IBAs do not permit Indigenous peoples to exercise their self-determination right or for their dignity to be restored (Flemmer & Schilling-Vacaflor, 2016).

As such, it is clear that the EIA and IBA mechanisms through which consultations occur under the duty to consult regime in Canada do not meet the procedural and/or substantive standards of the UNDRIP's FPIC requirement. A review of these governing mechanisms also

reveals that even though the duty to consult does stipulate that consent is required under specific conditions, the mechanisms through which that consent is to be obtained are equally limited and incapable of enabling affected Indigenous peoples to not only effectively participate in consultation spaces, but also for them to genuinely give or withhold their consent on their terms, and for that decision to be respected by other parties (Flemmer & Schilling-Vacaflor, 2016; Doyle, 2015).

It is for these reasons that Canada's consultation regime, which includes its laws and mechanisms, does not meet the UNDRIP's FPIC standard and is therefore why the government's attempt to control the FPIC requirement's implementation and operationalization, by confining it to the existing duty to consult regime and its practices, serves to separate the FPIC requirement from its self-determination and human rights-consistent purpose and foundation. The FPIC requirement thus risks becoming a technocratic state instrument to maintain and justify the settler colonial status quo, which continues to impose resource extraction projects on Indigenous peoples' lands (Doyle, 2015). As established throughout this dissertation, this not only dispossesses Indigenous peoples of their lands and threatens their physical, cultural and spiritual existence, it equally violates their right to self-determined social, cultural and economic development, and thus stands as a dignity taking.

The FPIC requirement, as stipulated and understood under the UNDRIP, serves as a dignity restoring solution since it outlines a process that affirms Indigenous peoples' humanity, as well as reinforces their agency and inherent right to self-determination to meaningfully participate and make decisions that affect their lands and peoples. While Canada has committed itself to implementing the UNDRIP's FPIC requirement into the country's legislation, symbolizing its dedication to the ongoing reconciliation process, its contradictory behaviour, such as its approval of the TMX pipeline project and its attempt to confine the FPIC requirement to the country's existing consultation regime and practices, highlights not only their lack of political will, but also their persistent disregard of Indigenous peoples' rights and denial of their dignity. The government's reluctance or refusal to meaningfully recognize, implement and operationalize UNDRIP's rights-consistent FPIC requirement with both its procedural and substantive components, meaning enabling Indigenous peoples to effectively and meaningfully participate in consultations and to have the genuine choice to give or withhold consent for resource extraction projects that affect them, significantly limits the transformative and dignity restoring potential of the UNDRIP's FPIC requirement in Canada.

Concluding Remarks

Indigenous peoples in Canada continue to be targeted by settler colonialism's underpinning logic of elimination, which has created enduring and continuously changing social, political and economic structural formations that benefit settler society and eliminate Indigenous peoples.

This logic of elimination has manifested itself in various ways, such as through initial European invasion, through the fraudulent and deceitful treaty making processes, through the IRS system and, significantly, through imposed large-scale resource extraction projects. The latter manifestation of elimination persists in contemporary Canada due to the settler-state's reliance on non-renewable resources for economic prosperity.

The settler-state's understanding and use of land and its resources as an ecological commodity is rooted in settler society's worldview, which separates the natural world from humans, whereby humans are believed to be superior to nature; thus, normalizing the acceptability of land exploitation. This world view is in complete opposition to Indigenous peoples' who have land-centered and place-based word views and relationships, which inform their identities, social and economic practices, traditions, and sustain them physically, emotionally, culturally and spiritually. If Indigenous peoples lose their sense of place, such as by being dispossessed of their land, as seen in the Treaty 8 negotiation process and outcome, or by the degradation and destruction of their land, as seen by the Alberta tar sands project, they experience physical, social, economic, cultural and/or spiritual death. Thus, the settler relationship to land and its related resource exploitation and extraction activities eliminate and dispossess Indigenous peoples of their lands and hinder their self-determined right to control decisions that affect their lands, resources and peoples.

While the myriad ways in which settler colonialism's logic of elimination has manifested itself and the way in which it has affected Indigenous peoples over time in Canada are known, the reconciliation process in Canada has narrowly focused on the IRS system and its legacy and failed to locate it as one part of the ongoing settler colonial project in the country. This compartmentalization of the IRS constrained the reconciliation process and its ability and potential to address broader systemic and structural issues rooted in Indigenous peoples'

elimination and dispossession of their lands and thus, the taking of their dignity and self-determination.

However, the government's endorsement and commitment to implement the UNDRIP and its FPIC principle into Canadian legislation, in response to the TRC's report and as a part of the ongoing reconciliation process, appeared to symbolize a promising shift away from the country's long-time opposition to the Declaration and its FPIC related-provisions. It also symbolized a veering away from the nation-building and recognition politics that often limit reconciliation processes in settler colonial states. Thus, it generated hope that the settler colonial status quo and Indigenous-settler relations, as well as the way in which resource extraction projects are proposed, approved and carried out could actually transform in favour of Indigenous peoples' demands and aspirations of self-determination. However, the government's inconsistent and contradictory behaviour, such as their approval of the TMX pipeline project despite Indigenous peoples' opposition, as well as their limited interpretation and implementation of the FPIC, demonstrated by their attempt to confine it to the country's existing constitutional laws and practices, specifically the duty to consult and the mechanisms of EIAs and IBAs, produce a lower standard consultation regime where Indigenous peoples are unable to effectively participate, shape and control consultations, as well as genuinely give or withhold their consent for proposed projects. The government's lack of political will to meaningfully implement the FPIC requirement is obstructing the requirement's dignity restoring and self-determination affirming potential. This ultimately reduces the prospect for true and meaningful reconciliation between Indigenous peoples and settler-Canadians, and it equally serves to maintain the settler colonial status quo, which once again forces Indigenous peoples to become reconciled to settler-colonialism and to their physical, cultural, economic, spiritual elimination.

Until settler colonial Canada meaningfully responds and respects Indigenous peoples' assertions and aspirations of self-determination, such as by implementing and operationalizing the FPIC requirement in a human rights-consistent manner that adheres to the international normative framework's procedural and substantive dimensions, as clearly articulated in the UNDRIP, Indigenous peoples will continue to be dehumanized, infantilized and eliminated via imposed resource extraction projects, and thus, robbed of their dignity and right to self-determination.

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