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Before the Ice Disappears: Pursuing Climate Justice for Inuit Women in the Context of Mining in Nunavut

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Abstract

The Arctic's rapid warming is increasing the potential for mining activity in Nunavut, and, consequently, Inuit women are increasingly at risk of experiencing the adverse and gendered impacts of mining, including gender-based violence. Through a theoretical framework influenced by feminism, Indigenous legal scholarship and legal anthropology, this thesis examines the flaws in the mining industry's voluntary efforts to acquiring a social licence to operate and in the Nunavut mining regulatory regime, while also considering how the law can provide legal recourse through tort actions and Inuit Impact Benefit Agreements. In every instance, it is clear that climate justice for Inuit women in Nunavut mining communities cannot be achieved without applying a gender-based analysis to laws and policies and that Inuit women must be afforded the opportunity to govern their own lives.

Keywords

Climate justice, Inuit women, gender-based analysis, environmental impact assessment, Indigenous feminist legal theory, Arctic mining, positive duty of care, Inuit Impact Benefit Agreement, social license to operate

Summary for Lay Audience

The climate crisis is causing the Arctic to warm at a rate greater than twice than that of the rest of the world. As a result of the Arctic's melting ice and snow, minerals have become accessible for extraction. As the extractive industry increasingly invests in opening mines in the Arctic, Inuit communities, who inhabit the majority of the Arctic, will experience the greatest direct impacts to their culture and every day lives. Mining has a tendency of harming women disproportionately, and often leads to an increase in gender-based violence such as domestic violence and sexual assault. Accordingly, the Arctic's warming and increasing potential for mining also increases the potential for Inuit women to be adversely impacted.

Mining companies often engage in voluntary effort to ensure that Indigenous communities effected by a mine will not resist their presence, and will embrace the economic opportunities arising from the mine. This thesis examines to what extent these mining companies engage in mitigating the unique harms faced by the Indigenous women, and why even the current best efforts fall short of what is needed.

This thesis also explores how Nunavut's mining regulations are not designed and implemented to protect Inuit women from the likely harms caused by mining, and recommends including Inuit women as decision-makers and necessary participants in the consultation process. This thesis also explores the potential to advance the interests of Inuit women in mining communities through Inuit Impact benefit agreements and civil actions against mining companies.

This thesis concludes that advocating for climate justice for Inuit women requires unpacking assumptions within Canadian law that Inuit women are inherently protected. The law must be intentionally shaped to protect the rights and interests of Inuit women. Otherwise, it will continue to have an oppressive effect. This thesis aims to provide policy-makers and law-makers the opportunity to utilize the law in this context as a tool for social betterment and climate justice, rather than as a an instrument for dominance.

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Chapter 1: Introduction

1.1 Introduction

There is a significant body of literature documenting the fact that the injustices heightened by climate change are deeply gendered and have significant negative impacts on Indigenous women, including, in particular, Inuit women. There is, however, a major literature gap addressing the many inequalities and vulnerabilities specifically faced by Inuit women in relation to climate change in general, and resource extraction in specific. In this thesis I point to the need to take a gendered approach to issues of climate justice and Inuit peoples' rights, in particular, Inuit women's rights. This thesis addresses the rights of Inuit women in relation to the issues of gendered harms arising from the climate crisis, and explores the ways in which law – at the domestic and international levels - can be utilized to protect and advance Inuit women's rights in the face of these threats.

This thesis is concerned with the injustices the climate crisis poses to Inuit women. In an effort to explore potential legal remedies, I focus on law's role in advancing and limiting the protection of Inuit women faced with the increasing influence of mining in Nunavut. I aim to provide a creative approach to seeking climate justice for Inuit women in mining communities which does not solely rely upon international law. I explore the immediate legal and practical challenges that underpin the ongoing violence, and negative social, health, and economic impacts resulting from

mining, and how to prevent these effects from persisting as Inuit women face the extractive industry's growing presence resulting from climate change.

Climate justice scholarship¹ has addressed the human rights and social welfare impacts of climate change on Inuit people.² Additionally, the gender inequities faced by Indigenous women in northern Canadian resource-based communities have also been explored in legal scholarship.³ This thesis attempts to contribute to this field by providing new legal perspectives and to view the issue as a matter of climate justice. Since it is not possible to seek an injunction on climate change, my thesis explores various legal avenues that may be available to Inuit women in order to address the harms of the climate crisis which affect them in specific ways, and exacerbate gender inequalities in Inuit communities.

1.2 Research Questions

This thesis is primarily interested in answering how to utilize law to better protect Inuit women from climate injustices. I am particularly focused on the gendered

¹ Climate justice can be seen as a subcategory of the environmental justice movement.

² Erika Chamberlain, "The Crown's Fiduciary Duties to Aboriginal Peoples as an Aspect of Climate Justice" (2012) 30:2 Windsor YB Access Just 289.

³ Konstantia Koutouki, Katherine Lofts, & Giselle Davidian, A Rights-Based Approach to Indigenous Women and Gender Inequities in Resource Development in Northern Canada" (2018) 27:1 Wiley 63 [Koutouki et al].

impacts of mining in Nunavut, which may increase in severity and frequency as the Arctic's warming presents new opportunities to expand resource development.

The following research questions organize this thesis:

1. In what ways are Inuit women negatively affected by mining in Nunavut? (Chapter 2)
2. How can voluntary measures in the mining industry better protect Inuit women from gendered impacts of mining projects? (Chapter 3)
3. Can Canadian law be utilized to protect Inuit women from these negative impacts and if so, how? (Chapter 4)
4. How is mining regulated in Nunavut? Are Inuit women equal participants and/or decision-makers within this process? (Chapter 4)
5. What role does the federal government play in perpetuating or protecting against harms experienced by Inuit women in mining communities? (Chapter 4)
6. Is law an effective tool with which to seek climate justice for Inuit women in the context of resource extraction in Nunavut? (Chapter 6)

I presume that the force of the law would provide opportunities for Inuit women to seek justice, but that addressing root issues of sexism and colonial attitudes will be critical for Inuit women to adequately be protected through law. I suspect it may be possible to hold mining companies liable beyond their voluntary measures, though it will likely require a novel legal argument.

1.3 Limitations and scope

The role of Inuit legal systems is not explored, as in the absence of any experience with an Inuit worldview it is not possible adequately to present or apply these ideas. Further, I do not explore the role of the federal government beyond its involvement in the governing of Nunavut's mining regulations. Instead, I focus more energy on how the mining industry could effect change through their practices on the ground. Mining is a powerful industry with the ability to shape the lives of those nearby for better or worse. The industry also is eager to improve its reputation on a global scale by improving its environmental impacts and by establishing better community relations.

1.4 Research Design

My research is designed to draw on insights from Inuit publications to the greatest extent possible. Given a lack of available research materials on the subject of Inuit women in Nunavut mining communities, I rely heavily on primary legal documents, testimonial evidence available through news articles, as well as the often limited scholarship exploring Inuit concerns with respect to climate change, gender, and the extractive industry in Nunavut. My theoretical research is utilized to advance my analyses of the Nunavut and Inuit-specific literature, reports and primary legal documents.

1.5 Theoretical Framework

This thesis aims to address legal concerns arising from climate change and natural resource extraction in Inuit communities, particularly as they affect Inuit women. Discussing the law and Indigenous interests from the perspective of a white non-Indigenous woman can have unintended consequences, as identified below. However, with the appropriate theoretical framework, it is possible to avoid falling into the many pitfalls of non-Indigenous analysis of Indigenous, life, culture, and law, which are identified below. This thesis will therefore be informed by insights gleaned from Indigenous legal theory, legal anthropology, and feminist jurisprudence. While each theoretical approach comes with respective strengths and challenges, the intersection of the three provides a more complete and nuanced perspective.

1.5.1 Indigenous Legal Theory

Attempting to analyse legal issues affecting Indigenous peoples in Canada by non-Indigenous scholars should be approached with great caution.⁴ While legal issues pertaining to Indigenous peoples is not the exclusive concern of Indigenous peoples, it is important that a non-Indigenous author understands how, various privileges may

⁴ Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J Richardson, Shin Imai, and Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) at 210.

influence how I read the text.⁵ Indigenous legal theory provides a lens that helps to avoid ethnocentrism. For example, as a non-Indigenous scholar, my understanding of Indigenous experiences is not based on personal experience or an Indigenous worldview, but it is based on the stories, teachings, and scholarship I have engaged with throughout my life.⁶ I can attempt to import such knowledge shared by Inuit women through literature and other means. However, an aspect of Indigenous legal theory which braids two different understandings of law cannot come from a place of my own interwoven worldviews. I have a Western worldview that is informed, as much as possible, by Indigenous worldviews. Indigenous legal theory assists in ensuring the implications of this thesis do not further colonize Inuit women and law.

Despite these many and important benefits of applying Indigenous legal theory, at least three main challenges may arise from relying solely on Indigenous theory as a framework for discussing experiences of Indigenous peoples.⁷ Such challenges are only sometimes present, but are cause for caution. First, there is a suggestion that only Indigenous persons are qualified to write about Indigenous issues and experiences.⁸

⁵ Emily Snyder, “Indigenous Feminist Legal Theory” (2014) 26: 2 CJWL/RFD 365 at 390 [Snyder].

⁶ See for example, Tracy Lindberg, “Critical Indigenous Legal Theory Part 1: The Dialogue Within” (2015) 27:2 CJWL 224 at 227 discusses trying to make sense of Canadian law where a Cree woman’s understanding of law given to them by the ‘creator’, or *manitow wiyinkewna*, differ in language, sources, grounding philosophies, breadth, applicability and enforceability.

⁷ Elizabeth Aletta Steyn, *At the Intersection of Tangible and Intangible: Constructing a Framework for the Protection of Indigenous Sacred Sites in the Pursuit of Natural Resource Development Projects* (LLD Thesis, Université de Montréal Faculté de droit, 2018) [unpublished].

⁸ *Ibid* at 40.

Second, Indigenous theory can place Indigenous and non-Indigenous interests as dualistic and in inherent opposition, placing Indigenous peoples as victims.⁹ The final difficulty identified is Indigenous theory's acute relativism: "certain Indigenous theorists decry the notion of fundamental human rights as a Western construct that is foreign to Indigenous culture,"¹⁰ as opposed to those who express the need to introduce human rights principles into Indigenous law.¹¹

Indigenous legal theory provides crucial insights to my theoretical framework, as eurocentric legal interpretation can destabilize Indigenous laws and potentially incite misunderstanding and misinterpretation of Indigenous laws. As John Borrows explains, "Even with the best of intentions, many simply may not be equipped to perform this role without further training."¹² A deep knowledge of the culture and unspoken symbolic aspects of Indigenous legal traditions is therefore crucial "to understand and acknowledge the meanings that Aboriginal people give to their laws."¹³

⁹ *Ibid* at 42.

¹⁰ *Ibid* at 43.

¹¹ John Borrows, *Canada's Indigenous Constitution* (Toronto Buffalo London: University of Toronto Press, 2010) at 38.

¹² *Ibid* at 140.

¹³ *Ibid* at 140-41.

1.5.2 Legal Anthropology

Legal anthropology takes a cultural and observational approach to understanding societies. It allows for the intellectual deliberation of questioning what the Canadian legal system can learn from different social structures regulating behaviour, such as Inuit customs and laws. This view of the law is a lens that will be used without attempting to establish new perceptions of Canadian law through an Inuit legal lens, as this falls outside the expertise of this author and beyond the scope of this thesis.

A fundamental challenge to legal anthropology is that various theories within the subfield essentialize the societies being studied while taking an ethnocentric understanding of Indigenous societies.¹⁴ Anthropological studies have been known to be uni-dimensional and incomplete.¹⁵ Thus, anthropologists like Basso argue for an approach that considers the “ideals, beliefs, stories and songs”¹⁶ of these people. Indigenous legal theorists often identify and unpack the complexities of Indigenous laws, lives and culture that are necessary to grasp an understanding of Indigenous perspectives. Therefore drawing on insights from both legal anthropology and Indigenous legal theory helps provide a well-informed approach to the topic in question.

¹⁴ Michael M Ames, *Cannibal Tours and Glass Boxes – The Anthropology of Museums*, 2nd ed (Vancouver: UBC Press, 1992) at 6.

¹⁵ Keith H Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque: University of New Mexico, 1996) at 66.

¹⁶ *Ibid* at 106.

Various branches of legal pluralism have risen within legal anthropology. This thesis is not prescriptive in terms of the institutionalization of Indigenous legal systems and reforming the Canadian justice system, as some legal pluralists¹⁷ propose. Legal pluralism falls victims to the same pitfalls of legal anthropology overall. However, certain Indigenous legal theory that arguably utilizes conceptions of legal pluralism is useful to fill the gaps, particularly the approach of “braiding legal orders.” In *Braiding Legal Orders*,¹⁸ various Indigenous legal theorists advance a multijuridical vision of a braiding and unifying of Indigenous, international, and Canadian laws. This helps to demonstrate how legal pluralism and Indigenous legal theory intersect and may demonstrate legal pluralism free of eurocentrism.

1.5.3 Feminist Jurisprudence

Feminist legal theory provides essential insights to the analysis of Inuit women’s experiences and rights as they relate to climate change and resource extraction. Feminist theories recognize that state law, though masked as ‘gender neutral’ is male-centric and that “standards of what is rational reflect the interests of those who

¹⁷ *Ibid*; and Mary Ellen Turpel, “Reflections on Thinking Concretely about Criminal Justice Reform” in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 206 at 215 (discussing the Canadian criminal justice system).

¹⁸ John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: CIGI Press, 2019).

currently hold power.”¹⁹ Unfortunately, some feminist legal theory has ignored Indigeneity and tacks on conversations of race, rather than understanding how race unsettles the field altogether.²⁰ Scholars who take liberal ideals of Western law and legal theories to the study of Indigenous issues have also been criticized as potentially contributing to ongoing colonialism.²¹

For these reasons, the feminist theoretical approach I draw on is informed by Indigenous Feminist Legal Theory (IFLT), a framework which was developed in response to the absence of substantive and internal work that focuses on Indigenous laws and the gender dynamics within them.²² As for with Indigenous legal theory, IFLT particularly focuses on understanding Indigenous laws, which is only pertinent to parts of this thesis, as the majority of this thesis analyses Canadian law. However, insights of IFLT can help prevent inserting my own assumptions about the Inuit experience, and mitigate applying eurocentric perspectives of the law and gender.

Mining projects can bring positive impacts to communities, but they also impose disproportionate negative effects on women and other marginalised groups, such as

¹⁹ Katharine Bartlett & Rosanne Kennedy, “Introduction” in Katharine Bartlett & Rosanne Kennedy, eds, *Feminist Legal Theory: Reading in Law and Gender* (Boulder, CO: Westview Press, 1991) 1 at 3 [Bartlett & Kennedy].

²⁰ Snyder, *supra* note 5 at 372.

²¹ Christie, *supra* note 4.

²² Snyder, *supra* note 5 at 388.

Indigenous peoples.²³ Chapter 2 describes why the effects of mining on Inuit women must be urgently understood and addressed. Chapter 3 explores the mining industry's voluntary measures to maintain good community relations, otherwise known as a 'social licence to operate.' I critique the extent to which they consider and address gendered impacts of mining. Chapter 4 consists of two parts; the first critiques the effects of Nunavut's mining regulations on Inuit women; and the second part explores examples of how private law may provide protection and legal recourse for Inuit women in mining communities. Chapter 5 analyses the concern of gender 'blindness' in the law, the potential hope brought by agreements between Inuit and mining communities, the role of international law in seeking justice for Inuit women in Nunavut mining communities, and finally how the findings from this research are grounded in climate justice. Finally, in Chapter 6, I conclude that the law is capable of providing recourse for Inuit women, however deep-seated problems with the legal system and the law must be improved in order to address root-causes that may lead to future climate injustices against Inuit women in Nunavut.

²³ Deborah Stienstra et al, "Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada's North" (13 May 2016), online (pdf): *FemNorthNet/The Canadian Research Institute for the Advancement of Women* <<http://fnn.criaw-icref.ca/images/userfiles/files/SSHRC%20KS%20Report.pdf>>.

Chapter 2: Context

2.1 Background

Mining projects can bring positive impacts to communities, but they also impose disproportionate negative effects on women and other marginalised groups, such as Indigenous peoples.²⁴ Indigenous peoples are important stakeholders in mining development, as most mining production or explorations sites are located within 200 kilometres of Indigenous communities and they are often located on traditional lands.²⁵ Mining and other development projects on or near indigenous territories are “one of the foremost concerns of Indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights.”²⁶ Additionally, the race to extract natural resources and gain profit in the global economy at the cost of significant socio-economic costs disproportionately experienced by women is a crisis at both a local and global scale.²⁷

Resource development projects and their workers have deep and complex impacts on nearby communities that typically lead to violence against women.

²⁴ *Ibid.*

²⁵ Adam Bond & Leah Quinlan, “Indigenous Gender-based Analysis for Informing the Canadian Minerals and Metals Plan” (2018) Native Women’s Association of Canada at 12 [NWAC].

²⁶ Koutouki et al, *supra* note 3 at 63.

²⁷ Stienstra et al, *supra* note 23.

Generally, causes for this violence include changes in family dynamics, sexual exploitation perpetrated by transient mine workers, an increase of substance abuse, as well as general shift in the community's economy. Harmful gendered impacts of mining are an incessant reality observable at global, national and community levels. In this chapter, I detail how Indigenous women face disproportionate and unique adverse impacts due to the presence of mining projects in their communities, with particular attention to Inuit women in Nunavut. Inuit women are the focus of this research for a number of reasons.

The first reason why I focus this thesis on Inuit women in Nunavut mining communities is that the Arctic is warming more rapidly than any other place on earth, thus increasing accessibility to new development opportunities for mining.²⁸ Nunavut's Inuit-owned lands have significant and proven mineral potential as well.²⁹ The Arctic's warming accordingly increases the extent of economic development and the number of industrial resource extraction activities on Inuit lands, thereby causing transformative ramifications on the land and wildlife, and consequently on Inuit culture and way of life.³⁰ There are gendered aspects to these ramifications. Addressing the negative

²⁸ Koutouki et al, *supra* note 3 at 63.

²⁹ Thomas R Berger, "Conciliator's Final Report: Nunavut Land Claims Agreement Implementation Planning Contract Negotiations for Second Planning Period." 2006, online: < <https://www.rcaanc-cirnac.gc.ca/eng/1100100030982/1542915160660?wbdisable=true> > [Berger].

³⁰ *Ibid.*

impacts of mining faced by Inuit women in the Arctic is an urgent matter due to the immediacy of climate crisis threats and impacts.

Second, Nunavut was established through a modern-day treaty known as the Nunavut Land Claims Agreement (“NLCA” or “Agreement”)³¹. The NLCA regulates the management of natural resources, including the assessment, approval and monitoring process for mining projects. Additionally, mining companies are required to come to an agreement with Inuit communities in certain circumstances, which I elaborate upon in Chapters 3 and 4. This legal framework is unique and also subject to negotiation, which I address in Chapter 5.

Finally, Nunavut’s Meadowbank Mine has been studied to a significant degree, providing reliable data regarding the impacts of the mine on Inuit women. This study stands out from the general dearth of literature on and case studies of resource extraction and Inuit women.

2.2 A Brief History of the Inuit of Nunavut

The Inuit are Indigenous peoples inhabiting northern Canada and other parts of the Arctic region. They refer to the Arctic’s land, water and ice as their homeland, or

³¹ Nunavut Land Claims Agreement, Inuit of the Nunavut Settlement Area and Canada, 25 May 1993
Ottawa: Minister of Indian Affairs and Northern Development and the Tungavik [NLCA].

“Inuit Nunangat.”³² The land, water and ice of the Arctic are integral to Inuit culture and ways of life.³³ As Inuit people have adapted to the harsh conditions of the Arctic for centuries, they have become some of the most culturally resilient people in North America.³⁴ However, they face persistent social and economic hardships due to a history of colonization.³⁵ Various interactions with European settlers, traders, missionaries in the mid-1700s and the introduction of federal government programs in the 1950s have fundamentally changed traditional Inuit societies and economies.³⁶ Inuit communities have experienced inter-generational traumas from economic violence³⁷ and various shifts to the fabric of Inuit life.³⁸ Canada’s colonization of Inuit Nunangat has destabilized Inuit societies, resulting in poverty, exclusion and dependencies on the state.³⁹ The resulting poverty and exclusion experienced by Inuit communities have gendered dimensions: Inuit women experience lower employment, income, health and general well-being outcomes compared to Inuit men.⁴⁰

³² Inuit Tapiriit Kanatami, “About Canadian Inuit”, online: <<https://www.itk.ca/about-canadian-inuit/>> [ITK].

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Elana Nightingale et al, “The effects of resource extraction on Inuit women and their families: evidence from Canada” (2017) 25:3 *Gender & Development* 367 at 369.

³⁷ Through forced settlement, relocation of families, residential schools and the slaughter of dogs used for hunting, according to Nightingale, *ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

When Nunavut was established as a separate entity from the North-West Territories in 1999, Nunavut's territorial government was designed to incorporate Inuit value and governance structures.⁴¹ Similarly to the other regions of Inuit Nunangat, Nunavut's economy is based on natural resource extraction, arts, fisheries and tourism.⁴² The resource sector is a rapidly growing part of the territory's economy, and the Nunavut government intends for this particular industry to continue to expand.⁴³ Arguably, mining development in northern Canada is an attempt to further colonise Indigenous communities.⁴⁴ Despite resulting benefits from mine exploration, development and production, these economic shifts and colonial legacies provide a delicate context for the negative impacts of mining to exacerbate existing vulnerabilities within communities.

⁴¹ Sheena Kennedy Dalseg, "Eva Aariak" in Sylvia Bashevkin, ed, *Doing Politics Differently?: Women Premiers in Canada's Provinces and Territories* (UBC Press 2019) 84.

⁴² Nunavut, Department of Executive and Intergovernmental Affairs, *Nunavut Economy*, (no date) online: <<https://www.gov.nu.ca/eia/documents/nunavut-economy>>.

⁴³ *Ibid.*

⁴⁴ Rebecca Hall, "Diamond Mining in Canada's Northwest Territories: A Colonial Continuity" (2013) 45:2 *Antipode* 376.

2.3 An Overview of Gendered Impacts of Mining

2.3.1 Global Patterns

Economic growth driven by resource extraction often comes at the expense of communities' environmental, social, cultural and physical wellbeing.⁴⁵ The impacts are profound, diverse, context-specific and observable around the world. Globally, most domestic laws and international standards providing guidance for the extractive industry do not sufficiently integrate a gender perspective, if they do so at all.⁴⁶ As the extractive industry continues to perpetuate gender inequality and undermine women's rights due to entrenched gender biases and gender-blind policies and practices.⁴⁷ Since women are generally more adversely impacted by mining than men,⁴⁸ policies and practices that neglect to acknowledge the gender-differentiated impacts of mining tend to harm women. For example,

Risks of HIV and AIDS and violence against women and girls can escalate with the influx of transient workers, the transition to a cash economy, and the emergence of new socioeconomic stresses.

⁴⁵ Pauktuutit Inuit Women of Canada, "Resource Extraction and Inuit Sexual Health: Sexual Health is Everyone's Responsibility" Conference Report (Ottawa: 2008).

⁴⁶ Sara L Seck & Penelope Simons, "Resource Extraction and the Human Rights of Women and Girls" (2019) 31:1 CJWL i at v.

⁴⁷ David Nelson, "Position Paper on Gender Justice and the Extractive Industries" (Oxfam International: 2017) [Oxfam].

⁴⁸ Catherine Macdonald, "The Role of Gender in the Extractives Industries" (2017) UNU-WIDER Working Paper No 52 at 7; Adriana Eftimie; Katherine Heller & John Strongman, "Gender Dimensions of the Extractive Industries: Mining for Equity" (2009) World Bank Extractive Industries and Development Series Working Paper No 8.

Furthermore, as vital resources like water and wood become scarcer, and water becomes more polluted, women and girls' unpaid care work can increase dramatically. The introduction of an [extractive] project can also cause a shift in gender power relations within affected communities that further tips the balance of power away from women. As this balance tips and gender inequality increases, so does the power inequality that drives poverty—undermining the development potential of the [extractive industry] sector.⁴⁹

Further, women often do not participate in the company-community agreement process due to local culture, social status, prevalence of violence, historic patterns, and legal and political climates.⁵⁰ The absence of women in consultation and decision-making roles can translate into a range of human rights infringements by the extractive industry.⁵¹ Additionally, because gender inequality and the marginalisation of women are some of the most persistent challenges arising from poverty,⁵² the mining industry's perpetuation of gender inequality may be counterproductive to a project's potential for reducing the poverty of affected communities.

⁴⁹ *Ibid* at 1.

⁵⁰ JC Keenan, DL Kemp & RB Ramsay, "Company-Community Agreements, Gender and Development" (2016) 135:4 J Bus Ethics 607 at 610 [Keenan et al].

⁵¹ *Ibid* at 1.

⁵² *Ibid* at 609 referring to Esther Duflo, "Women's Empowerment and Economic Development" (2012) 50:4 Journal of Economic Literature 1051.

2.3.2 Indigenous Women in Canada

The resource extraction sector is the largest private sector employer of Indigenous peoples in Canada and is viewed as critical to their financial prosperity.⁵³ Yet, the potential benefits arising from increased wage labour and income for community members also come with unintended and gendered negative impacts.⁵⁴ The economic benefits of resource development are not equally distributed among men and women, as jobs created by mines are more favourable to men, and when women are employed by the mine, they are perceived as token hires.⁵⁵ Shift work at fly-in-fly-out mines⁵⁶ has detrimental impacts on families and causes marriage breakdown due to the frequent absences of men working in remote mines.⁵⁷ Further, shift work alters gender roles and greater burdens fall on women.⁵⁸ Although road developments that increase access to remote communities may improve the availability of cheaper foods and supplies, “it has been shown to increase alcohol and drug use and to aggravate ongoing social ills.”⁵⁹

⁵³ Raywat Deonandan, Kalowatie Deonandan & Brennan Field, “Mining the Gap: Aboriginal Women and the Mining Industry” (March 2016), online (pdf): *ResearchGate* <https://www.researchgate.net/publication/322734704_Mining_the_Gap_Aboriginal_Women_and_the_Mining_Industry> at 7 [Deonandan et al].

⁵⁴ *Ibid* at 8.

⁵⁵ *Ibid* at 14.

⁵⁶ When mines are remote, workers must fly in and out of the work site for weeks at a time.

⁵⁷ Deonandan et al, *supra* note 53 at 16.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* at 17.

In Canada, Indigenous women are generally subject to experiencing 'risk pile-up' and intersectional forms of discrimination and harm and due to overlapping categorizations of socioeconomic status, race, gender indigeneity and the ongoing effects of colonialism.⁶⁰

In Canada, the risks associated with resource extraction and its impacts on indigenous communities must also be considered in the context of the legacy of colonialism that exists in the country, including a history of underfunding basic services for indigenous peoples, poor decision making over land and resources, and historically limited opportunities for indigenous peoples.⁶¹

Therefore, the forms of discrimination experienced by Indigenous women in general remain complex and pervasive in relation to resource extraction.

The resource extraction industry exacerbates violence against Indigenous women and girls in several ways due to its "issues related to transient workers, harassment and assault in the workplace, rotational shift work, substance abuse and addictions, and economic insecurity."⁶² The violence resulting from resource extraction

⁶⁰ The Firelight Group, Lake Babine Nation & Nak'azdli Whut'en, "Indigenous Communities and Industrial Camps: Promoting Healthy Communities in Settings of Industrial Change" (2017) 194 BC Studies Summer 7; Koutouki et al, *supra* note 3.

⁶¹ Koutouki et al, *supra* note 3 at 63.

⁶² National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place" (2019) at 584 [MMIWG].

takes place at the hands of both non-Indigenous men and Indigenous peoples within the mining community.⁶³

Companies that hire mostly non-Indigenous young workers to work in industrial camps, or 'man camps' have high salaries and little to no stake in host Indigenous communities.⁶⁴ They tend to exhibit a culture of hyper-masculinity, racism, sexism, homophobia and apathy, known as "rigger culture."⁶⁵ These attitudes are cited as a major factor in perpetuating sexual violence against women and girls in proximity to industrial camps.⁶⁶ "Rigger culture" and man camps often bring a sudden growth in the sex trade and an increase in sexual harassment, and have become some of the "predictable by-products" of mining operations.⁶⁷ Workers perpetuating violence against Indigenous women likely do not fear repercussions⁶⁸ because these camps are largely unpoliced.⁶⁹ Although more research is needed "to better understand the contributing factors of systemic and over racism and rigger culture to rates of sexual

⁶³ *Ibid* at 584.

⁶⁴ Kyle Edwards, "How we treat women' Worker camps make it possible to build infrastructure in remote locations in Canada. Is it worth the human cost?" May 13, 2019. Macleans. Online: < <https://www.macleans.ca/how-we-treat-women/>>.

⁶⁵ *Ibid*.

⁶⁶ NWAC, *supra* note 25 at 25.

⁶⁷ Rebecca Adamson, "Vulnerabilities of Women in Extractive Industries" (2017) 2:1 ANTYAJAA: Indian Journal of Women and Social Change 24 at 25.

⁶⁸ According to Qajaq Robinson, a commissioner for the National Inquiry into Missing and Murdered Indigenous Women and Girls, in Edwards, *supra* note 64.

⁶⁹ MMIWG, *supra* note 62 at 593.

violence against Indigenous women and girls,”⁷⁰ there is a clear connection between the camps and increases in incidents of sexual violence. Sarah Bradshaw, Brian Linneker & Lisa Overton explain how attitudes like rugged culture in the extractive industry lead to gendered violence:

Often, an exaggerated masculinity serves as a coping mechanism for the risks and dangers faced by those men working in extractive industries, and this “macho masculinity” constructs men as both brave and fearless providers for their families, and having insatiable sexual urges for an unlimited number of women....[T]he stereotypical ideals of what it means to be a man or a woman, and stereotypical ideas of women – in this case constructing women as either ‘wives’ or ‘whores’, is reinforced by the ‘supernormal patriarchy’⁷¹ in extractive industries.⁷²

Increased incidents of sexual violence is a multi-generational concern. Victims of sexual abuse and girls whose parents were sexually abused are more likely to be victims of trafficking.⁷³ Sexual violence against Indigenous women has deep roots in colonization as it has been used as a weapon of war during Canada’s colonization.⁷⁴ Incidents of violence against women are also increased by a mine’s presence as a

⁷⁰ NWAC, *supra* note 25 at 25.

⁷¹ A term coined by the authors based on the concept that where supernormal profits are produced, patriarchal relations may be exaggerated and intensified or ‘supernormal’. Sarah Bradshaw, Brian Linneker & Lisa Overton, “Extractive Industries as Sites of Supernormal Profits and Supernormal Patriarchy?” (2017) 25:3 *Gender & Development* 439 at 441 [Bradshaw, Linneker & Overton].

⁷² *Ibid* at 440.

⁷³ Dustin William Louie, *Preventative Education for Indigenous Girls Vulnerable to the Sex Trade* (PhD Thesis, University of Calgary 2016) at 7.

⁷⁴ NWAC, *supra* note 25 at 28.

consequence of the heightened presence of drugs and alcohol in industrial camps and mining communities.⁷⁵ Indigenous women have learned that violence on the land translates directly into violence against the bodies of Indigenous women and their ability to carry out and transmit their culture.⁷⁶ The same capitalist and colonial ethics that have allowed mining companies and governments to feel entitled to desecrate sacred lands allows them to feel entitled to the bodies of Indigenous women and children.⁷⁷

In response to these somber realities, the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls calls upon extractive and development industries to take action in ensuring the safety and security of Indigenous women, girls and 2SLGBTQIA⁷⁸ people and identified an ‘urgent need’ for Indigenous women and girls to be considered throughout all stages of resource extraction project planning, management, and monitoring.⁷⁹

⁷⁵ NWAC, *supra* note 25 at 27.

⁷⁶ NWAC, *supra* note 25 at 23.

⁷⁷ *Ibid* at 42.

⁷⁸ Acronym encompassing two-spirit, lesbian gay, bisexual, transgender, queer, questioning, intersex and asexual and other sexually and gender diverse people.

⁷⁹ MMIWG, *supra* note 62 at 592.

2.3.3 Inuit Women in Nunavut

The Meadowbank Mine is an open-pit gold mine owned by Agnico-Eagle Mines (AEM) and is located 110km outside of Baker Lake, Nunavut in the Kivalliq Region. The mine opened in 2010 and was expected to end production in 2018.⁸⁰ However, the discovery and development of a satellite mine 50km away in Amaruq in 2013 and the ongoing expansion of the Amaruq site, the life of the Meadowbank Complex⁸¹ will span at least until the year 2026.⁸² The remote Meadowbank mine camp hosts over 500 employees at a time, and the Amaruq camp can host an additional 350 employees.⁸³ Due to the remoteness of the mine, Meadowbank's workforce flies in and out of the site every two weeks according to the two-weeks-on, two-weeks-off rotation.⁸⁴ The short-term project transformed the local socio-economic conditions in such a way that a return to pre-mine era practices, such as subsistence hunting, is "hardly imaginable."⁸⁵

⁸⁰ Nightingale, *supra* note 36 at 370.

⁸¹ The Meadowbank Complex refers to the combined new Amaruq mine sites as well as the original Meadowbank mine.

⁸² Agnico Eagle Mines Limited. "Meadowbank Complex" (no date), online: <<https://www.agnicoeagle.com/English/operations/operations/meadowbank/default.aspx>>.

⁸³ *Ibid.*

⁸⁴ Ian Ewing, "New Path for Ancient Culture" *CIM Magazine* (01, September 2013), online: <<https://magazine.cim.org/en/management/new-path-for-ancient-culture/>>.

⁸⁵ Annabel Rixen & Sylvie Blangy, "Life After Meadowbank: Exploring gold mine closure scenarios with the residents of Qamini'tuaq (Baker Lake), Nunavut" (2016) 3 *The Extractive Industries and Society* 297 at 299.

The community near Meadowbank mine, Baker Lake, was selected as a site for research regarding the impacts of resource extraction on Inuit women and their families.⁸⁶ Baker Lake was selected because it was one of five active mines in Inuit Nunangat at the time, and the only mine in Nunavut, the largest Inuit region.⁸⁷ At the time the research was completed, 93 percent of the population in Baker Lake identified as Inuit.⁸⁸ In this research, a survey of Inuit women near Meadowbank mine identified that the social impacts of the mine on all women - whether employed directly in the industry or not – were considerable. Inuit women of this region are predominantly employed by the mine in the laundry, kitchen and as housekeepers due to stereotypes and perceptions of their levels of education.⁸⁹ This is despite the fact that Inuit women on average are more educated than Inuit men.⁹⁰

Additionally, according to employment and average income statistics available for the Meadowbank Mine community, Baker Lake, men experienced greater rates of employment and higher levels of income than the women.⁹¹ Inuit families benefit materially overall despite this gendered difference, but the changes in income also gave

⁸⁶ Karina Czyzewski, Frank Tester & Nadia Aaruaq, “The Impact of Resource Extraction on Inuit Women and Families in Qamani’tuaq, Nunavut Territory: A quantitative assessment” (2016) Pauktuutit Inuit Women of Canada at 47 [Pauktuutit].

⁸⁷ *Ibid* at 370.

⁸⁸ *Ibid* at 369.

⁸⁹ *Ibid*.

⁹⁰ NWAC, *supra* note 25 at 28.

⁹¹ Pauktuutit, *supra* note 89 at 48.

rise to social concerns.⁹² These social concerns were significantly tied to the increase in drugs and/or alcohol made available by increased income and permits issued by the RCMP.⁹³ Crimes related to substance use and misuse had increased, and “violence and assaults against women and children that involved drugs and/or alcohol [had] reportedly increased”⁹⁴ due to the presence of the mine. Further, the mine’s gender-based labour had led to an environment where women “[bore] the impact of navigating childcare and child-rearing, gender-based service-sector labour, harassment on the job and poverty and gender-based violence when money [went] towards gambling, alcohol, drugs and sex.”⁹⁵ Other gendered impacts of mining found in this study include an increase in sex work “in response to economic instability and an increased number of men with money.”⁹⁶

Local people also identified the material and economic benefits from employment opportunities introduced by the mine,⁹⁷ leaving most respondents of the Pauktuutit study conflicted, confused, worried and scared. Although the respondents enjoyed the opportunities to make friends, learn new things and have economic security, socio-cultural, racial and significant gender considerations to working in the

⁹² *Ibid* at 49

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid* at 50-51.

⁹⁶ *Ibid* at 53.

⁹⁷ *Ibid.*

resource extraction industry were also identified.⁹⁸ Overall, Inuit women report having mixed feelings regarding whether the mine is improving or worsening the lives of community members.⁹⁹

Women in mining communities are especially vulnerable to exacerbated gender-based violence due to the history of violence in Nunavut and the lack of publicly funded support.¹⁰⁰ The statistics documenting violence against Inuit women and women in Nunavut in general are a staggering indication of the highly delicate social context that mining proponents must consider. The rate at which Inuit women experience violence, particularly partner violence, is higher than any other group of women in Canada.¹⁰¹ Generally, women in Nunavut are victimized by violent crimes 13 times more than women in Canada as a whole and they “are 12 times more likely to be sexually assaulted than in other provinces and territories.”¹⁰² The rate of violent crime in Nunavut is more than seven times the national rate, meaning that women and girls are far more likely to be killed in Nunavut than anywhere else in Canada.¹⁰³ In 2016, women and girls represented nearly two-thirds of Nunavut’s reported crimes and were the victims of

⁹⁸ *Ibid* at 46.

⁹⁹ *Ibid* at 50.

¹⁰⁰ Keenan et al, *supra* note 48 at 612.

¹⁰¹ Pauktuutit Inuit Women of Canada, “Study of Gender-based Violence and Shelter Service Needs across Inuit Nunangat” Final Report (2019) at 26 [PIWC].

¹⁰² Pauktuutit Inuit Women of Canada & Elizabeth Comack, “Addressing Gendered Violence against Inuit Women: A review of police policies and practices in Inuit Nunangat” (2020) [PIWC & Comack].

¹⁰³ PIWC, *supra* note 101 at 26.

95% of sexual offences.¹⁰⁴ In 2016, Nunavut had the highest rate of female victims of police-reported family violence in Canada.¹⁰⁵ To make matters worse, these statistics do not capture unreported incidents of crime.¹⁰⁶

It is easy to draw a connection between mining activities and cultural determinants of violence. Primary cultural determinants of violence against Inuit women include the disruption of Inuit culture and identity, the normalization of violence, and the changing physical landscape.¹⁰⁷

If mining perpetuates violence against women due to substance abuse and family tensions, this kind of violence could arguably become more normalized. If mining creates a shift to Inuit cultures that were previously dependant on traditional ways of living, then Inuit culture and identity may be disrupted by mining. Finally, the changing physical landscape is inevitable with new mining projects, from access roads being built to the obvious exploitation of the land:

Both climate change and resource extraction activities are changing Inuit relationships to the environment by limiting access to the land and sea while also disrupting traditional ecological knowledge of landscape conditions.¹⁰⁸

¹⁰⁴ *Ibid* at 26.

¹⁰⁵ PIWC & Comack, *supra* note 102.

¹⁰⁶ *Ibid*.

¹⁰⁷ PIWC, *supra* note 101 at 28.

¹⁰⁸ *Ibid* at 35.

Other determinants of violence against Inuit women are also effects of mining: substance abuse,¹⁰⁹ an influx of high salaries and wage gaps, financial abuse, and an influx of non-Inuit workers. One participant of the study recounted the latter determinant as follows:

These men from away, they come into our communities and they get ridiculous amounts of money, and they go to the bars and prey on women who are drinking. And they feel entitled to sex or whatever. And it's scary, the sense of entitlement, and entitlement to women's bodies. I think that's an attitude of young men especially that you see around here. I think it's compounded by money, and the workers from away just here for a couple weeks. Letting out whatever, letting off steam.¹¹⁰

Inuit women encounter such high rates of gender-based violence that they have come to expect it in their lives.¹¹¹ Unfortunately, there is a significant knowledge gap regarding key interventions and primary prevention strategies, and an understanding of the needs of Inuit women and girls experiencing violence is critically lacking.¹¹² It is

¹⁰⁹ This is a social determinant of violence. See *ibid* at 39.

¹¹⁰ *Ibid* at 43. Participant is from Happy Valley-Goose Bay, a town in Newfoundland and Labrador affected by Voisey's Bay nickel project, which faced strong opposition against local Inuit women. For more on Inuit women and Voisey Bay, see: Linda Archibald & Mary Crnkovich, "If Gender Mattered: A case study of Inuit women, land claims and the Voisey's Bay Nickel Project." (Status of Women Canada 1999).

¹¹¹ Elizabeth Comack, "Inuit Women in Canada's North encountering 'racialized policing' report says" *CBC News North* (16 January 2020), online: <<https://www.cbc.ca/news/canada/north/inuit-women-in-canada-s-north-encountering-racialized-policing-report-says-1.5429512>>.

¹¹² PIWC, *supra* note 101 at 26.

therefore critical to undertake an examination of the possible strategies to mitigate gendered violence and other harms experienced by Inuit women in mining communities.

Chapter 3: Social Licence to Operate and Voluntary Measures by the Mining Industry

3.1 The Mining Industry's Approach to Gendered Harms Experienced by Indigenous Women

The deeply complex and harmful gendered impacts of mining are being ignored, diminished or oversimplified by the Canadian mining industry. Alex Buchanan, Vice President of the North-West Territories & Nunavut Chamber of Mines acknowledged that mining companies “strive for zero harm, [but] incidents where women experience abuse can and do occur.”¹¹³ He defended mining companies by stating that they are compliant with socio-economic terms and conditions of the community, environmental assessments, and obligations to “maximize Inuit involvement in our operations, including Inuit women.”¹¹⁴ He further grossly mischaracterized the effect of mining industries on the safety of Indigenous women and girls by suggesting that, “women are an order of magnitude safer at our mines than at home.”¹¹⁵

Mining companies have begun to attempt to address the occupational gender gap by encouraging the recruitment and training of women to work at the mine.

¹¹³ MMIWG, *supra* note 62 at 591.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

However, it often amounts to little more than window-dressing¹¹⁶ and downplays the magnitude and complexities of gender-related issues. For example, in 2018, the Native Women’s Association of Canada (NWAC) produced a detailed report regarding the complexities faced by Indigenous women in the mining industry for informing the Canadian Minerals and Metals Plan (CMMP).¹¹⁷ The report used a culturally relevant gender-based analysis (CRGBA) and provided 34 recommendations.¹¹⁸ NWAC’s report evidently had little to no effect on the CMMP, as the only comments regarding Indigenous women in the 2019 CCMP were about the need to employ more Indigenous women and for gender-sensitivity training at the mine. The only indication that the CMMP considered the NWAC report was the following vague statement:

Industry and governments must consider the concerns and interests of Indigenous women—particularly those factors that affect their safety on projects and in proximate communities—and address barriers to employment.¹¹⁹

Another illustration of the mining industry’s approach towards Indigenous women’s concerns relates to Meadowbank mine. The AEM Nunavut Community Relations, Education & People Development Team, was awarded the prestigious “2020

¹¹⁶ Deonandan et al, *supra* note 53 at 8.

¹¹⁷ NWAC, *supra* note 25.

¹¹⁸ *Ibid.*

¹¹⁹ Natural Resources Canada, *Canadian Minerals and Metals Plan* (2019) at 19.

Sustainability Award” presented by Prospectors & Developers Association of Canada (PDAC). PDAC is considered “the leading voice of Canada’s mineral exploration and development community since 1932.”¹²⁰ AEM’S team in Nunavut received the award in part for “setting an example for the mining industry” by “developing its Inuit workforce and providing support for local communities,”¹²¹ including Baker Lake near Meadowbank mine. Despite earning this award for the apparent outstanding efforts in community relations and environmental sustainability, the company has not addressed the gendered harms experienced in the community beyond the mine. Their only effort related to gender appears to be a program to encourage women to work at the mine and to advance through mentorship opportunities.¹²² This is despite the fact that Pauktuutit Inuit Women of Canada studied this community and determined the various gendered concerns of Inuit women, recounted above.

Awarding a company a prize for its community relations despite a near complete lack of consideration for women demonstrates that the mining industry does not feel

¹²⁰ Prospectors & Developers Association of Canada, “About PDAC” (no date), online: <<https://www.pdac.ca/home>>.

¹²¹ Prospectors & Developers Association of Canada, “PDAC Awards” (no date), online: <<https://www.pdac.ca/about-pdac/awards/2020-award-recipients/2020-sustainability-award>>.

¹²² Agnico Eagle Limited aims to foster an inclusive workplace for women and people for different backgrounds through a mentorship program. See: Agnico Eagle Mines Limited, “2018 Sustainable Development Report”(2018), online (pdf): <https://s21.q4cdn.com/374334112/files/doc_downloads/sd_reports/2018/2018-SD-Report-English.pdf> [AEM Report].

actual pressure to address gendered harms of mining development. The mining industry appears to be actively avoiding difficult questions regarding how they cause, perpetuate and amplify gendered harms.

3.2 Addressing Gendered Harms in Mining Through Voluntary Measures

Violence and other harms against Indigenous women and girls are rooted in human rights violations and in Indigenous-based understandings of rights,¹²³ yet there is little beyond public pressure to coerce corporations to actively engaging in the protections of Indigenous women's rights. Indigenous women's rights in relation to natural resource extraction can be addressed through various international human rights norms and obligations.¹²⁴ Although companies are not generally responsible for upholding these norms, many companies choose to sign on to international frameworks such as the UN Global Compact or the Guiding Principles on Business and Human Rights.

Due to the voluntary nature of a mining company's engagement under international standards, very little can adequately hold them accountable to the ways in which they engage in Indigenous women's issues. Understanding whether mining companies can be held liable in court for breaching customary international norms

¹²³ MMIWG, *supra* note 62 at 118.

¹²⁴ Koutouki et al, *supra* note 3 at 67.

relevant to this context is beyond the scope of this thesis.¹²⁵ However, voluntary measures with accountability systems such as corporate social responsibility (CSR) and a social licence to operate (SLO) are worth exploring as avenues for avoiding the gendered harms against Inuit women in mining communities.

3.2.1 CSR and Gender

In 2018, the Chief Executive of Rio Tinto, Jean-Sebastien Jacques, stated the importance of “hold[ing] the industry accountable for making sure we operate in a responsible way with care for the environment, our people and society, while remaining economically viable.”¹²⁶ However, accountability approaches differ depending on whether the responsible operation of a company is sought through CSR initiatives or SLOs. CSR is “a self-regulating business model that helps a company be socially accountable to itself, its stakeholders, and the public.”¹²⁷ Through a CSR initiative, a company can voluntarily choose to comply with international standards related to

¹²⁵ For a discussion on corporate accountability through law, see: Min Yan & Daoning Zhang, “From Corporate Responsibility to Corporate Accountability” (2020) 16 *Hastings Bus LJ* 43.

¹²⁶ EY, “Top 10 business risks facing mining and metals in 2019-20” (2018), online: <https://www.ey.com/en_gl/mining-metals/10-business-risks-facing-mining-and-metals> at 5.

¹²⁷ James Chen, “Corporate Social Responsibility (CSR)” (22 February 2020), *Investopedia*, online: <<https://www.investopedia.com/terms/c/corp-social-responsibility.asp>>.

human and Indigenous rights. The extent to which voluntary efforts are pursued, however, is subject to the conscience of the organizational decision-makers.¹²⁸

A “social licence to operate” (SLO) is a “catch-all for winning public support for contentious major projects, such as natural resource development.”¹²⁹ The concept was coined by James Cooney, the Vice President of External Relations of a Canadian gold mining company, in 1998 in response to the noticeable loss of money caused by community resistance to mining development.¹³⁰ Despite meeting their legal requirements, mines continued to face significant challenges as communities would refuse to approve of the project and campaign against the mine. As a product of the mining industry’s “budding concern” with emerging social and environmental issues, companies could demonstrate a willingness to go ‘beyond compliance’ to mitigate such issues and earn legitimacy through the notion of the SLO.¹³¹ Boutilier and Thomson¹³² suggest four possible levels of social licence, “from lowest to highest: withholding,

¹²⁸ Magda BL Donia et al, “The Theorized Relationship between Organizational (Non)Compliance with the United Nations Guiding Principles on Human Rights and Desired Employee Workplace Outcomes” (2020) 12 Sustainability 2130.

¹²⁹ MacDonald Laurier Institute, “Social License and Canadian Democracy” (no date), online: <<https://www.macdonaldlaurier.ca/social-licence-and-canadian-democracy/>>.

¹³⁰ Robert G Boutilier, “Frequently asked questions about the social licence to operate” (2014) 32:4 Impact Assessment and Project Appraisal 263 at 263 [Boutilier FAQ].

¹³¹ Sara Bice & Kieren Moffat, “Social licence to operate and impact assessment” (2014) 32:4 Impact Assessment and Project Appraisal 257 at 6 [Bice & Moffat].

¹³² Robert G Boutilier & Ian Thomson, “Modelling and measuring the SLO” 2011. Invited paper presented at: The Social Licence to Operate Seminar (Brisbane: Centre for Social Responsibility in Mining, University of Queensland).

acceptance, approval, and psychological identification, each level associated with different costs and benefits.”¹³³ As the level of social licence rises, socio-political risks decrease.¹³⁴

Corporate social responsibility (CSR) and sustainable development initiatives are perceived as ‘softer’ approaches to community relations, while SLOs are seen as “a form of risk management”¹³⁵ or as a concept “more readily related to technical design... or complementary to the financial goals of the company.”¹³⁶ Community stakeholders may be empowered through SLOs by being effectively responsible for holding proponents accountable to the expectations communicated.¹³⁷ CSR on the other hand, is subject to ‘audit culture’ from which SLO is free.¹³⁸ Therefore, unlike CSR, SLO is a stakeholder-centric approach to addressing community needs and interests. While CSR initiatives are controlled by company, SLOs are enforced by stakeholders.

The director of the Institute for Human Rights and Business advocates the private sector to approach sustainable development through a SLO rather than CSR, because:

¹³³ Boutilier FAQ, *supra* note 130 at 267.

¹³⁴ *Ibid.*

¹³⁵ Bice & Moffat, *supra* note 131 at 6-7.

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at 7-8.

¹³⁸ *Ibid* at 11.

CSR is often too peripheral to the core business model, too much of a side-show, too far from providing real 'shared value'... The social licence is a much more useful concept than CSR, as the social license requires any business to ensure its activities respect the rights of all those in the community.¹³⁹

The respect of individual and collective rights must be enforced by the community stakeholders, meaning that the SLO is not necessarily fool-proof. However, SLOs are more reliable than CSR due to the central role of stakeholders in accountability.

3.2.2 SLO and Gender

Despite the advantages, SLOs comes with challenges when being relied upon to address and mitigate the risks of complex gendered harms faced by Indigenous women in mining communities. In general, SLOs are often gender-blind.¹⁴⁰ For example, from this statement, it appears that AEM is confident in the success of its SLO strategy:

Rather than simply reacting to community feedback or complaints, our community relations teams are regularly and proactively reaching out to community stakeholders. The goal is to gain community understanding and acceptance for our mining activities and projects, and to assess and mitigate any potential risks to our business...Melanie Corriveau, Community Relations Coordinator at the LaRonde mine, says this proactive approach signifies, "Social acceptance is now an

¹³⁹ John Morrison, "Business and society: defining the 'social licence'", *The Guardian* (29 September 2014), online: <<https://www.theguardian.com/sustainable-business/2014/sep/29/social-licence-operate-shell-bp-business-leaders>>.

¹⁴⁰ David J Jijelava & Frank Vanclay, "Social licence to operate through a gender lens: The challenges of including women's interests in development assistance projects" (2014) 32:4 *Impact Assessment and Project Appraisal* 283 [Jijelava & Vanclay].

integral part of Agnico Eagle's success. As early as possible, we engage and partner with stakeholders to assess and address any impacts or concerns. This not only helps us avoid potential conflict, it helps us discover opportunities for collaboration, and build community relationships on a foundation of trust and transparency."¹⁴¹

Although AEM may maintain a certain level of community acceptance, there is ample opportunity for improvement with respect to the experiences of Inuit women.

To be sure that a project proponent has acquired meaningful and long-term community support of a project, SLOs must ensure restrained and softer voices of the community, such as marginalised or less influential people, are heard. Boutilier, a leading SLO scholar in the field of project management, highlights the importance of interviewing marginalised groups when engaging with a community and seeking a SLO.¹⁴² This step is crucial when considering the concerns of marginalised women, as they are unlikely to indicate disapproval by disrupting business operations.¹⁴³ A short-term business case for the involvement of marginalised women in the SLO process may therefore be weak, particularly given the short-term planning and budget cycles that

¹⁴¹ AEM Report, *supra* note 122 at 48.

¹⁴² Boutilier FAQ, *supra* note 130.

¹⁴³ Keenan et al, *supra* note 48 at 613.

characterise the mining industry.¹⁴⁴ However, considering the less vocal sub-groups can increase the chance of long-term sustainable success.¹⁴⁵

3.3 Applying a Culturally-Relevant Gender-Based Analysis

AEM could obtain a stronger SLO from the Meadowbank mine community by taking due consideration of the complex realities of Indigenous women through the continuous use of a culturally-relevant gender based analysis (CRGBA). A gender-based analysis (GBA)

provides a critical lens for researching or evaluating projects that seeks to elucidate 'gender-based relations of domination.' GBA allows the voices of women when and where they may have been silenced, and it "seeks to rectify the situation when women's work, roles and perspectives have been rendered invisible through 'gender neutral stories' and policies."¹⁴⁶

GBA can offer an approach understanding social organizations, and economic and political life that shapes society in a holistic and complementary manner.¹⁴⁷ The MMIWG report recommends that every level of government engage GBA at every stage

¹⁴⁴ *Ibid.*

¹⁴⁵ Jijelava & Vancly, *supra* note 140 at 285, referring to Frank Vanclay, "The potential application of Social Impact Assessment in Integrated Coastal Zone Management" (2012) 68 *Ocean Coastal Manag* 149.

¹⁴⁶ Pauktuutit, *supra* note 89 at 10.

¹⁴⁷ Pontso Moorosi, "Gender, skills development and poverty reduction" (2009) 81 *Agenda: Empowering Women for Gender Equity* 110 [Moorosi].

of development.¹⁴⁸ Currently, Canada's implementation of GBA has been promoted by the federal government as a measure for 'gender mainstreaming,'¹⁴⁹ though it is not directed at industry actors.¹⁵⁰ Gender mainstreaming is a public policy strategy towards gender equality. Canada's key commitment to gender mainstreaming is the implementation of GBA throughout federal departments and agencies.¹⁵¹

The additional 'culturally-relevant' component of a CGBA adds an acknowledgement of "the socio-cultural and historical realities caused by colonization."¹⁵² A gender analysis of this sort "sees women as active agents of change and not as mere recipients."¹⁵³ Thorough reports regarding the gendered impacts of mining include recommendations and calls to action informed by a CRGBA.¹⁵⁴ To go beyond compliance in a SLO process, mining companies should be informed by this literature and attempt to implement the relevant recommendations to the best of their abilities. They can also ensure that a CGBA is applied continuously throughout their own planning, implementation, monitoring and evaluation stages of a project. The constant

¹⁴⁸ MMIWG, *supra* note 62 at 592.

¹⁴⁹ Canada, *Mainstreaming of a Gender Perspective* (2017), online: <https://www.international.gc.ca/world-monde/funding-financement/mainstream-integration.aspx?lang=eng>.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Pauktuutit, *supra* note 89 at 10.

¹⁵³ Moorosi, *supra* note 147 at 112.

¹⁵⁴ NWAC, *supra* note 25; Pauktuutit, *supra* note 89; Oxfam, *supra* note 47; MMIWG, *supra* note 62.

‘back and forth’ and good communication between a company and community indicates that the company acknowledges and respects the rights and long-term wellbeing of the stakeholders, and it signals their central role in the project’s development.¹⁵⁵

To push a SLO process to its greatest potential, mining companies may even demonstrate their commitment to addressing the gendered risks of mining in Indigenous communities by holding governments accountable to their gender mainstreaming policies, or by offering to assist in its implementation. Additionally, it would be wise for mining companies to ensure that their practices do not breach international Indigenous and women’s rights, as a recent case at the Supreme Court of Canada¹⁵⁶ has opened up the possibility for corporations to be held liable for customary international human rights violations.

3.4. Meadowbank Mine and CRGBA

3.4.1 Early-Stage Public Involvement

Had a CRGBA been applied at the initial stages of the Meadowbank mine’s development, perhaps some of the harms experienced by the Inuit women of Baker Lake could have been mitigated. Unfortunately, when examining the initial consultations

¹⁵⁵ Pauktuutit, *ibid* at 12.

¹⁵⁶ Nevsun Resources Ltd v Araya, 2020 SCC 5.

with the Inuit of Baker Lake conducted by the mine's previous owner, Cumberland Resources Ltd (Cumberland), it is clear that a CRGBA was not utilized and that the company's attempt to consider gender equality was naïve, if not misguided.

Cumberland's public involvement report from 2005¹⁵⁷ detailed the company's approach to consulting with community members regarding traditional knowledge and the public's response to the project. The report includes transcripts of these interviews and indicated the company's attempt to represent the various stakeholder perspectives: "Deciding who should be interviewed was an important task, especially when keeping in mind that all demographic and gender groups should be adequately represented."¹⁵⁸ However, it is clear that gender considerations beyond women's employment were not actively pursued.

In terms of beings culturally sensitive, the company chose to have one Elder select the interviewees to speak to traditional knowledge, "as she was in a position to know which Elders were still practicing traditional skills; which Elders were from the Meadowbank area, and which individuals would be more able to recall the events of his or her youth."¹⁵⁹ This decision can also be viewed as the company's attempt to select an effective stakeholder. However, through this approach, mostly men were selected to

¹⁵⁷ Cumberland Resources Limited. "Meadowbank Gold Project Public Involvement Report" (2005) [Cumberland Report].

¹⁵⁸ *Ibid* at 2-2.

¹⁵⁹ *Ibid* at 2-2.

answer questions regarding the “potential changes to the community and potential effects these changes could have on traditional lifestyle and land use.”¹⁶⁰ The Elder explained that she selected mostly men to respond to the initial survey questions regarding traditional knowledge of the Baker Lake and Meadowbank area because the men “travelled more and can read maps” whereas women talk more about “what they do around the camp area.”¹⁶¹ However, the report does not provide an explanation as to why mostly men were surveyed regarding potential changes to the community. The report only states that women were specifically targeted for this survey.¹⁶²

Additionally, the company did not sufficiently investigate the public’s knowledge of potential gendered repercussions, although community members were often worried about increased drug and alcohol problems resulting from greater cash flow in the community. Further, the questions pertaining to women were designed only to gauge how community members felt about women working. The report summarizes concerns related to women as follows:

Generalized support was expressed for women wishing to work at the mine site. Although there were some apprehensions about their safety and one interviewee wondered how a woman would bond with her children if she worked away from home. No one expressed any doubts

¹⁶⁰ *Ibid* at 2-4.

¹⁶¹ *Ibid* at 2-2.

¹⁶² *Ibid* at 2-4.

as to a woman's ability to fill a variety of different roles and all were very positive about the opportunities the project afforded women.¹⁶³

When reading through the interview transcripts, it is noticeable that most interviewees care about gender equality, although this was not mentioned explicitly in the report. For example, when asked how he felt about Inuit women working at the mine, one interviewee responded: "If they are not making or giving problems, I don't mind them working, and as long as they are left alone, but if the problem arises towards them, I will not like it."¹⁶⁴ When asked what non-Inuit should know when living and working in camps with Inuit men and women, another interviewee responded: "I am not sure, but they will have to treat men and women equal."¹⁶⁵

This public involvement report illustrates how a company may be under the impression that they have conducted adequate interviews for a SLO, but have had a flawed or neglectful approach towards addressing complex gender-related concerns. The report did not reflect a thorough understanding of the potential risks the project had towards Inuit women, although it is unclear whether this was an oversight or by design.

¹⁶³ *Ibid* at 2-6

¹⁶⁴ *Ibid* at B-33 interview with Jacob Ikinilik.

¹⁶⁵ *Ibid*.

3.4.2 Inuit Impact Benefit Agreement

Had Meadowbank mine's current owner, AEM, applied a CRGBA to their SLO processes, the company could have enhanced their SLO by going beyond their legal obligations towards the community. Specifically, AEM could have chosen to negotiate gender-based concerns into the Inuit Impact Benefit Agreement (IIBAs), or ensured the process allowed for the voices of marginalised stakeholders to be involved in the negotiations.

Impact Benefit Agreements (IBAs) with affected Indigenous communities are often an important means for mining companies to acquire SLOs. The needs and interests of the community are negotiated and formalized through contract, thus gaining official community support. However, IBAs can be deceiving, as it is not always negotiated with the needs of marginalised community members and it may not involve parties opposed to the project. In Nunavut, mining companies do not control with whom they negotiate the terms of the agreement. Article 26 of the *Nunavut Land Claims Agreement Act* provides that any development impacting the resource or water on Inuit land requires the negotiation of Inuit Impact Benefit Agreement (IIBA) between the developer and a "Designated Inuit Organization" (DIO) by the Nunavut Tunngavik Incorporated (NTI) according to the "DIO Designation Policy."¹⁶⁶

¹⁶⁶ Nunavut Land Claims Agreement Act, SC 1993, c 29 art 16.

The most recent IIBA for Meadowbank was signed in 2011 between AEM and Kivalliq Inuit Association.¹⁶⁷ The IIBA unfortunately was not designed to adequately address all concerns of Inuit peoples in a community, as it “did not outline any specific gendered social impacts or consider in what ways Inuit women may be affected differently from Inuit men by the project.”¹⁶⁸ In a study conducted for Pauktuutit Inuit Women of Canada regarding the impact of resource extraction on Inuit women, 50.30% of women surveyed indicated that they were unsure of women’s involvement in negotiations and agreements at the local mine, and 18.7% of the total women surveyed did not believe that women had been involved or adequately consulted.¹⁶⁹

The IIBA’s general gender-blindness reflects the broader phenomenon of excluding women from mining-related decision-making and negotiations:

Although there are pockets of innovative, gender-sensitive practice, agreement processes are frequently ‘gender blind’ where disproportionate impacts on women remain invisible, and women do not have inclusive and equitable access to development opportunities.¹⁷⁰

¹⁶⁷ Kivalliq Inuit Association is a DIO for the Kivalliq Region. Its mission is “to represent, in a fair and democratic manner, Inuit of the Kivalliq Region in the development, protection, administration and advancement of their rights and benefits as an aboriginal people; as well as to promote their economic, social, political and cultural well-being through succeeding generations.” Its specific goals are: “to preserve Inuit heritage, culture and language; to manage Inuit owned lands in the region and provide information to and consult with land claims beneficiaries on land use; to protect Arctic Wildlife and the environment, thereby preserving traditional uses for current and future generations; and to assist Inuit in the Kivalliq region in training and preparation for a Nunavut Territory.” See: Kivalliq Inuit Association, “Home Page” (no date), online: <<https://kivalliqinuit.ca/>>.

¹⁶⁸ Nightingale, *supra* note 36 at 380.

¹⁶⁹ Pauktuutit, *supra* note 89 at 36.

¹⁷⁰ Keenan et al, *supra* note 48 at 613.

Indigenous women are often purposefully excluded from community decision-making, consultations and negotiations with the private sector.¹⁷¹ Women's concerns are often marginalized because developers assumed that men are decision-makers and companies decide not to risk offending community custom.¹⁷² Further, extraction companies often rely on the argument that the 'local culture' prevents them from including women in company-community consultation and decision-making processes.¹⁷³ This is especially the case where community men cite women's customary social role as a reason to exclude them.¹⁷⁴ However, it is important for companies to consider whose version of 'culture' is being considered and whose interests are consequently excluded.¹⁷⁵ The cultural argument must not be accepted outright, and should not broadly exclude women from participating.¹⁷⁶ Processes and decisions between communities and the private sector that marginalize the voices and concerns of Indigenous women in this manner undermine the legitimacy of the final agreement.¹⁷⁷

¹⁷¹ NWAC, *supra* note 25 at 4.

¹⁷² Leah S Horowitz, "It shocks me, the place of women': intersectionality and mining companies' retrogradation of indigenous women in New Caledonia" (2017) 24:10 *Gender, Place and Culture* 1419 at 1420 [Horowitz].

¹⁷³ Oxfam, *supra* note 47 at 14.

¹⁷⁴ Horowitz, *supra* note 172 at 1420.

¹⁷⁵ Oxfam, *supra* note 47 at 14.

¹⁷⁶ Keenan et al, *supra* note 48 at 612.

¹⁷⁷ NWAC, *supra* note 25 at 4.

An additional way AEM's SLO with Meadowbank mine could have been strengthened is by applying a CRGBA to the development and implementation of wellness reports mandated by the Meadowbank IIBA.¹⁷⁸ The IIBA requires AEM to prepare an annual report on the wellness of the Inuit residents of Baker Lake.¹⁷⁹ The objective of the report is "to provide an overview of any impacts of the Meadowbank Mine on the wellness of the Inuit residents of Baker Lake in as much detail as practically possible"¹⁸⁰ regarding a non-exhaustive list of potential areas of impact.¹⁸¹ In the report, AEM acknowledges the mine's impacts on family and relationship stress, substance abuse, and financial management.¹⁸² Specifically, it notes an increase in physical, sexual and emotional abuse within families, as well as an increase in sexually transmitted infections.¹⁸³ However, the report never acknowledges the gender dimensions to these issues, and only mentions women in topics concerning employment. The wellness report addresses all concerns enumerated in the IIBA's non-exhaustive list, but does not take the extra steps to identify their gender dimensions.

¹⁷⁸ Pauktuutit, *supra* note 89 at 2.

¹⁷⁹ Meadowbank Inuit Impact Agreement between Kivalliq Inuit Association and Agnico Eagle Mines Limited, (2011), online (pdf): < <http://www.miningnorth.com/wp-content/uploads/2011/11/MEADOWBANK-IIBA.pdf> > at L2.

¹⁸⁰ *Ibid* at L5.

¹⁸¹ It is clear that the list is non-exhaustive, because "including any impacts on" precedes the enumerated areas of impact.

¹⁸² Agnico Eagle Mines Limited, "Baker Lake Wellness Report & Implementation Plan – 2016 Update" (2017).

¹⁸³ *Ibid*.

A CRGBA would have enabled AEM to return a more enlightened and thorough wellness report. By doing so, AEM would have demonstrated the initiative to go beyond its legal requirements in typical SLO fashion, and garner greater credibility. By avoiding the gender dimensions in the report, AEM's transparency and willingness to address gendered harms of their mining project are suspect. The relatively gender-blind nature of the wellness report is particularly troublesome, because Pauktuutit had already released a qualitative report of the impacts of the resource extraction on Inuit women in Meadowbank mine a year prior to the release of the wellness report.¹⁸⁴

3.5 The Legitimacy of Meadowbank Mine's SLO

AEM may be a leader in the mining industry for its community relations and sustainability initiatives at Meadowbank mine, but this only serves as an indication of how little the mining industry is concerned about Indigenous women's wellbeing. Nunavut laws require AEM to undertake various measures to ensure good community relations. However, the company has done little beyond its legal requirements to address Meadowbank mine's gendered harms. Ironically, AEM, claims to be identifying and mitigating "systemic barriers to the participation and advancement of women in the mining industry in Canada, notably with a focus at our Northern Operations on

¹⁸⁴ Pauktuutit, *supra* note 45 at 2.

eliminating barriers that impact Inuit women at our sites in Nunavut.”¹⁸⁵ However, AEM does not identify how the company aims to mitigate these systemic barriers, and, as noted above, their efforts appear to focus only on addressing the occupational gender gap. The complex and significant gendered harms of mining experienced by Inuit women are apparently absent from AEM’s SLO process, as systemic barriers advancing Inuit women’s rights are far more intricate than unequal working conditions and employment opportunities.

If AEM wishes to maintain its status as a leader in the field, the company should consider applying CRGBA to the SLO process at Meadowbank mine. It is an opportunity for the company to go beyond its legal requirements and mitigate future risks of community disapproval. In particular, the issues of gender-based violence must be explicitly addressed and deeply examined.

Ultimately, so long as the presence of mining activities constitute a threat of sexual violence, there cannot be a reasonable conclusion that the industry is a positive force for Indigenous women and girls. No community can ever be reasonably expected to support a project that puts their women and children at risk of rape.¹⁸⁶

¹⁸⁵ AEM Report, *supra* note 122.

¹⁸⁶ NWAC, *supra* note 25 at 5.

Literature on how to develop strategies for specific issues and their stakeholders identifies the need to construct a stakeholder profile based on all the data available.¹⁸⁷ Accordingly, to better address specific issues of gender-based violence faced by Inuit women, CRGBA must not only be considered conceptually, but it should also be implemented according to the insights and recommendations available in the literature pertaining to the gendered impacts of mining experienced by Indigenous women. Additionally, companies should also try to proactively minimize the gendered harms arising from mining projects.

By having a sufficient understanding of the social phenomena arising from the unique context of resource development near Indigenous communities, mining companies can attempt to address the root causes as much as possible through their SLO efforts. Although some of these root causes may be inherent in the very nature of mining projects and grounded in a history of colonization, mining companies may be able to work with communities to address these inequalities more effectively than government efforts. Therefore, to eliminate all risks of harm related towards Indigenous women in mining communities, a collaborative approach between industry, Indigenous peoples and government is likely required. Future research is needed to visualize a future for Nunavut where governments, the mining industry and Inuit groups

¹⁸⁷ Robert G Boutilier, *A Stakeholder Approach to Issues Management* (New York, NY: Business Expert Press, 2012).

collaborate to eliminate the disproportionate harms of mining experienced by Inuit women.

3.6 Conclusion

The findings of this paper are not only relevant to current mining activity in Inuit Nunangat, but they also inform the future of mining in the Arctic during the climate crisis. It is anticipated that the Arctic's warming will increase access to Baker Lake's rich natural resources and will continue to increase job opportunities and develop infrastructure in the town.¹⁸⁸ With development and rapid changes to communities in Nunavut, the intricate gendered implications must be at the forefront of developer's minds. Further the climate crisis will bring changes both anticipated and unpredicted. Traditional practices will inevitably be altered as a result of the major changes to the Arctic's environment.¹⁸⁹ The interrelated health, cultural, social, and economic effects of the climate crisis will place developers in a position where their impacts will be felt more intensely, and potentially in unprecedented ways.

The Inuit are known for their resilience. They live in some of the harshest climatic conditions on earth, yet have thrived culturally for centuries. Nevertheless, the

¹⁸⁸ Danielle Bochove, "In Planet's Fastest-Warming Region, Jobs Come with Thaw." *Bloomberg Business* (17 September 2019), online: <www.inkl.com/news/in-planet-s-fastest-warming-region-jobs-come-with-thaw?share=aoRdyVhwza>.

¹⁸⁹ Anna Bunce et al, "Vulnerability and adaptive capacity of Inuit women to climate change: a case study from Iqaluit, Nunavut" (2016) 83:3 *Nat Hazards* 1419 [Bunce et al].

Inuit are experiencing irreversible shifts to their homeland that encourage development activities with the potential to amplify their vulnerabilities. Whether through SLO or other voluntary measures, developers have the opportunity to address the gendered concerns already evident, and to take these measures a few steps further to mitigate exacerbated challenges brought by the climate crisis. As research continues to expose the impacts of mining on Indigenous women and as the climate crisis simultaneously intensifies these concerns, the mining industry may begin to feel pressure to take action to protect the Inuit women from the gendered impacts of mining. For reasons beyond a moral argument, the mining industry should seriously consider taking immediate action.

Chapter 4: Domestic Law

4.0 Introduction

This chapter is divided into two parts to discuss the role of domestic law as both a barrier and a tool to advocating for the interests of Inuit women. In Part 1, I review and analyse Nunavut's legislative framework regulating the approval and monitoring of mining projects in attempt to identify how the process allows for gendered harms to persist against Inuit women. In Part 2, I explore potential legal avenues to advocate for the rights and interests of Inuit women through private law; first through contractual agreements between the Inuit and mining companies, and second through the commencement of a tort action against a mining company.

4.1 Public Law

4.1.1 Mining and the Nunavut Land Claims Agreement

In seeking justice for Inuit women in mining communities, it is essential to understand the regulatory process that approves projects with such high associated risks. Mining regulations establish the basic level of compliance required of mining companies and establish the public bodies responsible for oversight.

The Nunavut Land Claim Agreement is the foundational document of the Territory of Nunavut, resulting in the largest Aboriginal land settlement in Canadian history.¹⁹⁰ The NLCA was signed by the Inuit (represented by the Tunngavik Federation of Nunavut), the federal government and the government of the Northwest Territories on behalf of the Queen. The Agreement was ratified and came into force as the *Nunavut Land Claim Agreement Act*¹⁹¹ in December 1993. The Inuit “ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement area...in exchange for defined treaty rights”¹⁹² and other benefits including a cash settlement of \$1.173 billion, which would be cared for by the Nunavut Trust for the benefit of all Inuit, and the creation of the territory of Nunavut with an elected government to serve the interests of all Nunavummiut.¹⁹³

This modern-day treaty formalizes the division of property rights among various Inuit bodies and the Crown. Inuit hold fee simple surface title to 19% of the land in

¹⁹⁰ Mineral Resources Division at CIRNAC’s Nunavut Regional Office, “Nunavut Mineral Exploration, Mining and Geoscience Overview” (2018), online (pdf): <https://www.gov.nu.ca/sites/default/files/exploration_overview_2018-english.pdf> at 3 [Mineral Resources Division].

¹⁹¹ Nunavut Land Claims Agreement Act, S.C. 1993, c. 29 [NLCAA].

¹⁹² *Clyde River (Hamlet) v PetroleumGeo-Services Inc.*, 2017 SCC 40 at para 2 [Clyde River].

¹⁹³ Nunavut Tunngavik Incorporated, “A Plain Language Guide to The Nunavut Land Claims Agreement” (2004), online (pdf): <<https://www.tunngavik.com/documents/publications/2004-00-00-A-Plain-Language-Guide-to-the-Nunavut-Land-Claims-Agreement-English.pdf>> at 6.

Nunavut and fee simple surface and subsurface title to 2% of Nunavut's land.¹⁹⁴ These parcels of land are referred to as 'Inuit Owned Land' (IOL). All surface title to IOLs are vested in the respective regional administrative bodies otherwise known as Regional Inuit Associations (RIAs). RIAs are three regional Designated Inuit Organizations (DIOs) structured as not-for-profit corporations and governed by Board of Directors whose members are elected by each community in the region: Qikiqtani Inuit Association (QIA), Kivalliq Inuit Association (KivIA) and the Kitikmeot Inuit Association (KitIA).¹⁹⁵ For the 2% - or 150 parcels – of IOLs that give fee simple surface and subsurface rights to Inuit, subsurface title is held and administered by Nunavut Tunngavik Incorporated (NTI).¹⁹⁶

The remainder of the land in Nunavut is federal Crown land, some of which has been ceded to the territorial government and governed by the *Commissioner's Lands Act*.¹⁹⁷ In the 98% - or 944 parcels - of IOL that guarantee only surface fee simple title to Inuit, the Crown retains mineral rights. For those IOLs and for Crown land in Nunavut, mineral claims, prospecting permits and mineral leases are issued pursuant to the *Nunavut*

¹⁹⁴ Nunavut Tunngavik Incorporated, "Explore the Potential of Inuit Owned Lands" (March 2011) Nunavut Tunngavik Incorporated (blog), online: <www.tunngavik.com/files/2011/03/lands_brochure.pdf>

¹⁹⁵ Chris Hummel, "Behind the Curtain, Impact Benefit Agreement Transparency in Nunavut" (2019) 60:2 *Les Cahiers de droit* 367 at 374 [Hummel].

¹⁹⁶ Mineral Resources Division, *supra* note 190 at 3-4.

¹⁹⁷ *Commissioner's Land Act*, RSNWT (Nu) 1988, c C-11.

*Mining Regulations*¹⁹⁸ by Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) in the Nunavut Regional Office. Surface rights for Crown land are administered according to the *Territorial Lands Act*.¹⁹⁹

The objectives of the Inuit in its negotiations of the NLCA are captured in the document's Preamble:

to provide for certainty and clarity of rights to ownership and use of lands and resources and of rights for Inuit **to participate in decision-making** concerning the use, management and conservation of land, water and resources, including the offshore,

to provide Inuit with wildlife harvesting rights and rights **to participate in decision-making** concerning wildlife harvest,

to provide Inuit with financial compensation and means of participating in economic opportunities,

to encourage self-reliance and the cultural **and social well-being of Inuit**;...²⁰⁰

Accordingly, the NCLA has a clear objective of providing Inuit a role in decision-making. The following provides an overview of the regulatory process that the NLCA subjects potential mining projects to, and identifies how it falls short from wholly

¹⁹⁸ SOR/2014-69.

¹⁹⁹ RSC, 1985, c T-7.

²⁰⁰ *NLCAA*, *supra* note 191, Preamble, para 3 [emphasis added].

meeting its objective. As will be explained, the implementation of the NLCA neglects to consider the wellbeing and interests of Inuit women. Given the severe potential consequences of mining on Inuit women, it is deeply problematic that this process provides little to no protection or recourse for Inuit women.

4.1.2 Mining Project Assessments

The NLCA establishes a joint management approach to land and resources, mandating that half of the members each of these boards be appointed by Inuit organizations.²⁰¹ The *Nunavut Planning and Project Assessment Act*²⁰² (“NUPPA”) was created to fill in certain gaps within the NLCA. To that end, the approval and assessment process for mining to which mining projects are subject integrates both the NLCA and *NUPPA*.

To implement the guarantees of Inuit to participate in decision-making concerning the use, management, and conservation of land, water and resources, the NLCA creates five institutions of public government (IPG). One such institution of particular relevance is the Nunavut Impact Review Board (NIRB), which is the

²⁰¹ NLCA, *supra* note 31 art 10.

²⁰² SC 2013, c 14.

administrative body responsible for screening and reviewing the ecosystemic and socio-economic impacts of mining projects according to their proposals.²⁰³

NIRB's primary functions are:

to screen project proposals in order to determine whether or not a review is required;

to gauge and define the extent of the regional impacts of a project, such definition to be taken into account by the Minister in making his or her determination as to the regional interest;

to review the ecosystemic and **socio-economic impacts** of project proposals;

to determine, on the basis of its review, whether project proposals should proceed, and if so, under what terms and conditions, and then report its determination to the Minister; in addition, **NIRB's determination with respect to socio-economic impacts unrelated to ecosystemic impacts shall be treated as recommendations to the Minister**; and

to monitor projects in accordance with the provisions of Part 7.²⁰⁴

NUPPA adds the primary objectives of NIRB:

23 (1) The Board must exercise its powers and perform its duties and functions in accordance with the following primary objectives:

(a) to protect and promote the existing and future well-being of the residents and communities of the designated area; and

²⁰³ NLCA, *supra* note 31 art 12.2.3.

²⁰⁴ NLCA, *supra* note 31 art 12.2.2. [emphasis added].

(b) to protect the ecosystemic integrity of the designated area.

However, NIRB must also take into account the wellbeing of residents of Canada outside the designated area²⁰⁵ and cannot establish requirements relating to socio-economic benefits.²⁰⁶

Based on NIRB's screening of a project proposal, a review will be required if:

the project may have significant adverse socio-economic impacts or significant adverse impacts on wildlife habitat or Inuit harvesting activities,

the project will cause significant public concern, or

the project involves technological innovation, the effects of which are unknown²⁰⁷

A project is screened to determine whether it has the potential "to result in significant ecosystemic or socio-economic impacts"²⁰⁸ and whether it requires a review by NIRB or a federal environmental assessment panel.

²⁰⁵ *NUPPA*, *supra* note 166 s 23(2).

²⁰⁶ *Ibid*, s 23(3).

²⁰⁷ *Ibid*, s 89(1) [emphasis added].

²⁰⁸ *Ibid*, s 88.

During the screening process, NIRB distributes public notice of Screening and the two-week public comment period commences. NIRB then provides the proponent with the opportunity to respond to comments. The Screening decision is prepared, submitted to the responsible Minister(s). NIRB may indicate that the project requires public review to the Minister. If NIRB indicates that a project does not require a review, the Minister may override this decision and send it to be reviewed. Where the Minister refers a project for review, a federal environmental assessment panel or NIRB shall review both socio-economic and ecosystemic impacts²⁰⁹ while taking into account:

all matters relevant to its mandate, including the following:

whether the project would **enhance and protect the existing and future well-being of the residents and communities** of the Nunavut Settlement Area, taking into account the interests of other Canadians;

...

(c) **whether the proposal reflects the priorities and values of the residents** of the Nunavut Settlement Area;

(d) steps which the proponent proposes to take to **avoid and mitigate adverse impacts**;

(e) steps the proponent proposes to take, or that should be taken, to **compensate interest adversely affected by the project**;

...

²⁰⁹ NLCA, *supra* note 31 art art 12.4.7.

the **monitoring program** that the proponent proposes to establish, or that should be established, **for ecosystemic and socio-economic impacts;**...²¹⁰

The review process involves public comment periods and community meetings at various, although the extent to which the public is involved is discretionary. NIRB is responsible for creating by-laws regarding the “procedures and guidelines for collecting information and opinions, including procedures for the conduct of public hearings by the Board or one of its panels.”²¹¹ These by-laws must “allow a designated Inuit organization full standing to appear at a public hearing for the purpose of making submissions on behalf of the people it represents.”²¹²

After it reviews a project proposal, NIRB issues a report to the Minister.²¹³ If the Minister determines that the report is deficient with respect to ecosystemic and socio-economic issues, it is referred to NIRB for further review or public hearings.²¹⁴ The Minister shall provide NIRB with written reasons for every decision.²¹⁵ Where a federal

²¹⁰ NLCA, *supra* note 31 art 12.5.5. [emphasis added].

²¹¹ NUPPA, *supra* note 166, s 26(1)(d).

²¹² *Ibid*, s 26(3)(b).

²¹³ NLCA, *supra* note 31, art 12.5.6

²¹⁴ *Ibid*, art 12.5.7(e).

²¹⁵ *Ibid*, art 12.5.10.

environmental assessment panel completes the review, a report is forwarded to the Minister of the Environment and the Minister of CIRNAC, who forward a copy to NIRB and release the report publicly.²¹⁶ NIRB has 60 days to review the report and forward its findings and conclusions to the Minister, including deficiencies in the panel report, additional terms, conditions and mitigative measures that should be attached to any project approval.²¹⁷ Similarly, the Minister has the final decision and shall also supply NIRB with written reasons for every decision.²¹⁸ Additionally, the Minister may determine that NIRB's terms and conditions for a project to proceed are "more onerous than necessary, insufficient in mitigating ecosystemic or socioeconomic impacts, or "on the basis that the terms and conditions are so onerous that they would undermine the violability of a project that is again, in the national or regional interest."²¹⁹

4.1.3 Advancing the Interests of Inuit Women through the Regulatory Process

The crucial takeaway regarding the NLCA review and screening process is that the Minister always has the final decision in project approvals and rejections. Although

²¹⁶ *Ibid* art 12.6.9

²¹⁷ *Ibid*, art 12.6.10.

²¹⁸ *Ibid*, art 12.6.14.

²¹⁹ Daniel W Dylan, "The Complicated Intersection of Politics, Administrative and Constitutional Law in Nunavut's Environmental Impacts Assessment Regime" (2017) 68 UNBLJ 202 at 210 [Dylan], referring to NLCA, *supra* note 31, art 12.5.7(c).

Nunavut's impact assessment regime is intended to protect the Aboriginal rights and interests of Inuit as beneficiaries of the Agreement, participatory rights and other neighbouring rights have been fragmented by the NLCA.²²⁰ Due to the minimal power provided to Inuit in decision-making and the sole reliance on the Minister for final decision-making, the rights, interests and culture of Inuit are diluted. The Minister is obligated to consider how a project relates to the national interest as well regional interests, despite the Agreement being intended to grant an array of rights to the Inuit. The NIRB members also each act in the interests of Nunavummiut and Canadians regardless of who appointed them to the board.²²¹ Therefore, despite the ability of Inuit to appoint board-members as a method of implementing a joint-management approach to land and resource governance, their interests are not necessarily prioritized and must weighed against the interests of others. However, "a decision that is incongruous with Inuit desires and interests has the real possibility of thwarting the promotion and protection of rights which the NPC and NIRB aim to ensure."²²²

²²⁰ *Ibid* at 203.

²²¹ Nunavut Impact Review Board, "Nunavut Impact Review Board and You" (No date), online (pdf): <<https://www.nirb.ca/sites/default/files/documents/guides/130405-NIRB%20Guide%201-Introduction-English-Online%20View%20Version-OEDE.pdf>> at 11 [Nunavut Impact Review Board].

²²² Dylan, *supra* note 219 at 229.

Further, the role of Inuit in community participation has proven insufficient. The participatory opportunities of Inuit in the Agreement are nevertheless confronted with a design “skewed in the federal government’s favour”²²³ thereby infringing on the possibility to place control of the Inuit’s destiny in their own hands. The challenges I describe to this process are not only theoretical, but have been raised in a court proceeding. In 2010, the QIA filed an application for an injunction with the Nunavut Court of Justice to stop the Minister of Natural Resource (NRCan) from conducting seismic testing in waters of North Baffin Island on the basis that “the terms and conditions of the NIRB report and the licence were not complied with, in that the consultations that took place... were not meaningful.”²²⁴ QIA described public meetings during a NIRB screening as “simply opportunities for the government to provide information about the project and argued that they did not provide an opportunity for Inuit to truly be consulted.”²²⁵ The court opined with respect to the nature of the NIRB public meetings: “It is clear that community members felt decisions had already been made and that they could have little or no impact on those decisions.”²²⁶ The QIA also argued that the Government of Canada and the Government of Nunavut did not meet

²²³ *Ibid.*

²²⁴ *Qikiqtani Inuit Association v Canada (Minister of Natural Resources)*, 2010 NUCJ 12, at para 17 [QIA v Canada].

²²⁵ *Ibid* at para 26.

²²⁶ *Ibid* at para 27.

their common-law and constitutional duties to conduct meaningful consultations and, if appropriate, accommodate, as the project jeopardized the Inuit right to harvest marine mammals.²²⁷ However, given that the Court was not tasked with determining the nature of the consultations that took place, but rather whether an injunction was warranted, the Court did not opine as to whether the public meetings were sufficient to meet the Crown's duty to consult. However, the NIRB's responsibility to the Inuit was addressed:

...it is not clear that the NIRB screening process is a consultative process in the meaning of the common law duty to consult. The NIRB is not tasked with the responsibility of consulting; it is tasked with the responsibility of reviewing applications. A successful NIRB screening may be evidence that the consultation was considered sufficient by NIRB and this may well be a factor that the court would consider in determining the sufficiency of the consultative process. But this does not necessarily mean that the NIRB process is itself a consultative process.²²⁸

Since this regime leaves the final decision regarding a proposed project not with the Inuit of Nunavut or the Government of Nunavut, but with a federal Minister, it is fair to conclude that the Agreement amounts to little more – if at all - than the right to accommodation under the duty to consult jurisprudence applicable to all Aboriginal

²²⁷ *Ibid* at para 13.

²²⁸ *Ibid* at para 22.

groups in Canada.²²⁹ This contradicts representations made by NIRB to the public on its website regarding the review social impacts in the assessment process:

The review is not just about the land and water – it is about you. How will a proposed project affect you, your family, and your community?

What are the expected social impacts of a projects?

Will there be positive social impacts, like more opportunities for training, leading to more access to jobs?

Will there be negative social impacts like exposure to more outsiders in communities contributing to a loss of Inuit culture?

How can the positive impact be assured, and the negative impact be limited?²³⁰

NIRB also acknowledges to the public that it is “responsible for making sure that interested parties in communities affected by a project are aware of the project and its potential environmental, social and economic impacts.”²³¹ Accordingly, there is no representation that Inuit needs will be influential in the approval process. Rather, it will inform the public of information regarding the project and how it will impact Inuit communities, families and individuals.

²²⁹ Dylan *supra* note 219 at 203.

²³⁰ Nunavut Impact Review Board, *supra* note 221 at 4.

²³¹ Nunavut Impact Review Board, “Home Page” (no date), online: <<https://www.nirb.ca/>>.

The extent to which these problems persist beyond this one example cannot be illustrated by examples of case law, as DIOs have often agreed to not bring legal action against mining companies through Inuit Impact Benefit Agreements, which will be discussed in Part 2 of this chapter. However, this example demonstrates that the Agreement does not guarantee the protection of Inuit rights, despite having this explicitly stated in its objectives, thereby providing little hope for gendered concerns to be protected through this process.

Recourse for Inuit women experiencing or at risk of being subject to negative socio-economic impacts of a mining project may be available through judicial review or an action claiming a breach of the regulatory process. The NLCA provides that a DIO and “any person or body recognized by laws of general application as having standing to seek a court determination [...] shall have standing before an appropriate court” to seek a determination as to whether any of the terms or conditions to a project were implemented and to seek remedy if they had not been implemented,²³² to obtain a court order to enforce any term or condition of a NIRB certificate,²³³ or to seek judicial review of decision and orders pursuant to the NLCA.²³⁴ Where a project’s approval is

²³² NLCA, *supra* note 31, art 12.10.5(a)

²³³ *Ibid*, art 12.10.5(b)

²³⁴ *Ibid*, art 12.10.5(c)

under judicial review for not having taken appropriate consideration of the gendered socio-economic negative impacts of a proposed project, Inuit women may have the opportunity to establish precedence that gendered aspects of socio-economic impacts should be considered by the Minister and other administrative decision-makers. Further research and analysis is required to dive into the possibility that a judicial review would be successful based on the lack of gendered considerations in a project's assessments. However, without any mention of gender throughout, the choice to litigate on the matter may not be preferable.

Since the review and screening process itself does not ensure that the needs of the Inuit are prioritized, or necessarily met, it is currently unlikely to provide the most protection for Inuit women. These regulations do not explicitly create space to address the unintended, yet common, gendered consequences of mining occur in remote mining communities, particularly by the employees of the mine to women in nearby communities. Further, it is clear from the data available that Inuit women are negatively impacted by resource extraction despite the 'social wellbeing' being a factor in a project's approval. Should the process be altered in a way that meets the needs of Inuit people, including the gender-specific concerns, this process may be able to proactively protect the needs of Inuit women.

Beyond the ample evidence that a gender analysis is needed in the assessment of resource development projects, Parliament recently passed legislation mandating

gender-based analysis in the assessment process, and a provision including “the intersection of sex and gender with other identity factors”²³⁵ as a considerations that must be taken into account during a project’s impact assessment. The *Impact Assessment Act*²³⁶ demonstrates that the federal government is aware of not only the need for a gender-based analysis, which has been demanded by Indigenous and non-Indigenous organization for quite some time, but it is also aware that this provision is accepted as a matter that has been legitimized by political representatives who contributed to bringing this piece of legislation into existence and into force.

However, the consideration of gender as a variable in an impact assessment is without meaning if women are not fully integrated in the participatory process, as all issues are women’s issues. Characterizing women as an “interest group” rather than an integral part of an impact assessment, reduces Indigenous women to victims of potential harms, rather than full members and participants with an equal interest in the future of the community as their male counterparts.²³⁷ Further, research is often

²³⁵ *Impact Assessment Act*, SC 2019, c 28, s 22(1)(s) [IAA].

²³⁶ *Ibid.*

²³⁷ Sheena Kennedy Dalseg et al, “Gendered Environmental Assessments in the Canadian North: Marginalization of Indigenous Women and Traditional Economies” (2018) 47 *The Northern Review* 135 at 151.

unavailable or inaccessible to Indigenous communities, making it difficult for Inuit women to validate their experiences when advocating for their rights and interests.²³⁸

As such, it is imperative that, should the structure of the review and screening of resource development in Nunavut remain unchanged, the Minister should at least consider approving projects with the context of Parliament's mandate for a gender-based analysis in non-treaty federally controlled lands and fund continuous research of the gendered impacts of resource extraction in Nunavut.

It is unclear whether Nunavut's assessment process is inadequate due to its inherent structure, its implementation regarding how public meetings and community consultations are conducted, the dissemination of information, a lack of resources, outright dismissal, or any combination of such factors. Nevertheless, changes to this gender-blind framework are necessary to protect not only the interests of Inuit women, but also those of the entire Inuit community.

²³⁸ *Ibid* at 152.

4.2 Private Law

4.2.1 Inuit Impact Benefit Agreements

Beyond the project impact assessment process, the NLCA provides another opportunity for Inuit communities to voice their concerns to mining companies. Section 26.2.1 of the NLCA provides that the proponent and regional DIO must have signed an Inuit Impact Benefit Agreement prior to the commencement of a “Major Development Project”²³⁹ on IOL.²⁴⁰ Although Hummel argues that IIBAs are subject to public law,²⁴¹ they are generally viewed as contracts between Indigenous groups and project proponents. The NLCA provides that IIBAs may be freely negotiated, though they must include terms requiring arbitration procedures²⁴² and periodic renegotiation.²⁴³ The following provides guiding principles for IIBA negotiation and arbitration:

- a) benefits shall be consistent with and promote Inuit cultural goals;
- b) benefits shall contribute to achieving and maintaining a standard of living

²³⁹ “Major Development Project” includes any Crown or private corporation involved in developing or exploiting natural resources that entails over 200 years of employment or over \$35,000,000 in capital costs and which is at least five years long.

²⁴⁰ NLCA, *supra* note 31, art 26.2.1

²⁴¹ Hummel, *supra* note 195 at 382.

²⁴² NLCA, *supra* note 31, arts 26.2.1-26.8.5

²⁴³ *Ibid*, art 26.10.1.

- c) among Inuit equal to that of persons other than Inuit living and working in
- d) the Nunavut Settlement Area, and to Canadians in general;
- e) benefits shall be related to the nature, scale and cost of the project as well as its direct and indirect impacts on Inuit;
- f) benefits shall not place an excessive burden on the proponent and under- mine the viability of the project; and
- g) benefit agreements shall not prejudice the ability of other residents of the Nunavut Settlement Area to obtain benefits from major projects in the Nunavut Settlement Area.²⁴⁴

Further, Schedule 26-1 of the NLCA provides a non-exhaustive list of “Matters Considered Appropriate for Inuit Benefits”²⁴⁵ including “safety, health and hygiene” and “any other matters that the Parties consider to be relevant to the needs of the project and Inuit.” The health and safety concerns and other needs of Inuit women in mining communities are therefore appropriate matters to address within an IIBA.

IIBAs should not be understood as evidence that the entire community supports the project. Rather, it is a sign that the community has taken a decision regarding a particular project in the current circumstances. IIBAs and other contractual agreements between mining companies and Inuit organizations have proven to provide a useful tool

²⁴⁴ *Ibid*, art 26.3.3.

²⁴⁵ *Ibid*, art 26.3.1 schedule 26-1.

to advance the interest of the Inuit in Nunavut mining communities. There is the potential to utilize this mandated agreement as leverage in favour of the Inuit. However, negotiations on behalf of the Inuit are advanced by the respective DIO, so the ability of the agreement to address the needs of Inuit women are likely a reflection of the ability of the DIO to adequately represent and prioritize the needs of the community.

IIBAs often preclude the DIO from initiating any judicial or administrative procedure or any other activity that intends to delay or block the project.²⁴⁶ Such forbearance clauses are standard practice in impact and benefit agreements (IBAs) across Canada.²⁴⁷ Typically, IBAs between indigenous peoples and proponents are neither publicly available, nor are they mandated through legislation.²⁴⁸ Hundreds of IBAs exist in Canada, yet are protected from public scrutiny by industry-standard confidentiality clauses.²⁴⁹ Both Indigenous communities and extractive proponents may benefit from keeping IBAs confidential;²⁵⁰ however, some Inuit organizations and mining

²⁴⁶ Hummel, *supra* note 195 at 384.

²⁴⁷ Brad Gilmour & Bruce Mellett, “The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations”, (2013) 51 *Alta. L. Rev.*, 385 at 389.

²⁴⁸ “There are specific exceptions, such as the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c O-7, s.5.2 which mandates a “Benefits Plan” for oil and gas projects north of 60 degrees latitude.” Hummel, *supra* note 195 at footnote 7.

²⁴⁹ *Ibid* at 369.

²⁵⁰ First Nations may prefer confidentiality of IBAs in order to shield their financial information from the government. See: *Ibid* at 371-373. Further, the information-sharing may benefit other DIO in IIBA

companies have agreed to disclose their IIBAs to the public.²⁵¹ Transparency is not mandated under any legislation in Nunavut, yet there appears to be a shift towards voluntary transparency as a best practice in the region.²⁵² Hummel argues that this transparency is aimed at remedying the distrust and dissent among Inuit communities that arises due to the fact that the Inuit of Nunavut are culturally heterogenous and physically dispersed, while their representation is very centralized.²⁵³ It is therefore possible to examine how Inuit women are currently being considered in IIBAs,²⁵⁴ as I have done in greater detail in Chapter 3, and the potential IIBAs hold in advancing the rights and interests of Inuit women.²⁵⁵

4.2.2 Justice Through Tort Litigation

Although many IIBAs provide that DIOs will not commence litigation or judicial review against the mining company, other parties continue to have legal standing against mining companies. For example, women of mining communities can individually

negotiations, particularly given the relative informational disadvantage faced by Indigenous communities in comparison to proponents with whom they are negotiating. See: *Ibid* at 388.

²⁵¹ *Ibid* at 373.

²⁵² *Ibid* at 375.

²⁵³ *Ibid* at 366-367.

²⁵⁴ See Chapter 3.

²⁵⁵ See Chapter 5.

pursue private legal action against mining companies for damages through tort law. Tort law is a particularly appealing avenue for justice in this case, because this area of common law is interested in deterrence and “serves as a disincentive to risk-creating behaviour.”²⁵⁶ Holding a mining company liable through a private action in tort law can not only protect the plaintiff Inuit women, but it can also deter mining companies from creating an environment that increases the risk of harm against Indigenous women.

The hypothetical yet common scenario used to demonstrate the potential thread of a negligence claim is that of an Inuit woman being sexually assaulted by a mining company's employee in a Nunavut project. This is a scenario that companies developing projects in Nunavut should consider as a matter of due diligence, due to the high probability of such an incident occurring, as demonstrated in Chapter 2. An approach through tort law reacts to an injury, whereas preventative action may be taken at the impact assessment and the IIBA negotiation stages of a project, as demonstrated above. Nevertheless, the deterring effect of a tort claim and its jurisprudential value may have more widespread and long-term positive effects.

²⁵⁶ *Stewart v Pettie* (1995), 121 DLR (4th) 222 at para 49.

4.2.2.1 Negligence

In order to pursue a negligence claim against a mining company, the plaintiff must establish the common law requirements for a private law action in negligence: duty of care; standard of care; breach of the standard of care; causation; and damage or loss that is not too remote or unforeseeable. The last four requirements, while important, are heavily dependent on the facts.²⁵⁷ The following will therefore focus on whether it is possible for mining companies operating in Nunavut to owe a duty to Inuit women living in a nearby community who have been harmed by the presence of the mine. Inuit women are harmed by mining in many ways; however I will examine the ways in which mining companies may be held liable in tort law for the sexual assault against Inuit women.

4.2.2.2 Prima Facie Duty of Care

To recover in negligence, the defendant must owe the plaintiff a duty of care, and a breach of this duty must have caused injury to the plaintiff.²⁵⁸ Because this scenario contemplates the liability of a mining company where an Inuit woman of a nearby community was sexually assaulted by a migrant worker, Canadian court

²⁵⁷ Freya Kristjanson & Stephen Moreau, "Regulatory Negligence and Administrative Law" (2012) 25:2 CJALP 103 at 106.

²⁵⁸ *Clements v Clements*, 2012 SCC 32, [2012] SCR 181 at para 7 [*Clements*].

decisions regarding negligence for failing to prevent harms committed by a third party must be considered. *Fallowka*²⁵⁹ and *Choc*²⁶⁰ are cases in which the plaintiffs each pursued legal action against a defendant company for negligently failing to prevent the harms committed by a third party. In *Fallowka*, nine miners were killed by a bomb in an underground gold mine. The deceased and other victims injured by the bomb were replacement workers hired to keep the mine operations during a labour strike. The strike was escalating in violence and a striking miner deliberately set off the bomb. Justice Lutz, writing for the majority at the SCC, held that the territorial government, the mine's owners and the mine's security firm owed a duty of care to the deceased and injured to prevent violence from being inflicted upon them and that a *prima facie* duty of care was not negated by policy considerations.²⁶¹

Choc is judgement on an interlocutory motion to strike a cause of action regarding three different actions, including allegations of direct negligence by a mine's parent company for wrongdoings in its on-the-ground management of the Fenix project, a mine in Guatemala. In these actions, a group of people indigenous to Guatemala of Mayan descent allege multiple sexual assaults, a shooting resulting in severe injury to

²⁵⁹ *Fallowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5 [Fallowka].

²⁶⁰ *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 (CanLII) [Choc].

²⁶¹ *Fallowka*, *supra* note 259 at para 19.

the victim, and a murder Indigenous peoples carried out by the Fenix project's security personnel. The court held that "a *prima facie* duty of care may be found to exist"²⁶² and that the parent company may be held liable at trial for the security personnel.²⁶³

Further, the common law's general hostility towards affirmative duties of care has been overlooked for exceptional cases, including those "where the defendant is in a position of control over the plaintiff or over a third party who might injure the plaintiff, ... where the defendant has created a risk of harm to the plaintiff, and where the plaintiff is in a particularly vulnerable position."²⁶⁴ Accordingly, mining companies in Nunavut could be subject to similar claims, and may particularly anticipate claims by Inuit women against mining companies for negligently failing to prevent violence committed against them by the mine's employees.

Canadian courts have recognized a principled approach to negligence since *Donoghue v Stevenson*,²⁶⁵ stating that negligence is based on a "general public

²⁶² *Choc*, *supra* note 260 at para 70.

²⁶³ The Court made this determination with respect to a motion, pursuant to *Rules of Civil Procedure*, RRO 1990 Reg 194 O. Reg 575/07, s.6 (1) Rule 21.01(1)(b), that the plaintiff's claims fail for disclosing no reasonable cause of action in negligence. See *Ibid* at para 87.

²⁶⁴ Erika Chamberlain, "Affirmative Duties of Care: A Distinctly Canadian Contribution to the Law of Torts" (2018) 84 SCLR (2d) 101 at 104 [Chamberlain].

²⁶⁵ *Donoghue v Stevenson*, [1932] AC 462 (HL).

sentiment of moral wrongdoing for which the offender must pay”²⁶⁶ and that such legal duties extend only to one’s “neighbour,” defined as “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”²⁶⁷ This “neighbour principle” continues to animate the *Anns/Cooper* test to establish a duty of care.²⁶⁸ *Cooper* established that categories of relationships giving rise to a duty of care may be recognized as the case law develops, meaning that if a case is like another where the duty has been recognized, a *prima facie* duty of care will usually arise.²⁶⁹ If no existing category exists, a novel duty of care may be established by applying the *Anns* test. As a preliminary point, there is no case law that establishes a mining company owing a duty of care to the Indigenous women of a nearby community. The existence of a novel duty of care must therefore be considered.

To establish a novel duty of care, a “relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff” must

²⁶⁶ *Ibid* at 580.

²⁶⁷ *Ibid*.

²⁶⁸ Rankin (Rankin’s Garage & Sales) v JJ., 2018 SCC 19 at para 16 [Rankin].

²⁶⁹ *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79, [*Cooper*], cited in *Childs v Desormeaux*, [2006] 1 SCR 643, 2006 SCC 18 at para 15 [*Childs*].

exist.²⁷⁰ The *Anns* test for a novel duty of care was affirmed by the Supreme Court of Canada in *Odhavji Estate v Woodhouse*. Accordingly, the following must be proven:

1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and
3. that there is no policy reasons to negative or otherwise restrict that duty.²⁷¹

Although *Kamloops* sees foreseeability as an element of proximity, *Odhavji* “clarified that proximity will not always be satisfied by reasonable foreseeability”²⁷² and thus, viewed proximity and foreseeability as separate elements of the *Anns* test.

The first step, ‘foreseeability’, does not refer to the extent of the damage and its manner of incident, but rather it is sufficient to “foresee in a general way the sort of thing happening.”²⁷³ Foreseeability goes beyond a mere possibility of a specific harm,²⁷⁴

²⁷⁰ *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 39, cited in *Rankin*, *supra* note at para 18 citing.

²⁷¹ *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263, 2003 SCC 69 at para 52.

²⁷² *Childs*, *supra* note 269 at para 12.

²⁷³ *Bingley v Morrison Fuels et al*, 2009 ONCA 319 at par 21, citing *Assiniboine School Division No. 3 v. Hoffer*, 1971 CanLII 959 (MB CA), [1971] M.J. No. 39 (C.A.), *aff'd* 1973 CanLII 1313 (SCC), [1973] S.C.J. No. 48.

²⁷⁴ *Rankin*, *supra* note 268 at para 46.

since any harm that has occurred must have been possible. The question at this first stage is therefore whether it is reasonably foreseeable that a mining project in a remote community leads to the sexual assault of Inuit women.

The Ontario Superior Court of Justice has considered the duty of care of a mining company to the Indigenous women living in a community affected by the mine. In *Choc*, the three related lawsuits of direct negligence against the parent mining company of a subsidiary in Guatemala for wrongdoing in its on-the-ground management of the security personnel at a Guatemalan mine.²⁷⁵ The mine's security personnel killed a community leader,²⁷⁶ shot and paralyzed a young man,²⁷⁷ and gang-raped eleven women while forcibly evicting the local community.²⁷⁸ All of the victims in the various lawsuits against the mine's parent company, Hudbay, are members of the indigenous Mayan Q'eqchi' population from El Estor, Gutamala.²⁷⁹ The following illustrates factors considered in determining that the raping of eleven women in the mine's community was a reasonably foreseeable consequence of Hudbay's act of controlling and directing personnel at the mine:

²⁷⁵ *Choc*, *supra* note 260 at para 25.

²⁷⁶ *Ibid* at para 6 – *Angelica Choc v Hudbay Minerals Inc* lawsuit aka the “Choc” action.

²⁷⁷ *Ibid* at para 7 – *German Chub Choc v Hudbay Minerals Inc.* lawsuit aka the “Chub” action.

²⁷⁸ *Ibid* at para 5 – *Margarita Caal Caal v Hudbay Minerals Inc.* lawsuit aka the “Caal” action.

²⁷⁹ *Ibid* at para 4.

...in Guatemala, violence is frequently used by security personnel during the forced evictions of Mayan Q'eqchi communities; [the company] executives knew that violence had been used a previous forced evictions;... [the company] knew that there was a higher risk that more extreme forms of violence would be used during the eviction of remote communities;... [the company] knew or should have known that the level of violence and rape against women in Guatemala is very high; and [the company] knew that Guatemala's justice system suffers from serious problems and the vast majority of violent crime goes unpunished.²⁸⁰

What is noteworthy is that the Court acknowledged the relationship between the tortfeasor and the victims as historically violent, that higher risks of more extreme violence occur in the context at hand, that the level of violence and rape against women in the area was already highly problematic, and that the sort of crime often goes unpunished. All of these elements can be also said about Inuit women in mining communities. It would therefore be consistent with *Choc* for a judge to find that the risk of violence against women by a mine's employee in a remote community or 'man-camp', for example, is a reasonably foreseeable harm to Inuit women of that community.²⁸¹

²⁸⁰ *Ibid* at para 60.

²⁸¹ "[T]he risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged" according to *Rankin, supra* note 268 at para 18. See also: *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39 (CanLII).

4.2.2.3 Proximity

Mining companies and Inuit women in the respective mining communities are also likely to be viewed as having a sufficiently proximate relationship for a negligence claim to succeed in this hypothetical scenario. Proximity refers to “the circumstances of the relationship inhering between the plaintiff and the defendant being of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff’s legitimate interests in conducting his or her affairs.”²⁸² In determining whether the relationship is sufficiently proximate, “expectations, representations, reliance, and the property or other interests involved”²⁸³ may be considered. The factors “are diverse and depend on the circumstances of the case”²⁸⁴ and they “allow us to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.”²⁸⁵

In the scenario at hand, there would likely be various expectations, representations, reliance and other interests establishing proximity. For example, “public representations concerning its relationship with local communities and its

²⁸² *Cooper*, *supra* note 269 at para 33 citing *Hercules Management Ltd v Ernst & Young*, [1997] 2 S.C.R. 165 at para 24 [*Hercules Management Ltd*].

²⁸³ *Ibid* at para 34.

²⁸⁴ *Ibid* at para 35.

²⁸⁵ *Ibid* at para 34.

commitment to respecting human rights”²⁸⁶ were considered in establishing proximity in *Choc*. The Court in *Choc* also considered the company’s interest in developing a mining project with a relationship with the broader community as a critical component of the project’s success has been considered as contributing to a proximate relationship.²⁸⁷ Similarly, mining companies operating in Canada often have policies to build strong community relations with the Indigenous communities affected by an extraction project. If they have signed onto the *United Nations Guiding Principles on Business and Human Rights*²⁸⁸ as a voluntary measure, then this may also contribute to the finding of a proximate relationship. The various interactions between mining companies and Inuit community members required through NIRB would likely further bolster a finding of a proximate relationship.

A mining company also has contractual obligations to consider the interests of the Inuit through IIBAs. Representations and expectations that a mining company will be mindful of the impact of their project on the wellbeing and interests of Inuit women are implied, if not explicitly stated, in IIBAs. Although sexual assault may not be

²⁸⁶ *Choc*, *supra* note 260 at para 69.

²⁸⁷ *Ibid* at para 69.

²⁸⁸ HRC “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework” UN Doc A/HRC/17/31 (21 March 2011). See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [UN Guiding Principles].

specifically addressed in IIBAs or through in public representations by mining companies, they often have gender-specific policies to uplift women in the community through mentorship programs, training and educational opportunities, childcare services, and the recruitment of Inuit women to work at the mine. The fact that IIBAs are agreements between the DIO and the mining company also supports the proximity between Inuit women and a mining company, since DIOs represent the affected Inuit populations, thus inherently capturing affected Inuit women. To assume that Inuit women do not have a sufficiently proximate relationship with mining companies because they are not specifically named in IIBAs would be to deny the inherent inclusion of Inuit women as members of Inuit communities represented by their DIOs. However, Chapter 5 explores the ways in which the law is often drafted as having an element of gender 'neutrality', but instead tends to further marginalize already marginalized groups, such as Indigenous women. Regardless, the relationship of proximity would likely be satisfied in determining whether a duty of care was met.

4.2.2.4 Policy Considerations Between the Parties

One potential barrier is the policy considerations between the parties in the proximity analysis. The concept of fairness is often introduced at this stage and may

reflect an emphasis of the “moral intricacies of the parties’ relationships.”²⁸⁹ *Childs* contemplated whether a *prima facie* duty of care may arise if the defendant “has become implicated in the creation or enhancement of a risk sufficient to give rise to a *prima facie* duty of care to third parties, which would be subject to contrary policy considerations.”²⁹⁰ Of particular relevance to the hypothetical negligence claim at hand, the Court held based on the facts in *Childs*:

The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. **It is only when third parties have a special relationship to the person in danger or material role in the creation or management of the risk that the law may impinge on autonomy.**²⁹¹

The Court elaborated that “the themes that animate the cases imposing positive duties to act – risk enhancement and control, autonomy and reasonable reliance.”²⁹² This case identified certain situations that would impose a positive duty to prevent harm caused to the plaintiff by a third party. However, these are not strict legal categories. In

²⁸⁹ Chamberlain, *supra* note 264 at 129.

²⁹⁰ *Childs*, *supra* note 268 at para 44.

²⁹¹ *Ibid* at para 39.

²⁹² *Ibid* at para 43.

Fallowka, for example, the court does not refrain from finding a positive duty simply because it did not fall within a *Childs* category. Instead proximity was established because there was an undertaking to exert control as well as an expectation by the parties that the defendant would guard against the risk of harm.²⁹³ The Court in *Fallowka* went on to indicate that the government and the security firm did in fact have a “significant measure of control” over the risk of the activity that eventually killed and injured the miners.²⁹⁴ Although they did not have direct control over the individual who set off the explosive device, the security firm and government had contractual and statutory obligations, respectively, to provide a sufficient level of protection of the safety of the miners.

Accordingly, it can be argued that mining companies are materially implicated in creating a risk that Inuit women will experience violence, among other adverse gendered impacts, due to the presence of a mine. Further, it can be argued that a mining company had a significant measure of control of the risk that Inuit women would experience violence. If not for the mining project overall and, specifically, an influx of transient non-Indigenous workers arriving in the community, Inuit women would not be exposed to such a high risk of facing violence.

²⁹³ *Fallowka*, *supra* note 259 para 30 [emphasis added].

²⁹⁴ *Fallowka*, *supra* note 259 at para 63.

Common law has generally demonstrated hostility to impose affirmative duties upon third parties in negligence common law jurisprudence.²⁹⁵ The Canadian courts have however carved out certain exceptions, including in cases “where a defendant is in a position of control over the plaintiff or over a third party who might injure the plaintiff...,”²⁹⁶ where the defendant has created a risk of harm to the plaintiff²⁹⁷ and “potentially, where the plaintiff is in a particularly vulnerable position.”²⁹⁸ These aspects are not exceptions clearly laid out by the case law, but they are factors that play a role in the policy analysis.²⁹⁹ These exceptions in the Canadian jurisprudence indicate the tendency of Canadian courts to reflect the plaintiff’s potential vulnerability” and “the societal values at stake in the case.” The power imbalance present between the mining companies and Inuit women, as well as broader social need to encourage the harmful fly-in-fly-out of migrant workers design of mining operations in remote northern communities could influence the courts to identify a new sort kind of affirmative duty.

²⁹⁵ *Ibid* at 102.

²⁹⁶ *Ibid*. See e.g., *Funk Estate v. Clapp*, [1988] B.C.J. No. 2259, 54 D.L.R (4th) 512 (B.C.C.A.).

²⁹⁷ Chamberlain, *supra* note 264 at 103. See, e.g., *Wince v. Ball*, [1996] A.J. No. 496, 40 Alta. L.R. (3d) 66 (Alta. Q.B.).

²⁹⁸ Chamberlain, *supra* note 264 at 103. See, e.g., *Williams v. Toronto (City)*, [2016] O.J. No. 4718, 2016 ONCA 666 (Ont. C.A.).

²⁹⁹ Chamberlain, *supra* note 264 at 129.

This affirmative duty can also arise in vicarious liability. However, for the purpose of this thesis, I do not expand upon this preliminary yet important finding that Canadian courts would likely be able to establish that a mining company operating in Nunavut has a duty of care towards Inuit women. It is also possible to discharge one's obligations by meeting a standard of care that is reasonable in the circumstances. However, given the facts-dependent aspect of this analysis, I do not continue to develop the hypothetical. The point is that a claim against the mining company in negligence is possibly available, should the mining company be found to be negligent in the circumstances by failing to ensure the safety of Inuit women against migrant workers. This potential for litigation may incentivize mining companies to take measures beyond regulations, not as a voluntary measure ensuring they have acquired an SLO, but to protect themselves from civil liability.

Although the scenario sheds light on the potential for an Inuit woman sexually assaulted by a miner to sue a mining company, it does not capture other harms committed against Inuit women that is a reasonably foreseeable consequence of the mine's operations. However, there will likely be obstacles at the stage of the negligence analysis where causality is required. It could be argued that the injustices caused by the mining company have contributed to the broader injuries faced by Inuit women in mining communities. Further research that utilizes a case study with significant evidence

available would enable a negligence analysis to be fully fleshed out due to the fact-heavy aspects of the majority of a negligence analysis.

Seeking justice for Inuit women in this reactive manner may not be the most ideal form of pursuing justice, but setting positive precedence on the matter could significantly deter extractive companies from ignoring their responsibility for increasing violence in Indigenous communities. It may also promote greater diligence on the matter by other influential parties, such as the federal government, in order to avoid cross-claims in a civil sort of this kind. Another significant effect of pursuing a negligence claim against a mining company is the potential of expanding the common law in a meaningful way by shedding light on potential claims available to other Indigenous women who experience forms of violence caused by companies in the extractive industry. Mining companies should not feel protected by the practical barriers of litigation and issues regarding access to justice by Inuit women. Future research on possible civil claims available to Inuit women can place added pressure on mining companies to mitigate the risks of harm they impose upon Inuit women.

4.2.2.5 Residual Policy Considerations

The second stage of the *Anns/Cooper* test considers broad policy reasons to negate a duty of care outside the relationship between the parties and how the legal system and

society more generally would be effected by recognize a duty of care.³⁰⁰ In this stage, a defence may possibly arise that the perpetrator of violence should be held accountable for his wrongdoing, rather than the employer. However, this argument would potentially not succeed in Court, given its myopic approach. The mining company effectively facilitates the violence against Inuit women, a global phenomenon in extractive communities, and neglects to take steps to prevent the reasonably foreseeable wrongdoings resulting from the act of mining in a remote, largely Indigenous area, with practices that have notoriously dangerous consequences for Indigenous women. It is true that the criminal directly inflicting violence should be held accountable, but this does not render a mining company immune from responsibility.

Further, Inuit women do not have the choice to accept the risk of living in a mining community. As I discussed in Part 1 of this chapter, it is not the Inuit women who negotiate what risks they are willing to accept through IIBAs and often do not have the change to be sufficiently heard through consultations. Even if they did, no one can impliedly consent to serious bodily harm³⁰¹ or sexual violence,³⁰² and it would be contrary to such principles that Inuit women had voluntarily assumed the serious risk of

³⁰⁰ *Cooper*, supra note 269 at para 37.

³⁰¹ *R v Jobidon*, [1991] 2 S.C.R. 714.

³⁰² *R v Ewanchuk*, [1999] 1 S.C.R. 330.

being subjected to sexual violence. Accordingly, the Courts may not choose to negate the duty of care due to broader policy considerations.

Chapter 5: Seeking Solutions in the Name of Climate Justice

5.1 The Impact of Gender Blindness on Inuit Women

One must wonder whether it is truly possible to prevent gendered violence against women in resource development, or if the industry is too patriarchal and colonial in its very essence. Is it possible to insert the concerns of Inuit women into a regime that was designed without them in mind, particularly insofar as its legal structures are concerned? Why are the needs of Inuit women not more easily addressed in the legal context of Nunavut, by the territory is governed by a modern-day treaty between the Inuit and the government? The insufficiency of the NLCA is not only a consequence of the state's reluctance to provide the Inuit of Nunavut with greater self-determination, but it is also critically insufficient due to its gender-blindness.

This modern-day treaty that forms Nunavut and its natural resource governance model fails to consider Inuit concerns to attain its purported purpose of empowering Inuit in natural resource management. The NLCA is therefore inadequate even without considering the fact that it does not contemplate how it may impact Inuit women differently and negatively. The NLCA provides the Inuit of Nunavut relatively little authority, and Inuit interests are not required to be considered beyond mere consultation with respect to mining projects. The Agreement therefore provides a false

sense of self-governance in its 'joint-management' approach to natural resource governance for major extractive projects.

The tight grip of the federal government over Nunavut that is apparent in the NIRB review and screening processes has led to devolution negotiations between the Nunavut Tunngavik Inc., and the territory.³⁰³ The devolution of land and resource administration from the federal government to Nunavut's territorial government will be critical to the self-determination of the Inuit of Nunavut, particularly in shaping the future direction of Nunavut's development. It may allow the Government of Nunavut to prioritize the interests of the Inuit of Nunavut over the interests of the Canadian public as a whole. During these negotiations, however, it is imperative that Inuit women be present in the negotiations and that the negotiators apply a gendered-lens at all times. The entirety of the agreement must also have gendered considerations woven throughout, as gender-specific clauses or provisions indicating a 'special needs' category for women will lack little meaning to gender 'neutral' documents.

In terms of feminist legal theory, gender 'neutrality' in the law is a fallacy as "standards of what is rational reflect the interest of those who currently hold power."³⁰⁴

³⁰³ Berger, *supra* note 29.

³⁰⁴ Snyder, *supra* note 5 at 369 citing Bartlett & Kennedy, *supra* note 19 at 3.

Snyder summarizes the reasoning for which ‘neutrality’ in the law does not exist, but rather empowers empowered men:

Dominant social and cultural norms about gender infuse legal concepts, principles, and practices, and making obvious the power dynamics in a given society explicates who is intended to benefit from “the law.” Thus, in a legal system that exists in a patriarchal society and is premised on a liberal male subject and his experiences, males are the intended beneficiaries of law. Law should be understood as a site of gendered struggle.³⁰⁵

Since the federal government currently continues to hold such a significant position of power in Nunavut, it is not surprising that Inuit women’s interests are not reflected in the NLCA. Even though the Tunngavik Federation of Nunavut represented the Inuit of Nunavut while negotiating the NLCA with the federal government, and while Inuit individuals and organizations play various roles in resource management, these remain within the context of the Canadian legal system. Gender “neutral” approaches are, however, also pervasive in Indigenous legal theory, which often relies on a universal male subject and expresses a male-centered version of Indigenous laws and theory.³⁰⁶ Simply including the Inuit in negotiations does not necessarily absolve concerns that the very law will further marginalize Inuit women, since sexism is frequently ignored in

³⁰⁵ Snyder, *supra* note 5 at 369.

³⁰⁶ *Ibid* at 366.

Indigenous communities and scholarship.³⁰⁷ The prioritization of “race and tribal nation over gender is a mistake, since sexism and racism oppress indigenous women at the same time.”³⁰⁸ A culturally-relevant and gender-based analysis is critical not only to the approach of voluntary measures explored in Chapter 3, but as a general practice, including while drafting and negotiating legal documents and governance systems. Further, the extractive industry tends “to produce and reproduce highly patriarchal contexts”³⁰⁹ and has consequently been labeled a site of supernormal patriarchy.³¹⁰ Any regulations, policies and laws about the mining industry must therefore be actively anti-patriarchal as a way to counteract the inherent patriarchy it generates. The culturally-relevant gender based analysis discussed in Chapter 3 will provide a useful basis for actively rejecting these patriarchal environments in mining, through legislative reform including the devolution negotiations.

The systems of law and governance that create and perpetuate injustices and inequalities towards Inuit women must not be understood as necessarily grounded in the ignorance and hate of the oppressors. The understanding of law as patriarchal and

³⁰⁷ Renya K Ramirez, “Learning across Differences: Native and Ethnic Studies Feminisms” (2008) 60:2 American Quarterly 303 at 305.

³⁰⁸ *Ibid.*

³⁰⁹ Bradshaw Linneker & Overton, *supra* note 71 at 444.

³¹⁰ *Ibid* at 444.

colonial is not always an understanding that the law is created with the intent to marginalize and harm some while enabling and benefiting others. Similarly, mining companies and the federal government do not necessarily promote hatred, racism and misogyny, nor do the individuals overseeing those entities. This approach of understanding the fundamental problem as ignorance and hate promotes a solution focused on education, love and persuasion.³¹¹ In reality, it is the self-interest, particularly economic, political and cultural, of the party in power that creates a inequalities in Canada's legal foundations and in other systems producing inequalities.³¹²

It should not detract from the pursuit of justice through the Canadian legal system, but the legal system was not designed with the intention to protect the interests of Indigenous women.

Without recognizing the links between violence against Indigenous women and male-dominated colonial structures, Indigenous women will remain subject to staggeringly high levels of violence "since violence against women is one of the key means through which male control over women's agency and sexuality is maintained." Thus the

³¹¹ According to Ibram Kendi, a leading scholar on racism in America in Lonnae O'Neal, "Ibram Kendi, One of the Nation's Leading Scholars of Racism, Says Education and Love Are Not The Answer" *The Undeclared* (20 September 2017), online: <<https://theundefeated.com/features/ibram-kendi-leading-scholar-of-racism-says-education-and-love-are-not-the-answer/>>.

³¹² *Ibid.*

web of oppressive and unequal relationships within which Indigenous women are enmeshed must be addressed...³¹³

Beyond the challenges inherent in the nature of gender ‘neutral’ laws, Canada’s justice system and the lawyers that operate within it are “ill prepared to comprehend or correct the relationship between the oppressed indigenous peoples and their oppressors in relation to the rule of law.”³¹⁴ Further, reparations desired by Inuit women may not be available under the common law of torts and lawyers are rarely trained in indigenous law, a vital tool for crafting appropriate reparations for the wrongs perpetuated by colonial practices and prejudices.³¹⁵

Koutouki and colleagues³¹⁶ also discuss how there is “a paucity of jurisprudence pertaining more specifically to indigenous women’s land rights, treaty rights or natural resource governance”³¹⁷ despite the Charter’s recognition of the right for equality

³¹³ John Borrows, “Aboriginal and Treaty Rights and Violence against Women” (2013) 50:3 Osgoode Hall LJ 699 at 708-709, citing the Executive Summary of a 2006 Report prepared for the General Assembly, detailing global violence against women. See: Secretary-General, *Ending violence against women: from words to action: Study of the Secretary General*, UN Doc A/61/122/Add.1 (2006) at 1 [Borrows].

³¹⁴ Kathleen Mahoney, “Indigenous Legal Principles: A Reparation Path for Canada’s Cultural Genocide” (2019) 49:2 American Review of Canadian Studies 207 at 208.

³¹⁵ See *ibid* for a discussion of how western judicial frameworks lack the tools necessary to remediate injuries motivated by systemic discrimination, particularly for Indigenous plaintiffs.

³¹⁶ Koutouki et al, *supra* note 3.

³¹⁷ Koutouki et al, *supra* note 3 at 71.

before the law and to equal protection of the law without discrimination on the basis of race, sex, religion, national or ethnic origin or mental or physical ability.³¹⁸ Further, section 35(1) of the *Constitution Act, 1982*³¹⁹ has yet to be used as a tool to address the gendered concerns of Indigenous women, although the rights of Indigenous women are arguably “existing” Aboriginal and treaty rights.³²⁰ In general with respect to section 35(1) jurisprudence, the courts have “largely emphasized land and resource conflicts between the Crown and Indigenous governments to the exclusion of other human rights issues.”³²¹ Borrows says that section 35(1) jurisprudence does not deal with the issue of violence against Indigenous women because “the courts have not construed these powers as falling within Indigenous peoples’ jurisdiction” and because “Indigenous communities are not fully trusted to deal effectively with violence against women.”³²²

5.2 IIBAs: A Source for Hope

The devolution negotiations present the opportunity for Inuit women to have equal consideration when planning for the future of Nunavut. However, in a more

³¹⁸ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK, 1982, c 11 s 15.

³¹⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³²⁰ Sharon McIvor, “Aboriginal Women’s Rights as “Existing Rights” (1995) 15:2-3 *Can Woman Stud* 34.

³²¹ Borrows, *supra* note 313 at 703.

³²² *Ibid* at 705.

direct manner, prior to the final devolution agreement coming into force, and in the event that the devolution agreement is deficient, IIBAs for mining projects provide the opportunity for Inuit women to play a significant decision-making role. Further, the provisions of an IIBA may be considered as representations by the mining company to Inuit women supporting the existence of a 'proximate' relationship in establishing a mining company's duty of care owed to Inuit women.

As previously discussed, IIBAs are required for major resource extraction projects on ILOs, and are negotiated by the region's DIO. The processes within a DIO to determine how to best represent the Inuit of the region in question could potentially be revised to elevate the voices of Inuit women. This is consistent with the general observation that "a major factor that has contributed to the adverse impacts experienced by Indigenous women is that they have largely been excluded from negotiations concerning benefits from extractive industry development."³²³ A gender-based approach must therefore be integrated by DIOs and can negotiate accordingly. It is not clear that the DIOs do not already adequately represent Inuit women and their concerns, and simply concede at times to exclude gender-specific provisions in IIBAs. However, it is apparent that IIBAs have the potential to hold mining companies

³²³ Sarah Morales, "Canary in a Coal Mine: Indigenous Women and Extractive Industries in Canada" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: CIGI Press, 2019) 119 at 120.

accountable for collecting data and monitoring the community's wellbeing. Mining companies appear reluctant to acknowledge the gendered violence caused and exacerbated by their presence, particularly in remote indigenous communities, and would likely be reluctant to do so in a publicly available legal document like an IIIBA. However, these are concerns that can be addressed through negotiations, while ensuring that mining companies are liable for implementing measures to protect the Inuit women in the community from various gender-specific impacts of mining, including gendered violence.

Mining companies actively avoid addressing the gendered harms they cause, by only acknowledging gendered issues that can be addressed through mentorship and training programs in the mine. The heavy lifting of identifying and calling out the complex ways in which mining harms the women of a communities remains the burden of Inuit communities. The mining industry can have within it interventions that can clearly reveal gendered inequalities in local communities as a way of introducing gendered rights into the concerns and activities of industrial mining.³²⁴ In Chapter 4, I explore how the mining industry currently claims to make efforts to promote gender equality and avoid concerns regarding power imbalances and gendered violence.

³²⁴Kuntale Lahiri-Dutt, "Do Women Have a Right to Mine" (2019) 31:1 CJWL 1 at 11 [Lahiri-Dutt].

Gender sensitization programs, gender training workshops and gendered community development programs have shown to empower women to have financial independence.³²⁵ The act of not only ‘protecting’ Inuit women but creating programs that empower them is significant. However, the research on Nunavut’s mines demonstrate that voluntary programs have not lead to financial empowerment that goes so far as to mitigate the increase in gendered harms experienced by Inuit women when a mining project commences in the community. Economic empowerment is not a complete solution, and it is certainly not a shield against institutionalized violence. I do not intend to detract from the value of initiatives and programs that currently exist to empower Indigenous women in mining communities. Empowerment can be derived from self-determination, making it the platform to voice an opinion and to be shown that that opinion is valued. Currently, the Inuit voice, particularly the Inuit woman’s voice has not been shown to be valued. It cannot be heard through the systems readily available with respect to resource extraction in Nunavut, and, even if it does, there is no guarantee that it will be impactful from the perspective of decision-makers. The IIBAs may be able to address this in a more immediate and pro-active manner, than pursuing litigation and seeking legislative reform.

³²⁵*Ibid* at 12.

5.3 The Role of International Law in Addressing Injustices Faced by Inuit Women

Various international instruments attempt to mitigate and address laws and practices with discriminatory and unjust effects. Koutouki and colleagues argue that these international instruments, including international human rights norms and obligations, international labour law,³²⁶ the *United Nations Declaration on the Rights of Indigenous Peoples*,³²⁷ the International Convention on Economic, Social and Cultural Rights,³²⁸ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),³²⁹ the *United Nations Guiding Principles on Business and Human Rights*,³³⁰ and the Inter-American Human Rights system support a rights-based approach in protecting, respecting and fulfilling the rights of Indigenous women in relation to resource development.³³¹

³²⁶ International Labour Organization Convention No.169 (adopted 27 June 1989, entered into force 9 May 1991) 28 ILM 1382.

³²⁷ UNGA 'Declaration on the Rights of Indigenous Peoples' UN Doc A/RES/61/295 (2 October 2007) [UNDRIP].

³²⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

³²⁹ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 [CEDAW].

³³⁰ UN Guiding Principles, *supra* note 288.

³³¹ Koutouki et al, *supra* note 3 at 71. For a more detailed exploration of how *UNDRIP* can be implemented by the state to safeguard Indigenous women from the deleterious effects of resource extraction disproportionately experienced by Inuit women, see Morales, *supra* note 323.

The literature has explored the ways in which Indigenous women should be protected by international legal instruments. For example *UNDRIP* could be implemented into Nunavut legislation with a gendered lens. This would mean that differing gender roles existing in Inuit society could be harnessed, and discourse and practices would be enriched by the unique and diverse knowledge held by Inuit women.³³² Additionally, laws and policies that have different impacts on Inuit men and women could be reviewed with a gendered approach and an Inuit understanding of gender.³³³ However, the previous chapters identify in broad terms that the self-interestedness of institutions that propel inequalities against Inuit women of Nunavut is a powerful driving force that is not significantly compelled or threatened by these rights-based arguments. Additionally, international human rights law and guidelines have been critiqued for “privileging a masculine view” and reinforcing women’s powerlessness.³³⁴ The language of non-discrimination and equality within international instruments addressing systemic discrimination against women has not only been critiqued for its

³³² Brenda L. Gunn, “Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples” in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: CIGI Press, 2019) 55.

³³³ *Ibid* at 59. For example, the Cree understanding of gender is that “the gendered line... is not clear, and it zig, zags, and becomes invisible depending on who we are with, what we are doing, and when we are doing it.” *Ibid* 59 citing Tracy Lindberg, “Not My Sister: What Feminists Can Learn about Sisterhood from Indigenous Women” (2004) 16 *CWJL* 342 at 351.

³³⁴ Hilary Charlesworth, “What are ‘Women’s International Human Rights’?” in Rebecca J Cook, ed, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 58 at 60.

insufficient effect, but they also “only give women access to a world already constituted.”³³⁵ The constructed realities of the *UN Guiding Principles* impacts the lives of women “who become involved in, or are affected by, business activity, such as resource extraction, though their diverse roles as victims, agents, workers, leaders, activists, and beneficiaries.”³³⁶

For instance, extractive companies that choose to implement the *UN Guiding Principles* by developing a policy on human rights and engaging in [corporate human rights due diligence] are unlikely to ensure that such a policy reflects the everyday nature of violence faced by women in the context of resource extraction, whether as employees, service providers, or as members of the local community. Equally, states are less likely to adopt and enforce laws and adopt and implement policy, with respect to resource extraction that addresses this violent, life-threatening reality.³³⁷

Nevertheless, as explained above, the law at both international and domestic levels present various challenges as a tool for seeking justice for Inuit women in Nunavut’s mining communities. This thesis aims to add creative solutions beyond the use of international law in order to expand upon the potential options for recourse

³³⁵ *Ibid* at 64, citing Clare Dalton, “Where We Stand: Observations on the Situation of Feminist Legal Thought” (1987-88) 3 Berkeley Women’s Law Journal 1 at 5.

³³⁶ Penelope Simons & Melisa Handl, “Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the context of Resource Extraction” (2019) 31:1 CJWL 113 at 138.

³³⁷ *Ibid* at 138-139.

5.4 Climate Justice

“Climate justice” generally involves an “intersectional understanding that the impacts of climate change are grounded in gender, class and race... and necessitate a radical transformation of existing political, social and economic structures.”³³⁸ Climate justice is intertwined with Indigenous women’s rights both in terms of “who are most vulnerable to harms [of the climate crisis] and whose voices are crucial as agents of change.”³³⁹ As I have previously mentioned, the Arctic’s warming risks posing significant social inequities in Inuit communities. The likely increase in mining activity in Nunavut resulting from changes to Nunavut’s ice coverage will have significant ramifications for Inuit women, who are vulnerable to the unique and disproportionate adverse effects of mining. The lack of protections in policy and law in this respect is therefore a climate justice issue.

The focus on mining in this thesis is intended to provide a detailed example of how the climate crisis is impacting the lives of Inuit women. It is important to consider the implications of the climate crisis on Inuit women when planning for the future of the

³³⁸ Patricia E Perkins, “Gender justice and climate justice Building women’s economic and political agency through global partnerships” in Susan Buckingham & Virginie Le Masson, eds, *Understanding Climate Change Through Gender Relations* (London: Routledge, 2017) 45 at 46-47.

³³⁹ Sara L Seck, “Relational Law and the Reimagining of Tools for Environmental and Climate Justice.” (2019) 31:1 CJWL 151 at 152.

Inuit of Nunavut and adapting to the changing landscape. Nunavut is physically transforming in a dramatic way resulting in equally dramatic threats to the Inuit way of life.³⁴⁰ The economic ramifications of climate change in Nunavut include mining on a larger scale in Nunavut, the opening of and navigation and shipping through Arctic Island passages and the Northern Passage, increased oil and gas development, as well as bringing demographic change from agricultural development arising from the changing landscape.

The social and cultural ramification of the climate crisis in Nunavut must therefore also be anticipated with a gendered lens in order to protect the livelihood of Inuit women facing deep climate injustices. The International Circumpolar Council has acknowledged the need for Inuit people to adapt to the inevitable effects of the climate crisis.³⁴¹ This adaptation must include the abolition of a gender-blind approach to law and policy. The prioritization of climate change mitigation and adaptation without gender considerations will likely only bring about exacerbated injustices arising from climate change upon Inuit women.

³⁴⁰ See interview with Sheila Watt-Cloutier on Inuit safety and ways of life being threatened by climate change in Bridget Watson, "Melting ice threatens safety, way of life for Indigenous people says Inuit leader" *CBC News* (18 February 2020), retrieved 24 February, 2020, online: < shorturl.at/lryT8>.

³⁴¹ Inuit Circumpolar Council Canada, "2018-2019 Annual Report" (2019).

Although women and girls play a vital role in disaster relief and solutions to the climate crisis,³⁴² they often lack the control and decision-making power to govern their own lives.³⁴³ Similarly, there is critical need for the voices of Inuit women in Nunavut to have a greater influence as decision-makers, by holding roles such as negotiators and legislators, and administrative decision-makers.³⁴⁴ Inuit women are not only the “victims” of climate change, but they are also crucial agents of change and key stakeholders in addressing climate change and the future of Nunavut. Legal developments and decision-making that anticipate the impacts of the climate crisis on life in Nunavut consider the gendered consequences. Nunavut’s strategy for a prosperous and healthy future must include the concerns for women, not simply as an effort to demonstrate gender parity, or to protect Inuit women’s special needs. Inuit women must co-pilot the direction of Nunavut’s growth in this critical transformative and determinative period.

Increased involvement by Inuit women is important, but a collaborative approach by the federal government as well as the mining industry is necessary to

³⁴² Christine Chinkin and Keina Yoshida, “Women’s Human Rights and Climate Change: State Obligations and Standards” (2020) 43 LSE Law Policy Briefing Series.

³⁴³ *Ibid* at 3.

³⁴⁴ For a discussion on the lack of gender parity in Nunavut’s legislature see: Laakkuluk Jessen Williamson, “Inuit gender parity and why it was not accepted in the Nunavut legislature” (2006) 30:1 *Études/Inuit/Studies* 51.

effectively combat injustices rooted inherently and by design in the law. Inuit women are valuable members of their communities, and the “annihilation” of Inuit women by any means, including through the justice system and mining practices, equates to the “annihilation” of their communities.³⁴⁵

³⁴⁵ Sherene H Razack, “Gendering Disposability” (2016) 28:2 CJWL 285 at 290 [Razack].

Chapter 6: Conclusion

Although the law can be a tool of oppression, it is also a tool of social change. My intention in my research and analysis is to contribute to the literature on climate justice in a novel way. I have identified one of many projected effects of the Arctic's warming on Nunavut: increased mining activities. I have identified the unavoidable connection between mining and significant deleterious effects experienced by Indigenous women. By exploring how the mining industry approaches the social license to operate and its voluntary measures, I have noted the superficiality of claims that gender concerns are being addressed by industry players. Further, by exploring the legal framework intended to safeguard the interests of Inuit affected by incoming mining projects, I have identified the patriarchal role of the federal government and the apparent distrust in the Inuit of Nunavut to make decisions with respect to natural resource management. Further, I note that this flawed system provides little opportunity for Inuit women to take a proactive approach to protecting their interests through the NLCA. I identify that IIBAs are mandated and have a great deal of potential as an entry point for Inuit women. However, further information must become available regarding why this is not already being utilized before a deeper analysis of the availability of IIBAs as a mechanism through which Inuit women can enter into the NLCA's flawed review and screening process of mining companies.

I consider whether it is possible for mining companies to be held liable in tort law for failing to prevent migrant employees from assaulting the Inuit women of nearby communities would be viable. Based on jurisprudence and policy considerations, I conclude that mining companies are vulnerable to negligence claims of this kind and that they should therefore perform their due diligence by implementing measures to prevent the creation of an environment with a high risk of the mine's employees acting violently towards the Inuit women in nearby communities. I narrowly approach the possibility of holding a mining company liable in negligence to illustrate that mining companies should not feel absolved from responsibility and rely solely on the fact that they have complied with mining regulations. Mining companies should not only feel compelled to prevent the risk of harming Inuit women as a result of operating in Nunavut as a means to holding a social licence to operate, but these efforts could also be critical in avoiding litigation. Even if the financial repercussions of engaging in litigation are not sufficient to incentivize the mining industry to prioritize addressing the gendered violence resulting from their operations, the risk of negative publicity of such a claim may have a significant influence.

Although international legal instruments are typically relied upon as a means of substantiating the rights of Indigenous women impacted by resource extraction, this thesis aims to look beyond the rights-based argument in order to identify entry points in the current legal system for Inuit women in Nunavut to advocate for themselves. This

thesis does not exhaust all possible entry points. Nevertheless, it illuminates the need to deeply reassess Nunavut's mining 'joint-management,' opportunities for Inuit women to advance their interest through negotiations of IIBAs, and Nunavut's devolution. And I support reasons for which these entry points should accept an influential presence of Inuit women and a gender-based analysis. Inuit women face the burden of advocating for themselves in a system designed with no regard for their wellbeing. It is therefore critical that all parties involved in decision-making that may impact the lives of Inuit women engage in rejecting a gender 'neutrality'.

There is not only a climate crisis impacting the Inuit of Nunavut, but there is also a nation-wide crisis of missing and murdered Indigenous women and girls. Nunavut has some of the highest rates of gender-based violence. Inuit women justifiably have a distrust towards the police.³⁴⁶ The justice system has proven time and time again that it treats Indigenous women as disposable.³⁴⁷ And although Inuit women remain resilient in the face of layered injustices, their resilience "should not serve to simply facilitate the continuation of existing unequal power relations and enable further exploitation."³⁴⁸ The realities experienced by Inuit women in mining communities are forms of climate

³⁴⁶ See: PIWC & Comack, *supra* note 102.

³⁴⁷ Razack, *supra* note 345.

³⁴⁸ Lahiri-Dutt, *supra* note 324 at 10 referring to Katy Jenkins & Glevys Rondón, "

injustice, continued colonisation and gender-based discrimination. Even the systems intended to elevate Inuit voices are not sufficient to empower the voices of Inuit women. The law can perpetuate colonial and sexist ideals, unintentionally causing further marginalization and injustice. However, addressing the legal concerns affecting Inuit women in Nunavut mining communities would allow for a significant source of pain to instead be used as protection and empowerment. As the Arctic warms rapidly, it is an urgent matter of climate justice that Inuit women are protected, at least in part, through law.

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