Legal Analysis

From Constitution to Living Land: Environmental Rights and Indigenous Sovereignty in Canada and Chile

Constance Ruan

Keywords: *Indigenous rights, land sovereignty, environmental justice, constitution, judicial reasoning*

This paper presents a comparative case analysis between Canada and Chile to examine whether a constitutionally protected right to a healthy environment strengthens Indigenous land sovereignty. The analysis focuses on judicial interpretations of s.35 within the Charter of Rights and Freedoms and Article 19 of the Chilean Constitution.

The author adopts an in-depth, small-N qualitative analysis of legal cases adjudicated by the supreme courts of the two countries, arguing that the right to a healthy environment entrenched in the Constitution embodies a stronger protection of Indigenous land sovereignty. Furthermore, considering Indigenous Traditional Ecological Knowledge (ITEK) in judicial rulings can further uphold Indigenous rights to land sovereignty.

1. Introduction

In November 2021, Clayton Thomas-Müller, an environmental activist, revealed to CBC News (2021) in South Sarnia, Ontario, that Indigenous communities endure a systematic inequality of living in a polluted environment due to the lack of control over their land. Indigenous people are disproportionately living in an unhealthy environment. Much pollution-associated infrastructure, such as mines and pipelines, was located on Indigenous lands, resulting in greater exposure to lethal chemical materials among Indigenous communities than non-indigenous populations. The significant disproportionality leads to a crucial research question in studies of Indigenous rights: "*Does a Constitutionally Protected Right to a Healthy Environment Strengthen Indigenous People's Land Sovereignty?*" Based on an in-depth analysis of the 9 collected cases, I argue that a constitutionally protected right to a healthy environment can strengthen Indigenous land sovereignty by incorporating Indigenous Traditional Ecological Knowledge (ITEK) into judicial rulings.

Canada has a progressive Constitutional framework in which fundamental rights, such as rights to life, security, liberty, and equality, are universally applied to everyone and entrenched in the highest law of the country. Although the right to a healthy environment is not explicitly codified in the Constitution, Worstman (2019) argues that the extensive set of rights included in the Constitution overlaps with environmental protection. protection. Despite this, Canada's environmental record has led to a substantive deficiency in healthcare delivery nationwide. Some existing constitutional rights, including the right to life, security, and liberty and the rights of Indigenous people, are expected to be adversely impacted by climate change and environmental pollution. Ultimately, Indigenous people are disproportionately affected by environmental degradation. Chile was selected to compare with Canada because both countries share key

similarities: **1)** they have diverse Indigenous populations, a history of colonialism and Indigenous land dispossession; **2)** the incorporation of guidelines from influential international treaties, particularly UNDRIP and ILO-Convention 169, into domestic laws in protecting Indigenous rights; and **3)** ongoing environmental contamination and climate change challenges. A key difference is that the Chilean *Constitution Act, 1980*, guarantees the right to a healthy environment. This difference provides a valuable basis for analyzing the legal impact of constitutional environmental rights on Indigenous land sovereignty.

This paper begins with a literature review to identify the research gap. The literature review compares judicial rulings in Indigenous environmental disputes between Canada and Chile, where the right to a healthy environment is codified in the Constitution. Based on the literature review, I will hypothesize why a constitutionally protected right to a healthy environment can strengthen Indigenous land sovereignty and why considering ITEK in judicial rulings can reinforce a more equitable process. I will then introduce the selected legal cases, along with the case selection criteria, the research method, and its limitations. The cases will then be analyzed in both countries in accordance with two different legal frameworks adopted in Canada and Chile to identify the decisive factor in judicial outcomes. Finally, I consider alternative explanations and the counterargument to examine other causes of the judicial rulings to refine the argument.

2. Literature Review

2.1 Indigenous Rights Challenges within the Canadian Constitutional Framework

Since the enactment of the Charter of Rights and Freedoms, Indigenous rights have become a contentious issue in the legal system. In the late 1990s, reconciliation appeared more

frequently in official discourse. Government agencies stated that reconciliation with Indigenous people involves developing respectful relationships, acknowledging past injustices, and working towards a future of mutual equality (Crown-Indigenous Relations and Northern Affairs Canada, 2024). This gave rise to discussions of whether section 35 of the *Charter of Rights and Freedoms* broadens the scope of Indigenous rights or perpetuates former colonial rules. Section 35 specified the Crown's duty to consult with Indigenous communities about conduct that may adversely impact their rights or title and to accommodate their interests in certain circumstances. In many cases, the SCC has reinforced this duty. However, whether these judgements strengthen Indigenous land sovereignty remains unclear.

The core contention surrounding Indigenous land sovereignty in Canada centres on which party possesses the final authority to interpret s. 35 interpretation. While s.35 affirms existing aboriginal and treaties, it allows the government to infringe the rights under certain circumstances when a significant public benefit is identified (Brideau, 2019). The SCC has opposed absolute Indigenous land sovereignty when an infringement aligns with fundamental interests of a large non-Indigenous population (*Tsilhqot'in Nation v. British Columbia*, 2014). In contrast, Indigenous scholars uphold absolute land sovereignty based on a holistic approach, claiming that the land is a living entity that nurtures life over generations (Kimmerer, 2013; Turner, 2014). The reciprocal relationship between Indigenous people and the land makes Indigenous communities experienced stewards. This contention necessitates an examination of how the judicial branch interprets s.35. Examining the scope of Indigenous rights under s.35 of the *Constitution Act, 1982* provides a more nuanced explanation of why indigenous communities are disproportionately affected by environmental pollution.

McCrossan (2019, p.96) stated that the SCC does not recognize an Indigenous community's persisting authority and power over their land. Judges often signify the most important level of control of the Crown, overlooking how Indigenous people relate to their land in the pre-colonial stage. Judicial members found it challenging to understand what the land means for Indigenous people from the ITEK perspective and when prioritizing the Crown's interest. On the other hand, since 2019, the federal government has committed to implementing the rationale of the *Declaration on the Rights of Indigenous Peoples (UNDRIP)* in domestic laws (Mason, 2024). Article 29 of the UNDRIP recognizes Indigenous rights to the conservation and protection of the environment. The federal government's action plan stems from Article 29, supporting Indigenous people's right to a healthy natural environment with Indigenous ways of knowing to protect their lands and resources (Mason, 2024, p.13). In 2023, Canada recognized the right to a healthy environment following a resolution of the UN General Assembly. It incorporated the resolution into the *Canadian Environmental Protection Act* (CEPA), 1999 amendment (Mason, 2024, p.5). Nevertheless, the effect of the amendment on environmental protection in Indigenous communities was left unanswered in Mason's work.

2.2 A Constitutionally Protected Right to a Healthy Environment in Chile

Chilean domestic law incorporated environmental protection and Indigenous rights much earlier than Canada. Since 1980, Article 19 of the *Chilean Constitution* has guaranteed the right to "live in a pollution-free environment." Indigenous communities have successfully invoked the Constitutional provision to defend their culture against environmental disruptions (Cespedes, 2013, p.71).). The distinction of environmental protection between Chile and Canada is that Chilean domestic law incorporates several international agreements to protect Indigenous rights.

Specifically, *ILO-Convention 169*, the *Indigenous and Tribal Peoples Convention (1989)*, played an essential role in enriching the Chilean domestic legal system as one of the most critical changes to modern indigenous-environmental law.

The *Chilean Constitution* reflects Indigenous people's right to lands, resources, and self-determination enshrined in *ILO-169* and the Indigenous and Tribal Peoples Convention (1989). Indigenous people in Chile have successfully used Article 19 of the Constitution and *ILO 169* provisions that were incorporated in domestic law in environmental trials to challenge the power of big corporations and governmental authorities in domestic courts (Cespedes, 2013, pp.73-74).

2.3 Land Sovereignty and Environmental Degradation

Indigenous people have experienced ongoing challenges in regaining control of their lands. Indigenous scholar Leanne Simpson (2014) suggests that land sovereignty is an inherent right in her pedagogy theory, encompassing the governance and stewardship of land and resources while reflecting cultural, spiritual, and social dimensions. Indigenous communities transmit life skills and traditions that are learned from the land across generations. ITEK sometimes contradicts the Western school of thought in a colonial society. For example, Indigenous communities traditionally view land not merely as a resource for economic benefit but as an integral part of their identity, culture, and spiritual practice (Fernández‐Llamazares et al, 2019). The land is a living entity that requires stewardship to maintain balance and sustainability. This view often contradicts mainstream economic models prioritizing immediate benefits and development goals (Simpson, 2014; Turner, 2014; Kimmerer, 2013). Over the years, Indigenous land sovereignty has steadily weakened due to the environmental challenge of land

degradation. Environmental pollution has disrupted traditional practices, disconnecting Indigenous peoples from their cultural heritage and ancestral knowledge.

According to Fernández‐Llamazares et al.'s (2019) findings on the impact of pollution on Indigenous communities, except for health and environmental degradation, non-material cultural dimensions of Indigenous people's way of life are also affected. For example, herbicide treatments have contaminated plants used by Aboriginal tribes for different cultural uses. Other traditional cultures, such as harvesting local plants for sustenance, ceremonial purposes, or drinking from their historical water source, also increase exposure to toxic pollutants. Pollution has jeopardized their traditional knowledge system, as activities associated with collecting wild foods serve crucial community roles. Pollution-related concerns regarding wild food consumption impact their cultural practices (Fernández‐Llamazares et al., 2019, pp.227-228). Pollution also affects spiritual well-being. In many First Nations' perspectives, water is a living and sentient being or a spiritual resource that must be kept clean from pollution. In contrast, from a Western scientific perspective, drinkable water may have some acceptable contaminants (Fernández‐Llamazares et al., 2019, p.330). Based on these examples, Indigenous people's unique knowledge system requires some level of recognition when resolving an environmental dispute, given the distinction between mainstream science and ITEK.

3. Theory

As noted in the literature review, Indigenous communities experience varying levels of success in litigating environmental disputes in courts between Canada and Chile. Although much literature does not examine whether these disparities are attributable to the presence of a constitutionally protected right to a healthy environment, Chilean Indigenous communities have

successfully argued their rights to land governance in accordance with Article 19 of the constitution. While a constitution establishes the supreme set of rules of a country, it is reasonable to suggest that such a constitutional guarantee can enhance the protection of Indigenous land sovereignty. Additionally, given the epistemological distinction between ITEK and Western environmental paradigms, including ITEK in judicial rulings may counterbalance the Crown's interests that conflict with Indigenous claims, reinforcing a more equitable and culturally sensitive adjudication process. Therefore, considering ITEK's perspective within a constitutional framework that guarantees a right to a healthy environment can further strengthen Indigenous land sovereignty.

4. Method of Analysis

I will assess the effect of the independent variable: a constitutionally protected right to a healthy environment, on the dependent variable: the protection of Indigenous land sovereignty. The intervening variable is the consideration of ITEK in judicial rulings. I apply Mill's method of difference by comparing court cases from Canada and Chile. The case selection criteria for this research are as follows: **1)** the foreign case must originate from a jurisdiction where the right to a healthy environment is constitutionally guaranteed, **2)** the case involves an Indigenous community experiencing negative environmental impacts on their territory, **3)** the case must have been decided by the Supreme Court to ensure finality and avoid potential misunderstandings from lower court rulings that could be appealed, and **4)** the dispute is related to Indigenous communities asserting their rights to land and resource governance. I will perform a small-N, in-depth qualitative analysis by examining the judicial reasoning of nine selected cases. Limiting the case numbers can provide a better in-depth analysis.

I selected six Canadian cases to analyze judicial reasoning in Indigenous environmental disputes. I included *Haida Nation v. British Columbia (Minister of Forests) (2004)* and *Taku River Tlingit First Nation (TRTFN) v. British Columbia (2004)* as both were adjudicated before Canada endorsed the UN Declaration in 2010 (Government of Canada, 2024). Most importantly, *Haida (2004)* established a fundamental legal principle regarding the duty to consult for similar cases afterwards. Additionally, I selected *Tsilhqot'in Nation v. British Columbia (2014)*, *Mikisew Cree First Nation v. Canada (2018)*, *Southwind v. Canada (2021)*, and *Saskatchewan (Environment) v. Métis Nation (2025)* to examine the judicial trend in Indigenous environmental disputes between 2010 to 2019, when Canada acknowledged and began incorporating the principles of the UN Declaration into domestic law. I also selected three Chilean cases to analyze judicial reasoning within a constitutional framework that protects the right to a healthy environment. The cases of *Aqua Mineral Chusmiza v. Comunidad Indigena de Chusmiza Usmagama (2009), Machi Francisca Linconao Huircapan v. Sociedad Palermo Itda (2009),* and *Compañía Minera Nevada Spa v. Superintendencia del Medio Ambiente (2022)*.

Each of them directly invoked Article 19 of the Chilean constitution, offering valuable insight into how the Chilean supreme court interprets environmental protections in disputes involving Indigenous communities. If the thesis is correct, Chilean judges will not only rule in favour of the Indigenous community but also consider Indigenous people's unique perspectives on environmental issues in their reasoning. In contrast, Canadian judges will still rule in favour of Indigenous communities in certain cases, but they will prioritize upholding the Crown's sovereignty and interests under the common law. If the thesis is incorrect, judges of both countries will rule in favour of the governmental agencies, prioritizing state authority over Indigenous rights and overlooking the distinctiveness of Indigenous traditional knowledge.

The methodology has limitations. While a small-N study provides an in-depth understanding of judicial rulings of the selected cases, the findings may lack generalizability in a broader context. A quantitative data analysis is required to examine an extensive set of cases from countries with a constitutionally protected right to a healthy environment, developing a more comprehensive assessment of judicial trends in Indigenous environmentalism. Moreover, due to the absence of documents in English translation in the Chilean Supreme Court, I use peer-reviewed articles and materials from international research institutions that have translated the judgments into English to analyze the judicial reasoning. This may limit the scope of direct legal interpretation and cause interpretive biases inherent in secondary sources, potentially affecting the depth of the case analysis.

5. Analysis

5.1 Analysis of Results: Constitutional Supremacy v. Analogous Grounds

I argue that the judicial ruling approach between Chile and Canada diverges with respect to Constitutional Supremacy and Analogous Grounds. As the right to a healthy environment is entrenched in the highest law of Chile, Chilean judges rely on Constitutional Supremacy in rulings. In contrast, Canadian judicial ruling is based on the Analogous Ground. Although analogous ground is typically used in s.15 of the Charter determining the scope of discrimination, I find it useful in s.35 interpretation. It allows judges to actively analyze whether the Crown's consultation is *meaningful,* as well as whether a significant public interest is identified. In the absence of a constitutionally protected right to a healthy environment in Canada, Canadian judges must align environmental threats with violations of s.35 on an analogous ground, providing courts with discretion to justify infringements on Indigenous rights.

Before determining the environmental threat, the Crown must fulfill the duty to consult with Indigenous communities, which was assured in *Haida (2004)* and *Taku River (2004)*. If the court deems the consultation meaningful and accommodating, governmental infringements will likely be justified in courts. *Haida (2004)* set a precedent for subsequent cases on the Crown's duty to consult when a conduct may adversely impact Indigenous rights under s.35. The SCC ruled in favour of the Haida Nation for the absence of consultation and provided a guideline for the duty to consult. The level of consultation and accommodation required is proportionate to the claim's strength and the seriousness of the contemplated governmental action's adverse impact on the claimed right. If consultation or accommodation is found to be inadequate, the government decision can be suspended or set aside (*Haida Nation v. British Columbia*, 2004, para.37). Notably, following the principle established in *Haida (2004)*, in *Taku River (2004)*, the SCC ruled in favour of the BC government and upheld the approval of the mining project to build a road in the TRTFN's traditional territory. Given that the province was aware of the TRTFN's claims through its involvement in the negotiation process, the court unanimously concluded that the Crown's obligation to consult was engaged. Despite acknowledging that the mining project may adversely affect the substance of their cultural practices (*Haida Nation v. British Columbia*, 2004, para.21).

The *Tsilhqot'in (2014)* case is a landmark decision that established Aboriginal title for the Tsilhqot'in First Nation and recognized their rights to a vast territory in BC. The court declared that the BC government had breached its duty to consult through its land use planning and forestry authorizations (*Tsilhqot'in Nation v. British Columbia*, 2014, para.153). It acknowledged that the courts need to be careful not to distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts (para.32). On the other hand, the SCC

noted that governments can infringe Aboriginal title lands for 'compelling public interests' if the Crown has undertaken the procedural duty to consult and accommodate (para.77). While justices acknowledged that the *Forest Act* no longer applies to Tsilhqot'in lands given the establishment of Aboriginal title, Chief Justice McLachlin stated that the Act is open to amendments to extend its application to lands under Aboriginal title if it complies with applicable constitutional restraints (para.116).

Although s.35 imposes the Crown with the duty to consult meaningfully, the government retains the ultimate authority to make final decisions on actions that may negatively impact Indigenous rights if such actions serve a "compelling" objective or align with fundamental public interests (McCrossan & Ladner, 2016; *Tsilhqot'in Nation v. British Columbia*, 2014, para.44). The duty to consult does not extend to the legislative process, as established in *Mikisew (2018).* While Indigenous communities can still seek judicial review after enactments, precedents set in cases such as *TRTFN (2004)* and *Tsilhqot'in (2014)* provide governments with legal grounds to justify infringements on Aboriginal title, especially when such actions are deemed necessary to fulfill a compelling public objective. Although Justices Abella and Martin stated in their concurring reason that the purpose of the duty to consult is to reconcile with the pre-existing Indigenous societies, which is the "fundamental objective of the modern law of aboriginal and treaty rights" (*Mikisew Cree First Nation v. Canada, 2018, para.63),* they did not conceptualize **reconciliation** and **meaningful** consultation.

Most recently, the SCC ruled in favour of the Métis Nation–Saskatchewan (MNS) regarding uranium exploration permits, which were argued to constitute an abuse of process, given their ongoing Aboriginal title litigation initiated in 1994. The SCC unanimously concluded that the duty to consult serves as an interim measure to protect Indigenous rights pending final

determinations, so the courts should facilitate, not impede, the resolution of Aboriginal claims (*Saskatchewan (Environment) v. Métis Nation*, 2025, para.40). After reviewing the past proceedings of litigations, the court declared that the MNS's judicial application does not constitute an abuse of process whose doctrine focuses on the integrity of the adjudicative functions of courts (para.55). This ruling reflects the Canadian courts' reliance on procedural protections, such as consultation duties, rather than on substantive constitutional guarantees like a right to a healthy environment. While such rulings can offer temporary relief, they may fall short of long-term, enforceable protections grounded in constitutional supremacy.

On the contrary, Chilean judges are bound by the codified statutes in the constitution to uphold Indigenous rights in environmental matters. Constitutional supremacy not only provides a strong argument for Indigenous communities but also allows judges to incorporate Indigenous perspectives on land and resource management into their reasoning to ensure greater protection for Indigenous rights. In *Chusmiza (2009),* the Indigenous Aymara and Atacama communities in northern Chile challenged Agua Mineral Chusmiza SAIC's action to bottle and sell water from a source on their ancestral lands. They alleged the company had illegally deprived them of their lands and water sources and violated their rights in ILO-Convention 169 (Cespedes, 2013, p.76). The Chilean Supreme Court ruled in favour of the Indigenous communities and recognized the "ancestral water rights," aligning with their rooted traditions. Judges acknowledged that Indigenous communities had relied on the water since time immemorial, affirming that their right to water use predates any constitutional framework. They confirmed the Aymara and Atacama communities' ability to register these rights, thereby enriching the scope of Indigenous rights protection (Business and Human Rights Resource Centre, 2013). Moreover, the court reaffirmed that Indigenous rights extend to lands traditionally used by Indigenous communities for cultural

and spiritual practices, including ceremonies and sacred water recognition (Tomaselli & Hoffman, 2016, p.7).

The case of *Machi* (2009) involves a similar issue to *Haida (2004)*, where the government granted a logging permit for native trees close to land belonging to the Mapuche Indigenous community. The court found that logging activities had damaged sacred Mapuche sites (menocos) close to the Cerro Rahue hill in the Araucanía region, adversely affecting the collection of herbs and the practice of traditional medicine. Judges not only referred to Article 19 of the constitution, ascertained the Indigenous claim to a healthy environment in their territory, but also adopted Articles 8 and 13 of the *ILO-Convention 169* to emphasize the importance of indigenous cultures and spiritual values of their relationship with the lands or territories. Following the constitutionally guaranteed right with consideration of the irreversible environmental damage to Indigenous lands and non-material cultural dimensions, the Chilean Supreme Court ruled in favour of the Mapuche community and ordered the cessation of logging activities (Tomaselli & Hoffman, 2016, pp.8-9).

The *Pascua Lama* case involves Barrick Gold Corporation, a Canadian mining company, centred on gold and silver mining projects in the Atacama region. The project threatened glaciers, which are crucial for the region's water supply (Cavallo, 2013, pp.28-29) and contaminated rivers used by Indigenous Diaguita communities. The Diaguita Indigenous communities argued that the mining project would damage their ancestral lands and disrupt their way of life. Following Chile's First Environmental Court's decision to permanently close the Pascua Lama project due to significant environmental violations in 2013 (Mining Technology, 2019), the Supreme Court upheld this ruling in 2022, emphasizing the project's violation of Article 19 of the constitution given by its detrimental impact on land and water resources critical

to the Diaguita community and its adverse effects on their traditional way of life (Mining Technology, 2022).

The analysis reflects a distinction between Canada and Chile in Indigenous environmentalism legal cases. Although s.35 of the *Constitution Act, 1982,* recognizes Indigenous rights to govern their land and imposes a duty on the Crown to consult with Indigenous communities, Canadian courts often allow future governmental infringements if they are deemed to serve a compelling public objective. This judicial flexibility contrasts with Chile, where the constitutionally protected right to a healthy environment constrains judicial discretion and mandates stronger protections for Indigenous rights, allowing courts to prioritize Indigenous interests in environmental disputes.

5.2 Analysis of Results: Compelling Objectives v. Indigenous Perspectives (ITEK)

As I argued in the previous analysis, governments can infringe Aboriginal titles after undertaking meaningful consultation if a compelling objective justifies the action. In *TRTFN (2004)*, the mining company's project proposal was assessed under the Environmental Assessment Act that sets out the purposes of environmental projects, which is to promote sustainability by protecting the environment and fostering a sound economy and social well-being (para.5). This leads to a critical discussion: do the compelling objectives, such as a sound economy and social well-being, contradict or align with Indigenous perspectives on land and resource management? To assess whether court rulings strengthen Indigenous land sovereignty, it becomes crucial to understand how ITEK and Indigenous perspectives on environmental issues differ from mainstream, state-driven objectives.

In *Southwind (2021)*, the SCC again emphasized the importance of consultation to accommodate Indigenous interests and demands. The Crown had breached this fiduciary duty by

failing to act in the best interests of Lac Seul First Nation (LSFN) when expropriating the land. To remediate the destruction of the traditional lands of LSFN, the SCC ruled that compensation should be based on the full economic value of the land taken to deter further wrongdoings and foster trust in the fiduciary relationship (*Southwind v. Canada*, 2021, para.66), establishing a precedent for how compensation should be calculated for past land seizures. The SCC ruled that compensation cannot be limited to land expropriation but also to lost economic opportunities (para.131), concluding that a hypothetical value of the lost opportunities must be considered in future cases when the Crown has not fulfilled the fiduciary obligations. Similarly, in *Taku River* (2004), the Supreme Court upheld the British Columbia government's actions, reasoning that the consistent financial assistance provided to the TRTFN, as well as their participation in many project meetings, constituted meaningful consultation and adequate accommodation of Indigenous interests (para.38).

As previously discussed, Indigenous peoples do not merely perceive land as an economic resource from the mainstream views but as a living entity: an educator, a spiritual guide, and a sacred home with intergenerational significance (Turner, 2014). During the colonial stage, the entire system of knowledge, practice, and belief that was fundamental to Indigenous people was scrutinized within the framework of Western thought. The dominant knowledge systems suppressed their traditional environmental practices, disrupted their relationship with the land, and led to long-lasting challenges in regaining their rights and sovereignty over their territory (Turner, 2014; Simpson, 2014). Thus, awarding financial compensation for economic opportunities may be unlikely to repair the intergenerational damage caused by disconnecting Indigenous communities from their lands. Article 11 of the UNDRIP recognizes Indigenous peoples' cultural, intellectual, religious, and spiritual property and their right to practice their

traditions. Similarly, Article 26 affirms Indigenous rights to the lands and resources they have traditionally owned; states should give legal recognition and protection to these rights. When Canada began incorporating the UN Declaration into domestic law, it represented progress in reconciliation, which has been reflected in *Southwind* (*2021*) and *Saskatchewan (Environment)* (*2025*). Yet, the deep-rooted tension between Indigenous perspectives (ITEK) and common law interests presents challenges for courts, making it difficult to resolve this conflict thoroughly. As a result, Canadian courts have to uphold the Crown's sovereignty over Indigenous claims, as seen in the selected cases. Conversely, a constitutionally protected right to a healthy environment offers greater flexibility for Chilean judges to interpret the law, allowing for more thoughtful, rather than merely practical, protections of Indigenous interests in their rulings.

6. Alternative Explanations: Common Law Nature v. Civil Code

An alternative explanation for Indigenous land sovereignty is the difference between the Common Law and Civil Law systems. The Common Law tradition, followed in Canada, relies on judicial precedent and case law. From the nine Canadian cases discussed above, *Haida (2004)* established a lasting precedent on the duty to consult Indigenous communities. This principle has been referenced in subsequent cases, including *Southwind (2021)*, *Mikisew (2018)*, and *Saskatchewan (Environment) (2025)*, where courts reiterated the process of meaningful consultation and outlined the justifications for violating s.35 when the Crown's action serves compelling objectives. In contrast, Chile's Civil Law system is primarily based on codified statutes, allowing judges greater flexibility in interpreting solid legal provisions. As seen in the

three cases above, this flexibility allows judges to incorporate Indigenous knowledge in their rulings without being strictly bound by precedent as in Common Law systems.

The Common Law system can be a double-edged sword in this context. Supposing the SCC revises the meaningful consultation principle in the future and begins incorporating Indigenous knowledge and perspectives into its rulings, this change will be solidified in subsequent cases, thereby continuously upholding Indigenous land sovereignty. Conversely, the Civil Law system allows judges to adjust their rulings on a case-by-case basis without being bound by precedents. It gives them more flexibility to adapt to new perspectives, such as ITEK, but also makes the consistency of rulings potentially less stable over time. On the other hand, judges within the Common Law system must adhere to existing rules, even if they wish to adopt more progressive reasoning when adjudicating Indigenous land disputes. This becomes challenging without a constitutionally entrenched right as the supreme rule of the country. Therefore, this alternative explanation cannot become the leading argument, given the supreme role of the Constitution in guiding judicial decisions.

6.1 Alternative Explanations: Public Opinions

Another alternative explanation for the differences in judicial analysis is public opinion towards Indigenous rights. Judicial rulings often prompt legislative action to reinforce their decisions. Fuentes et al. (2025) conducted a survey in the Chilean Congress to evaluate the level of recognition of Indigenous rights. The result revealed more than 40% of parliamentarians support a plurinational approach to resolving Indigenous rights disputes. The approach implies recognizing and accepting Indigenous people as collectives with rights over their territories because of their pre-dated occupations, establishing a unique relationship with the environment

(Fuentes et al., 2025, p.34). Similarly, Reconciliation Canada (2016) conducted an online survey to assess the public's attitude toward reconciliation with Indigenous communities. The result reflects a positive attitude among the non-Indigenous population towards a progressive action for reconciliation. The result showed that 59% of the non-Indigenous respondents agreed to recognize Indigenous perspectives, based on ITEK, on lands and environments, and 45% believed that reconciliation means including Indigenous ITEK and perspectives in public decision-making.

Both countries demonstrated a positive attitude toward strengthening relationships with Indigenous communities. If public opinion is a decisive factor in Indigenous land sovereignty, Canadian judges can be influenced by shifting societal attitudes. However, this influence is not evident in the selected cases. Although judges reinforced the Crown's duty to consult in all cases, they are open to future governmental infringements when the duty is undertaken, and a compelling public objective can justify the infringement. Hence, despite both countries having similar public attitudes, the collected cases show that the influence of public opinion on judicial rulings in Canada remains insignificant. Unlike a constitutionally embedded right to a healthy environment, Canadian judges are not obligated to uphold absolute sovereignty over Indigenous land claims. Instead, they must balance Indigenous rights with broader governmental objectives, often justifying infringements when aligned with compelling public interests. Conversely, Chilean judges are constitutionally bound to prioritize environmental protection, strengthening judicial support for Indigenous land sovereignty. This distinction implies how constitutional frameworks shape the extent to which Indigenous environmental claims are upheld. While Canada emphasizes reconciliation through consultation, the Chilean constitution mandates stronger judicial alignment with Indigenous stewardship in environmental disputes.

7. Counterargument: Accepting the Oral Tradition as Evidence in Court Ruling

A counterargument to my thesis is the inclusion of Indigenous perspectives on environmental issues in judicial disputes. *Delgamuukw v. British Columbia (1997)* and *Tsilhqot'in Nation v. British Columbia (2014)* affirmed that oral traditions are legitimate evidence in Indigenous land claims, acknowledging their central role in transmitting culture, knowledge, and history. These cases, especially *Tsilhqot'in Nation (2014)*, were deemed as game changers regarding the perceived power held by Indigenous communities to govern their lands. Nevertheless, the SCC simultaneously clarified that Aboriginal title does not confer absolute sovereignty; governmental infringements may still be permitted when justified by a compelling public objective. While oral traditions are an essential tool to pass along knowledge in Indigenous communities throughout generations, the recognition of oral traditions as evidence enables the inclusion of ITEK and Indigenous worldviews in legal reasoning. However, it does not restructure the existing legal framework, which is grounded in constitutional doctrines that prioritize the Crown's interests and sovereignty.

As McCrossan and Ladner (2016) indicated, the validation of Indigenous knowledge systems may hold limited effects when courts continue to uphold the state's overriding authority. Even with expanded evidentiary inclusivity, Canadian jurisprudence may fall short of fully protecting Indigenous land sovereignty in the face of competing governmental objectives. Therefore, this counterargument partially refutes my thesis by illustrating that the incorporation of Indigenous perspectives on environmental issues, such as the acceptance of ITEK, strengthens Indigenous land sovereignty. Instead, the inclusion of ITEK can promote a more equitable legal

proceeding but does not guarantee land sovereignty. Judicial recognition is constrained by constitutional frameworks that ultimately permit governmental infringements under justified objectives. On the other hand, this counterargument also reaffirms my central thesis: that a constitutionally protected right to a healthy environment can strengthen Indigenous land sovereignty. When courts are bound by the supreme law, as in the case of Chile, they are obligated to declare the violation of a healthy environment unconstitutional, reinforcing judicial accountability and fostering stronger protection for Indigenous land sovereignty, as seen in Chilean jurisprudence.

8. Conclusion

Based on the qualitative analysis of the nine selected cases, Chilean judges tend to incorporate Indigenous perspectives on land and resource management into their adjudications, guided by a constitutionally protected right to a healthy environment. Alongside the public discourses regarding reconciliation in Canada, judges have taken a more activist approach in upholding Indigenous rights entrenched in s.35. Yet, Canadian courts are restrained within the Common Law system, constraining the inclusivity of Indigenous traditional knowledge in judicial decisions.

My thesis is **partially** supported by the selected cases. With a constitutionally protected right to a healthy environment, Chilean judges upheld Indigenous rights and incorporated their traditional perspectives on environmental issues into their rulings. Canadian judges ruled in favour of Indigenous communities in my selected cases and assured their rights and protections. In the absence of a constitutionally protected right within the Common Law system, Canadian

judges have to prioritize the Crown's sovereignty over Indigenous perspectives. This constrains judicial capacities to strengthen Indigenous land sovereignty. While the inclusion of ITEK regarding environmental concerns can promote an equitable judicial process, it does not guarantee Indigenous land sovereignty, as supported in *Delgamuukw (1997)* and *Tsilhqot'in Nation (2014)*. Judicial consideration of Indigenous traditions is still scrutinized by the Common Law system that prioritizes the Crown's interests and sovereignty.

This paper is subject to several limitations, as discussed in the methodology section. The small number of cases analyzed and language barriers in accessing original Chilean Supreme Court documents may restrict the generalizability of the findings to broader contexts. Future research should expand the case selection to include a wider range of jurisdictions with constitutionally protected rights to a healthy environment through a quantitative study to establish a more comprehensive assessment of judicial trends in Indigenous environmentalism. Conducting detailed textual analyses of Chilean cases using direct translations is necessary for developing a more refined comparison based on the findings of this study.

REFERENCES

Brideau, I. (2019, June 12). *The duty to consult Indigenous peoples*. Library of Parliament. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201917E

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 7, 35

Cavallo, G. A. (2013). Pascua Lama, Human Rights, and Indigenous Peoples: A Chilean case through the lens of international law. *Göttingen Journal of International Law*, *5*(1). https://doi.org/10.3249/1868-1581-5-1-cavallo

Céspedes, R. (2013). Indigenous peoples' human right to a clean environment, environmental impact assessment, and ILO Convention 169. *Warwick Student Law Review, 3*(1), 71–80.

Chile's Constitution of 1980 with Amendments through 2021. (2021). *Constitute Project.* https://jps.library.utoronto.ca/index.php/des/article/download/22170/17985

Fernández‐Llamazares, Á., Garteizgogeascoa, M., Basu, N., Brondizio, E. S., Cabeza, M., Martínez‐Alier, J., McElwee, P., & Reyes‐García, V. (2020). A state‐of‐the‐art review of Indigenous peoples and environmental pollution. *Integrated Environmental Assessment and Management, 16*(3), 324–341. https://doi.org/10.1002/ieam.4239

Fuentes, C., de Cea, M., & Miranda, C. (2025). A divided society: Social perceptions about Indigenous peoples' rights in Chile. *Canadian Journal of Latin American and Caribbean Studies, 50*(1), 23–42. https://doi.org/10.1080/08263663.2024.2421120

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73.

International Labour Organization. (1989). *Indigenous and Tribal Peoples Convention, No. 169.*

Mason, R. (2024). Climate change and the right to a healthy environment: International and Canadian developments. *Library of Parliament: International Affairs and Integrated Reference Services, 2023*-12-E.

McCrossan, M. (2019). Advancing dishonourable relations: Legal reasoning, Indigenous rights, and strategic uses of reconciliation. *Studies in Political Economy, 100*(2), 93–110. https://doi.org/10.1080/07078552.2019.1646454

McCrossan, M., & Ladner, K. L. (2016). Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power. *Canadian Journal of Political Science*, *49*(3), 411–431. https://doi.org/10.1017/S0008423916000822

Mikisew Cree First Nation v. Canada (Governor General in Council), 2018 SCC 40

Saskatchewan (Environment) v. Métis Nation – Saskatchewan, 2025 SCC 4

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74.

The Canadian reconciliation landscape: Current perspectives of Indigenous Peoples and non-Indigenous Canadians. (2016). https://reconciliationcanada.ca/wp-content/uploads/2022/11/NationalNarrativeReport-ReconciliationCanada-ReleasedMay2017_3.pdf

Thomaselli, A., & Hofmann, R. (2016). *Committee on the implementation of the rights of Indigenous peoples of the international law association (ILA) Case study: Land and water rights in Chile.* BIA. https://hdl.handle.net/10863/9269

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

Turner, N. J. (2014). *Ancient pathways, ancestral knowledge: Ethnobotany and ecological wisdom of Indigenous peoples of northwestern North America.* McGill-Queen's University Press.

United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples.* https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

Wortsman, L. (2019). "Greening" the Charter: Section 7 and the Right to a Healthy Environment. *Dalhousie Journal of Legal Studies*. 28, 245-289.