Crown-Aboriginal Relations in Resource Development: An Analysis of Institutional Incentives and Constraints in the Reconciliation of Aboriginal Interests

Matthew Kinch

A Thesis
In the Department
of
Political Science

Presented in Partial Fulfillment of the Requirements
For the Degree of
Masters of Arts (Public Policy and Public Administration) at
Concordia University
Montreal, Quebec, Canada

November 2015

CONCORDIA UNIVERSITY

School of Graduate Studies

This is to certify that the thesis prepared

By: Matthew Kinch

Entitled: Crown-Aboriginal Relations in Resource Development: An Analysis of Institutional Incentives and Constraints in the Reconciliation of Aboriginal Interests

and submitted in partial fulfillment of the requirements of the degree of

Master of Arts (Public Policy and Public Administration)

complies with the regulations of the University and meets the accepted standards with respect to originality and quality.

Signed by the final Examining Committee:

Dr. James Kelly Examiner

Examiner's name

Dr. Amy Poteete Examiner

Examiner's name

Dr. Daniel Salée Supervisor

Supervisor's name

Approved by _____

Chair of Department or Graduate Program Director

October 28th, 2015

ABSTRACT

Crown-Aboriginal Relations in Resource Development: An Analysis of Institutional Incentives and Constraints in the Reconciliation of Aboriginal Interests

Matthew Kinch

The advancement of a constructive Aboriginal agenda in the form of rights-based litigation since the recognition and affirmation of Aboriginal and treaty rights in the *Constitution Act, 1982* has led to the creation of the legal doctrine of the duty to consult and accommodate. As a discipline on Crown decision-making, the legal doctrine of the duty to consult and accommodate presents a prospective pathway for the reconciliation of Crown and Aboriginal interests in resource development. While maintaining promise as a framework to provide for the full and fair consideration of Aboriginal interests in regulatory reviews, administrative decision-makers representing the Crown have made the management of legal liabilities the principal policy objective of consultation and accommodation. As a result, there is minimal incentive for administrative decision-makers to deviate from highly legalistic interpretations of common law. This standard operating procedure is steadily reinforced, as the Crown, able to efficiently reduce the risk of litigation by First Nations, permits projects without consideration of the continued and incremental diminishment of Aboriginal interests in lands and resources. The purpose of this thesis is to deconstruct processes of consultation and accommodation embedded in environmental assessment processes associated with major resource projects as a means to identify institutional arrangements that promote and provide for the full and fair consideration of Aboriginal interests in Crown decision-making.

Table of Contents

List of Tables

List of Figures

List of Acronyms

AIR ..... Application Information Requirements
CEAA ..... Canadian Environmental Assessment Agency
DFO ..... Department of Fisheries and Oceans Canada
EAC ..... Environmental Assessment Certificate
EAO ..... Environmental Assessment Office
FNLC ..... First Nations Leadership Council
IAD ..... Institutional Analysis and Development Framework
IBA ..... Impact Benefit Agreement
LNG ..... Liquefied Natural Gas
LNGESI ..... Liquefied Natural Gas Environmental Stewardship Initiative
TEK ..... Traditional Ecological Knowledge
TLE ..... Treaty Land Entitlement
TLU ..... Traditional Land Use
VC ..... Valued Component

Introduction

The recognition and affirmation of Aboriginal and treaty rights under Section 35(1) of the *Constitution Act, 1982* significantly shifted the foundation of Crown-Aboriginal relations. Since 1982, the advancement of a constructive Aboriginal agenda in the form of rights-based litigation has established a new standard for Crown-Aboriginal relations in the context of resource development. In a series of landmark decisions, the Supreme Court of Canada has been unequivocal in its determination that Aboriginal rights, whether defined by treaties or arising from Aboriginal assertions, maintain a distinct constitutional and legal status. These decisions have established both procedural and substantive duties of the Crown when it contemplates conduct that may adversely affect Aboriginal and treaty rights. As defined in common law, the Crown, possessing knowledge of a project and its potential impact on Aboriginal interests[1], must consult and, where appropriate, accommodate First Nations.

The increasing interest and investment in resource sectors as a driver of economic development presents new possibilities for Crown-Aboriginal relations. The emergence and evolution of the legal doctrine of the duty to consult and accommodate must be understood as a positive and promising legal development for First Nations. Based on a set of legal and relational principles, the duty to consult and accommodate presents a prospective pathway for the reconciliation of Crown and Aboriginal interests in decision-making processes. While it does not require the parties to reach agreement, it provides a practical instrument for the interlocutory protection of Aboriginal interests in lands and

[1] The term "Aboriginal interests" refers to asserted Aboriginal rights, including Aboriginal title and Aboriginal treaty rights, that are recognized and affirmed under Section 35(1) of the *Constitution Act, 1982*.

resources in the absence of settlement agreements that provide for the full and final definition of those interests. It is this expectation of both the process and its possibilities that poses the most significant challenge for the duty to consult and accommodate in its practical interpretation and implementation.

Research Question

Although the recognition of Aboriginal and treaty rights establishes a prospective pathway for the reconciliation of Aboriginal interests in resource development, the interpretation and implementation of the duty by administrative decision-makers has been consistently characterized as legally reductionist and mechanistic with minimal cohesion in terms of its capacity to advance the broader purpose of reconciliation. For many First Nations, consultation comes to be represented in policy and practice as a function of information sharing, whereby administrative decision-makers representing the Crown secure input, whether directly or indirectly, from an affected First Nation for the purposes of discharging legal, financial or political liabilities.

There are two primary research pursuits in the context of the problematic posed above. First, to what extent does the legal doctrine of the duty, as a liability and discipline on Crown decision-making, provide interim protections to Aboriginal interests in the absence of settlement agreements that define constitutionally protected rights in its full and final form? Second, and as an extension of the first, to what extent does the legal doctrine of the duty present institutional incentives for the formal reconciliation of Crown and Aboriginal interests in the form of negotiations as an alternative to costly litigation?

Thesis Statement

The purpose of this thesis is to deconstruct processes of consultation and accommodation embedded in environmental assessment processes associated with major resource-based projects as a means to identify institutional arrangements that promote and provide for the full and fair consideration of Aboriginal interests in Crown decision-making. Although the legal doctrine of the duty to consult and accommodate is codified in policies and standard operating procedures used by administrative decision-makers in regulatory reviews, it is posited that operational rules, while providing for a process commensurate with the minimal duties mandated by common law, make the management of legal liabilities the principal policy objective of the Crown. The result, as will be discussed, is that the institutional arrangements intended to operationalize the duty present minimal incentive for administrative decision-makers to deviate from legally reductionist interpretations of common law. This standard operating procedure is steadily reinforced, as the Crown, able to efficiently reduce the risk of litigation by First Nations, permits projects without consideration of the continued and incremental diminishment of Aboriginal interests in lands and resources.

State of Knowledge and Study Significance

The continued evolution and contestation of Aboriginal rights, title and treaty rights in the courts has resulted in a significant body of legal literature concerned with the interpretation and, in certain cases, implications of case law. This body of legal literature provides both a comprehensive chronology of developments in case law (Borrows & Rotman, 1998; Slattery, 2000; Christie, 2003; Henderson, 2006; Ochman, 2008) and

perspective on particular decisions, including *Sparrow* (Rotman, 1998), *Delgamuukw* (Bankes, 1998; Lambert, 1998; Borrows, 1999; Christie, 2001), *Van der Peet* (McNeil, 1997), *Haida* and *Taku* (McNeil, 2005; Tzimas, 2005), and *Rio Tinto* and *Beckman* (Mullan, 2010). The legal literature also deconstructs legal constructs that arise as a result of judicial articulations, including the concepts of justified infringement (Dufraimont, 2010; Luk, 2014) and fiduciary duties (Bryant, 1993; Hurley, 2000; Coyle, 2003). In many cases, the legal literature critiques case law, challenging the legitimacy of colonial institutions and questioning the compatibility of liberal legal traditions and indigenous perspectives (Borrows 1994, 1996-7, 1997-8; Christie, 2005, 2006).

In the context of this thesis, there has been a burgeoning body of legal literature concerned with the current state of case law as it relates to consultation and accommodation (Christie, 2005; Treacy, Campbell & Dickson, 2007; Sanderson, Bergner & Jones, 2012, Imai & Stacey, 2013). As case law has taken shape, there has been an increasing interest to understand the implications for administrative decision-makers representing the Crown (Metcalf, 2008; Promislow, 2013; Reddekopp, 2013) and the participation of industry (Isaac and Knox, 2004, 2005; Fogarassy and Litton, 2005; Gogal, Riegert & Jamieson, 2006) and First Nations in regulatory reviews (Baker & McLelland, 2003; Booth & Skelton, 2011a, 2011b; Lambrecht, 2013).

While the legal literature has provided clarity to core legal constructs, literature aimed at unpacking or understanding the relationship between institutions and individual actors in the process of consultation and accommodation has been limited. Although it is acknowledged that this thesis does include a discussion of legal developments as a means to define the procedural and substantive dimensions of consultation and accommodation,

this thesis is principally concerned with the duty in its practical application. To this end, this thesis contributes to an understanding of how policies and standard operating procedures constrain the scope, content and substantive results of consultation and accommodation relative to its broader potential as defined in case law.

Thesis Outline

This thesis is composed of five chapters. The first chapter presents a chronology of landmark legal developments as a means of situating Crown-Aboriginal relations in its broader historical and legal context. The second chapter presents the procedural and substantive dimensions of the legal doctrine of the duty to consult and accommodate as a means of constructing criteria upon which the case studies can be evaluated. The third chapter presents the theoretical tenets and practical applications of the Institutional Analysis and Development (IAD) framework as a strategy for inquiry when analyzing institutional arrangements and patterns of interaction related to the process of consultation and accommodation. The fourth and fifth chapters include descriptive overviews and discussions of the scope, content and overall process of consultation as conducted and directed by the BC Environmental Assessment Office (EAO) in the issuance of Environmental Assessment Certificates for the Coastal GasLink Pipeline Project and the Westcoast Connector Gas Transmission Pipeline Project in northern British Columbia. Finally, this thesis concludes with a discussion of key findings relative to the case studies presented.

Chapter 1 – Aboriginal Rights, Title and Treaty Rights as Legal Constructs

Introduction

Although Crown-Aboriginal relations has been subject to significant study in its customary and contemporary form, the legal literature concerning Aboriginal law has largely concentrated on the interpretation, clarification and potential implication of Aboriginal rights, title and treaty rights as these legal constructs evolve with decisions of the courts. As the doctrine of the duty to consult has emerged and evolved with case law, the legal literature has unpacked both the principle and procedural components of Aboriginal rights, title and treaty rights in relation to the conduct of the Crown. Through the interpretation of case law, the legal literature has contributed to an understanding of both the legal framework from which constitutionally protected rights are established and defended as well as the scope and content of the procedural duty to consult and accommodate.

As case law relevant to Crown-Aboriginal relations continues to evolve, the legal literature has primarily focused on Aboriginal rights, title and treaty rights as the dominant legal framework from which Aboriginal communities advance customary and contemporary assertions inherent to the exercise of constitutionally protected rights with the Crown. Thus, the literature is often occupied with the translation of Aboriginal rights, title and treaty rights in the context of Canadian common law as to contribute to understandings of the broader political and legal landscape in which Crown-Aboriginal relations rest.

The purpose of this chapter is to construct a chronology of landmark legal developments for the purposes of describing defensible principles applicable to Aboriginal rights and title[2].

Evolution of Aboriginal Rights, Title and Treaty Rights as Legal Constructs

Although Section 35(1) of the *Constitution Act, 1982* recognized and affirmed existing Aboriginal and treaty rights, the text and structure of Section 35(1) is characterized by its ambiguity. Section 35(1) does not define the exact nature or extent of Aboriginal and treaty rights, nor does it substantively define Crown-Aboriginal relations in this context. Beyond the entrenchment of Aboriginal and treaty rights in the Constitution of Canada, the intentions of Section 35 (1) and (2), and the subsequent additions of provisions (3) and (4), are unclear. It has been noted by commentators of constitutional negotiations that Section 35 was drafted with the intent to define the extent of Aboriginal and treaty rights in negotiations with federal, provincial and Aboriginal leaders once repatriation was complete (McFarlane, 1993; Nahwegahbow & Richmond, 2007-08)[3]. This legal and definitional uncertainty of Aboriginal and treaty rights led many Aboriginal leaders to question whether Section 35(1) was a box of treasures or simply an empty box (Walkem, 2003).

[2] This thesis is principally concerned with asserted Aboriginal interests not defined by settlement agreements. Therefore, the discussion of Aboriginal legal constructs is largely focused on Aboriginal rights and title as opposed to Aboriginal treaty rights.
[3] In 1983 and 1984, in accordance with Section 37(2) of the *Constitution Act, 1982*, constitutional conferences were convened by the Prime Minister of Canada and the First Ministers of the Provinces to deal specifically with "constitutional matters that directly affect the Aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada" (Constitution Act, 1982). As a result of these discussions, subsections 35(3) and (4) were added to the *Constitution Act, 1982*. These amendments provided recognition to land claim agreements and ensured these rights would be extended equally to Aboriginal men and women. Subsequently, as agreed by federal, provincial and Aboriginal representatives, constitutional conferences were again convened in 1985 and 1987 to provide recognition for Aboriginal rights to self-government. In the end, federal, provincial and Aboriginal representatives were unable to reach agreement and ongoing commitments to constitutional conferences were repealed.

Ultimately, constitutional conferences convened between 1982 and 1987 on matters concerning the substantive meaning of Section 35 failed to yield consensus. In the absence of agreement by federal and provincial governments on amendments to the *Constitution Act, 1982*, the responsibility to expand the definition of Aboriginal and treaty rights became the purview of the courts. It is therefore instructive to construct a chronology of legal developments that describe how the evolution of Aboriginal rights and treaty rights have shaped contemporary Crown-Aboriginal relations, including the legal doctrine of the duty to consult that now characterizes these interactions in resource development.

From Calder to Sparrow:

Prior to the seminal decision of *R. v. Sparrow* (1990), two prominent Supreme Court decisions provided precedent for cases concerning Aboriginal rights and title. The first, *Calder v. Attorney-General of British Columbia* (1973), required the Supreme Court of Canada to contemplate the existence of Aboriginal title as claimed by the Nisga'a Tribal Council. As was asserted by the Nisga'a Nation, Aboriginal title, similar to legal constructs prominent in colonial law, is not dependent on treaty, executive order or legislative enactment, but rather premised on the prior use and occupation of those lands (Calder v. Attorney-General of British Columbia, 1973). In rendering its decision, the Supreme Court of Canada was divided. While three justices concluded that Aboriginal title existed on the basis of occupation prior to contact and was therefore unextinguishable by statute, three justices, in offering a dissenting opinion, concluded

that the test for Aboriginal was based on definitions of possession in common law (Godlewska & Webber, 2007).

In the end, the case was dismissed on a procedural point[4] and the question of extinguishment was left unresolved. The influence of *Calder* (1973), however, must not be diminished. In many ways, *Calder* (1973) provided a legal basis to confront the assimilationist assumptions that had come to define the aspirations of Aboriginal policy making. As a direct response to this decision, the Government of Canada issued a policy statement in 1973 declaring its interest and intent to negotiate land agreements with First Nations and Inuit in recognition that the *British North America Act* (1867) and *Royal Proclamation* (1763) contained within it a responsibility to protect Aboriginal interests[5].

The second case of significance preceding *Sparrow* (1990) was *Guerin v. The Queen* (1984) in which the Musqueam Indian Band asserted that the Crown, as represented by Indian Affairs Branch officials, acted dishonestly when it leased 162 acres of reserve land to a golf club on different and less valuable terms then was agreed to in prior consultations. In 1982, a federal trial judge concurred with the claimant, ruling that the Crown was in breach of trust in entering into the lease and, as a consequence, was required to award appropriate damages to the band. Shortly thereafter, and as a result of an appeal by the Crown, the question of Crown-Aboriginal relations was once again a matter of deliberation for the Supreme Court of Canada. In particular, with the facts of the case confirmed by a lower court, the focus of *Guerin* (1984) shifted to an

[4] The appeal was dismissed on a procedural point. It was concluded that the Supreme Court of Canada was unable to make a decision on the basis that the Nisga'a Nation had not obtained permission from the Attorney General to sue the Crown, as was required by law in British Columbia at the time.

[5] In summarizing the significance of Calder (1973), Asch concludes, "notwithstanding either the course of Canadian history as understood by the descendants of the settlers, immigrants, and colonists or legal precedent derived from British colonial law, the Canadian state was required to recognize the self-evident yet hitherto ignored fact that Aboriginal peoples lived in societies prior to the arrival of Europeans and that, as a consequence, there was a likelihood that their institutions, tenures, and rights to government remained in place despite the presumption of Canadian sovereignty" (2002, p. 9).

interpretation of Section 18 of the *Indian Act* (1876) and the implication that this imposed a fiduciary duty on the Crown in its dealings with Aboriginal communities[6].

Guerin (1984) is instructive for understanding Crown-Aboriginal relations for two reasons. First, and most importantly, *Guerin* (1984) affirmed the precedent advanced in *Calder* (1973) that Aboriginal interests in lands is a pre-existing right not dependent on legislative or executive orders of the Crown (Hurley 1985). To this end, whether the assertion of title is a claim to traditional territory or the title arises from the surrender of lands in exchange for a portion of those territories, it is clear from *Guerin* (1984) that "property rights, once established, continue unaffected by a change of sovereignty unless positively modified or abrogated by the new sovereign" (Hurley 1985, p. 571). In summary, *Guerin* (1984) provided recognition that Aboriginal interests to lands and resources survived the acquisition of Crown sovereignty and therefore constitute a liability on Crown decision-making.

The second reason *Guerin* (1984) is instructive relates to the expansion of Crown responsibility that comes with the assertion of Aboriginal title, whether recognized or unrecognized. *Guerin* (1984) is the first case where the responsibility of the Crown to Aboriginal peoples is characterized as a fiduciary duty. As described in the ruling, treaties such as the *Royal Proclamation of 1763* and legislation such as the *Indian Act, 1876* provide certain protections to Aboriginal interests by positioning the Crown as the only authority able to acquire Aboriginal title. By extension, and as described by Hurley in relation to the case presented in *Guerin* (1984), the Crown is not only an intermediary between the affected Aboriginal community and a third party, but maintains a historical

[6] 18. (1) Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

relationship with Aboriginal communities codified in legislation that establishes an obligation to work toward the benefit of those communities (1985). As Slattery asserts, in cases where Aboriginal lands have been surrendered, the burden of proof rests with the Crown, whereby the Crown must demonstrate that Aboriginal rights were extinguished by statute and, where this cannot be demonstrated, that the Crown must provide compensation (1987). Although the decision in *Guerin* (1984) did not fully equate the concept of fiduciary duty with concepts of trust in private law due to the *sue generis*[7] nature of Aboriginal title, it has similar implications. *Guerin* (1984) introduces the implication that when the Crown fails to uphold its fiduciary duty, the consequences for the Crown would be the same as it were in a beneficiary-trustee relationship under private law with remedies for a breach of trust (Hurley 1985).

By 1990, the interpretation of Aboriginal rights as protected under Section 35(1) of the *Constitution Act, 1982* had been primarily the purview of academics concerned with the propositions posed by these new provisions. In describing its significance, Lyon asserts that Section 35(1) "renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown" (1988, p. 100). With Section 52(1) of the *Constitution Act, 1982* representing a shift from legislative supremacy to constitutional supremacy, Section 35(1) ensured the protection of Aboriginal rights from extinguishment by unilateral legislative or executive order (McNeil, 1982). However, Section 35(1) did not establish absolute rights. Slattery asserts that in circumstances of competent law making, legal limitations can be applied to the right (1984). It is in this interpretation that the recognition of Aboriginal rights

[7] Introduced in *Guerin* (1984), the term *sue generis* is used in Aboriginal law to describe the unique rights of Aboriginal people and the historic relationship between the Crown and the Aboriginal peoples of Canada.

in Section 35(1) maintains a broad reconciliatory and remedial character within the dominant legal doctrine. As Slattery advises, Aboriginal rights can be situated between two ends – one where Aboriginal rights are entrenched upon signature of the *Constitution Act, 1982* with no evolutionary character and one where Aboriginal rights are absolute and any limitation or restriction applied to it is illegitimate. Slattery posits that Aboriginal rights proposes a more moderate solution, arguing that regulations must enable the exercise of the right and, where the exercise of the right risks endangering a public good, regulations can limit its exercise with appropriate validation (Slattery 1987).

In *R. v. Sparrow* (1990), the Supreme Court of Canada contemplated for the first time the scope and content of Section 35(1) of the *Constitution Act, 1982*. In this case, a member of the Musqueam Indian Band was charged in 1984 under the *Fisheries Act* with using a fishing net longer than the one permitted under the terms and conditions of the food fishing license issued by the Department of Fisheries and Oceans (DFO). With the appellant in the case admitting to the facts constituting the charge, the charge was defended on the basis that the use of an unpermitted fishing net was exercising an existing Aboriginal right protected under Section 35(1).

In its decision, the Supreme Court of Canada extended the doctrine of fiduciary duty to Crown conduct concerning inherent Aboriginal rights. In its decision, the Supreme Court of Canada advanced a liberal interpretation of the word *existing*, defining it as an *unextinguished* entitlement that survived the assertion of Crown sovereignty (Christie, 2006). The court also acknowledged the strength of the Aboriginal claim in this case and the inherent interdependency between the Aboriginal right to fish and the subsistence and cultural practice of the First Nation community. To this end, the decision

articulated clearly that while an Aboriginal right is not absolute, legislation and regulation is not able to extinguish an existing Aboriginal right, nor is it able to define its substantive content. It is only a mechanism to manage the exercise of an Aboriginal right in a manner that is sustainable.

Finally, and consistent with the legal constructs introduced in Guerin (1984), the court clarified that "federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights" (R. v. Sparrow, 1990). In practical terms, the Supreme Court of Canada posed a pathway for Crown representatives to determine if legislation or regulation is consistent with Section 35(1) by proposing a two-part test. This test requires the Crown to bear the burden of demonstrating that the infringement is defensible on the basis of a valid regulatory objective and, where the expression or exercise of the right is legitimately limited on this basis, that priority is provided to Aboriginal interests as a measure of precedence (Asch & Macklem, 1991). In its decision, the court also sets a standard for Crown-Aboriginal relations in cases where an Aboriginal right is confined. In particular, the court advances the argument that the Crown must consult the affected Aboriginal group and, where resources are reallocated or appropriated, to ensure fair compensation is available (R. v. Sparrow, 1990). By situating Crown-Aboriginal relations in this context, the ability of the Crown to uphold its substantive and solemn promise requires a process of consultation whereby Aboriginal interests are fairly considered in decision-making.

Van der Peet, Gladstone and Delgamuukw:

In 1996, the Supreme Court of Canada provided additional clarification as to the nature and scope of Aboriginal rights in relation to Section 35(1) of the *Constitution Act, 1982* in *R. v. Van der Peet* (1996)[8] and *R. v. Gladstone* (1996)[9]. In *Van der Peet* (1996), the Supreme Court of Canada reflected on the purpose of Section 35(1). According to the ruling, the purpose of Section 35(1) is to protect distinctive Aboriginal practices, traditions and customs for the greater purposes of "facilitating reconciliation between the fact of the prior presence of Aboriginal societies within Canada and the sovereignty of the Crown" (Christie 2006, p. 148). The conception of Aboriginal rights as distinctive practices, traditions and customs was extended in *Gladstone* (1996), as "the specter of exclusivity affected both the form of the Crown's fiduciary obligations and the degree of scrutiny that would be turned on the Crown's efforts to meet its obligations" (Christie 2006, p. 148). In this case, the fiduciary doctrine becomes a responsibility incumbent on the Crown to appropriately accommodate assertions of Aboriginal rights in accordance with Crown responsibilities associated with the allocation of natural resources. The Crown maintains the discretionary authority to establish limits on the exercise of Aboriginal rights in recognition of other issues and interests, but maintains the responsibility to consult Aboriginal groups in circumstances where the exercise of an Aboriginal right may be purposely constrained. For Christie, Aboriginal rights are entitlements to participate in activities sanctioned by the Crown, as "these rights must be merged into a political, legal and economic landscape structured around other—non-

[8] In *R. v. Van der Peet* (1996) Dorothy Van der Peet, a member of the Sto:lo Nation was charged for selling salmon that had lawfully been caught under the First Nations food fish license. The issue before the Supreme Court was whether the law preventing the sale of the fish infringed Van der Peet's Aboriginal rights and section 35(1) of the *Constitution Act, 1982*.

[9] In *R. v. Gladstone* (1996) William and Donald Gladstone, members of Heiltsuk First Nation were both charged with selling herring spawn contrary to the *Fisheries Act*. The brothers justified the action under the section 35(1) of the *Constitution Act, 1982*.

Aboriginal—rights and interests" (2006, p. 149-50). The precedents articulated by the Supreme Court of Canada in *Van der Peet* and *Gladstone* establish a framework for the reconciliation of Aboriginal and non-Aboriginal rights, an important development in the allocation of natural resources.

In 1997, the Supreme Court of Canada reflected on the nature and scope of Aboriginal title in relation to Section 35(1) of the Constitution Act, 1982 in *Delgamuukw v. British Columbia* (1997). The *Delgamuukw*[10] case presented a consequential interpretation of Aboriginal title, specifically the assertion that Aboriginal title was found to be a property right. The Supreme Court of Canada ruled that some Aboriginal land interests could be conveyed as a right to land if the Aboriginal community in question could demonstrate exclusive use and occupation of traditional territory prior to the absolute assertion of Crown sovereignty (Christie 2006). The implications of this ruling is that the assertion of Aboriginal title requires the Crown to accommodate Aboriginal people in resource development processes, as Aboriginal title becomes a critical consideration in the deliberation over land use (Morelatto 2008). However, the nature of consultation and accommodation remained abstract at this stage. It is only in the cases of *Haida* (2004), *Taku* (2004) and *Mikisew* (2005) where the courts contemplate fully the duty to consult and accommodate First Nations when dealing with settled and unsettled claims.

[10]In *Delgamuukw v. British Columbia* (1997) the Wet'suwet'en Nation claimed ownership and legal jurisdiction over 133 individual traditional territories in an area larger than the province of Nova Scotia.

Conclusion

The presentation of a historical perspective of this legal framework provides clarity in understanding the current constraints for the full and proper implementation of Aboriginal and treaty rights in the context of the *Constitution Act, 1982*. Further, a historical perspective of this legal framework illustrates evolving conceptions of Aboriginal and treaty rights in both theory and practice. While these legal developments must be understood as the advancement of a constructive Aboriginal agenda, these constructs continue to be the subject of contestation in the courts. These landmark legal decisions do, however, provide the basis for contemporary Crown-Aboriginal relations in the context of the resource development, including the specific duties now described as consultation and accommodation.

Chapter 2 – Defining the Legal Doctrine of the Duty to Consult and Accommodate

Introduction

Since *Sparrow* (1991), the courts have cautiously crafted a framework for Crown-Aboriginal relations in the context of resource development. With the decisions of *Haida Nation v. British Columbia* (2004), *Taku River Tlingit First Nation v. British Columbia* (2004) and *Mikisew Cree First Nation v. Canada* (2005), the Supreme Court of Canada provided clarity and definition to the legal doctrine of consultation and accommodation. These three decisions fundamentally altered the ways in which the Crown, whether represented by a federal or provincial entity, is able to exercise its decision-making authority in forestry, fisheries, mining, oil and gas, and infrastructure development. On the basis of these three decisions, the Crown is legally required to consult and, where appropriate, accommodate Aboriginal interests where a First Nation evidences the existence of a *prima facie*[11] Aboriginal right and the Crown contemplates conduct that may impede or interfere with the full expression of that right.

Based on this fundamental precedent, the Supreme Court of Canada has provided general guidance to the Crown in discharging its duty to consult and accommodate. Building from the previous chapter on the evolution of Aboriginal rights, title and treaty rights as legal constructs in common law, this chapter presents the core components of the legal doctrine of the duty to consult and accommodate. It considers both the procedural and substantive dimensions of the duty based on a review of relevant cases, including the more recent decisions of *Beckman v. Little Salmon/Carmacks First Nation*

[11] The term *prima facie* refers to the presentation of sufficient evidence to support a specific claim. In the context of Aboriginal law, the term *prima facie* refers to instances where First Nations present evidence of the existence of Aboriginal rights or title.

(2010) and *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* (2010). By defining the core components of the legal doctrine, I will be able to describe the process by which case law is constituted in operational policies and procedures used by administrative decision-makers in environmental assessment processes. With a clear definition of the legal doctrine, I will also be able to assess if the consultation processes and outcomes embedded in the environmental assessments in the cases of the Coastal GasLink Pipeline Project and the Westcoast Connector Gas Transmission Pipeline Project are consistent and compatible with the legal doctrine as defined in case law.

Source of the Duty

As illustrated by legal literature and case law, the duty to consult must be understood in the context of principles, both legal and historical, that define Crown-Aboriginal relations in its customary and contemporary context. The courts have been clear that the duty to consult is grounded in and flows from the honour of the Crown (Sanderson, Bergner & Jones, 2012). The honour of the Crown, however, does not apply exclusively to circumstances in which the Crown is required to consult First Nations. It is a broader legal and relational precedent that defines fiduciary duties and distinct processes related to the negotiation, litigation and interpretation of Aboriginal and treaty rights.

In an attempt to unpack this legal construct, Slattery posits a theory to understand the honour of the Crown and its ultimate source. Most importantly, and as articulated in *Haida* (2004), the Court describes Crown sovereignty as *de facto*, which, in its continued interpretation, implies that the assertion and subsequent acquisition of Crown sovereignty after contact was illegitimate, but accepted for practical purposes (Slattery, 2005). In the

process of acquiring sovereignty, the Crown interposed itself in relationships between Aboriginal and non-Aboriginal people. As animated in the *Royal Proclamation of 1763*, the Crown assumed responsibility for the protection of Aboriginal interests by prohibiting the transfer of Aboriginal lands directly to settlers and required that those lands be surrendered to the Crown first (Imai and Stacey, 2013). While the *Royal Proclamation of 1763* is not itself the source of the duty of the Crown to act honourably, it is the clearest articulation of the deliberate role that the Crown assumed in relation to Aboriginal peoples[12]. As further described in *Haida* (2004), with the assertion of Crown sovereignty arose a responsibility on the part of the Crown to protect Aboriginal peoples from exploitation (Slattery, 2005).

In its practical application, the duty of the Crown to act honourably is a commitment to a process of reasonable dealing where Aboriginal claims are provided full and fair consideration, particularly in cases where Aboriginal claims have not been reconciled with the sovereignty of the Crown. As articulated in *Haida* (2004), "the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof" (Haida Nation v. British Columbia, 2004). To an extent, the principle of fair dealing is consistent with precedents established in administrative law where the Crown is required to deal with individuals in a manner that is procedurally fair and reasonable (Isaac & Knox, 2004). This principle is also compatible with the law of fiduciary duty where the Crown is required to consider the interests of First Nations

[12] As stated in the Royal Proclamation of 1763, "whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians".

where a trust-like relationship exists (Isaac & Knox, 2004). The duty to consult is animated by legal principles associated with administrative law, but ultimately rooted in the reconciliation of Crown and Aboriginal interests in lands and resources that were, in reality, controlled by First Nations at the time of contact.

Defining Consultation

The term consultation in this context refers to a process whereby the Crown, contemplating an administrative decision and attentive to defined or asserted Aboriginal rights, notifies and shares information with the appropriate rights-holder. In defining consultation, it is informative to review relevant agreements between the Crown and First Nations. As an example, the *Nisga'a Final Agreement* signed in 1999 defines consultation as due notice of a matter to be decided, a process of information sharing to support the affected party to prepare its view on the matter, and an occasion for the affected party to present those views for full and fair consideration by the decision-maker (Nisga'a Final Agreement, 1999). This definition, which has been referenced as precedent for consultative processes in decisions of the courts, implies a process by which information relevant to a decision is disclosed and the party potentially affected by that decision has sufficient time to consider and share its position and perspective with the decision-maker.

Purpose of the Duty

The definition and source of the duty to consult only partially specifies its objectives. In defining its purpose, it is important to describe its procedural objectives and its broader potential. First, to define its purpose in the most instrumental terms, it is a

function of notification and information sharing coordinated by the Crown in fully discharging its constitutional and, as applicable, statutory duties in a way that accounts for Aboriginal assertions. The duty to consult, however, cannot be interpreted in such simplistic terms as to obfuscate its potential in promoting a process of reconciliation pursuant to Section 35(1) of the *Constitution Act, 1982* (Taku River Tlingit First Nation v. British Columbia, 2004). It is, as has been defined by the courts, part of a broader process of "fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (Haida Nation v. British Columbia, 2004).

The purposes of the duty to consult as described in *Haida* (2004) and *Taku* (2004) has since been expanded in *Rio Tinto* (2010) and *Beckman* (2010). In *Rio Tinto* (2010) the court reflects on the purposes contemplated in *Haida* (2004), clarifying that the duty to consult is based on the desire to protect unproven or proven Aboriginal rights from irreversible degradation pending the resolution of comprehensive land claims (Sanderson, Bergner & Jones, 2012). In *Beckman* (2010), the reconciliatory character and capacity of the duty to consult is more fully contemplated. It is characterized as an adjustment to the honour of the Crown and thus serves as a means or method for the Crown to act honourably in the ultimate pursuit of reconciliation (Sanderson, Bergner and Jones, 2012). As Justice Binnie reflects, "the reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of Section 35" (Beckman v. Little Salmon/Carmacks First Nation, 2010). In this context, the duty to consult has a complex, multiplicative character that commits the Crown and First Nations to interest-based cooperation, rather than position-based rigidity (Lambrecht, 2013).

The purpose of the duty to consult in its practical application is best summarized in *Beckman* (2010). In the immediate term, it is intended to provide interlocutory protection to constitutionally protected Aboriginal and treaty rights. In the intermediate term, it is intended to present incentives for the Crown and First Nations to define those rights through negotiation as opposed to costly litigation. Finally, in the long-term, it is intended to provide incentive for the reconciliation of Aboriginal interests with non-Aboriginal stakeholders. In essence, the duty to consult is viewed as one part of a broader pathway toward social and political inclusion of First Nations interests. It is not, however, by itself, intended to achieve the full reconciliation of Aboriginal economic or environmental interests that are the subject of negotiations between the Crown and First Nations.

Scope and Content of Consultation

The duty to consult arises in a wide array of contexts and circumstances. For the most part, the duty to consult applies to administrative decisions made by the Crown, including licensing and permitting, where there is potential to adversely affect the exercise of Aboriginal rights that are largely contingent on the ability to access and use lands and resources within an asserted or defined area.

To an extent, the duty is comparable to principles of procedural fairness in administrative law where a public authority makes an administrative decision that directly affects the rights, privileges or interests of an individual (Sanderson, Bergner & Jones, 2012). However, the test to determine if consultation is required is distinct. As set out in *Rio Tinto* (2010), the test involves three steps. First, the Crown must maintain knowledge, whether substantiated or constructive, of a proven or unproven Aboriginal

assertion. Second, consultation is required for 'strategic, higher-level decisions' where the Crown may allow an activity to proceed that will, in the intermediate-term, affect an Aboriginal assertion. As an example, issuing an Environmental Assessment Certificate (EAC) under the *Environmental Assessment Act* (2002) does not itself constitute an infringement on Aboriginal interests. It is the decision that permits a project proponent to undertake activities that will adversely impact Aboriginal interests. Third, and consistent with the previous notion, consultation is required where it is probable that the conduct contemplated by the Crown will adversely affect an Aboriginal assertion.

Importantly, the affected First Nation is, to a degree, responsible to demonstrate a causal relationship between the potential decision and probable impacts on that assertion (Imai & Stacey, 2013). As concluded in *Mikisew* (2005), it is the responsibility of the First Nation "to carry out their end of the consultation, to make their concerns known, to respond to government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution" (Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005). In this sense, a reciprocal relationship exists between the Crown and First Nations in discharging the duty to consult. The Crown cannot be expected to adjudicate a set of assertions with no basis for validating the strength of the claim.

It is important to note that although the duty to consult and the principle of procedural fairness are legally distinct, the practical purposes of each maintain similarity procedurally (Sanderson, Bergner & Jones, 2012). It was articulated in *Beckman* (2010), as an example, that although the "obligation of the Crown in respect of Aboriginal peoples is not one of procedural fairness arising from the common law, the flexible

procedural safeguards of administrative law are nonetheless relevant and useful in understanding what is required to adequately discharge the Crown's duty to consult" (Beckman v. Little Salmon/Carmacks First Nation, 2010).

As the duty to consult is contingent on the facts and circumstances of each case, the scope of consultation is proportional to the strength and soundness of the Aboriginal assertion (Fogarassy & Litton, 2005). The determination of scope is a two-step test (Sanderson, Bergner & Jones, 2012). First, the Crown, often in collaboration or conjunction with project proponents in the case of large-scale developments, must calculate the strength of the Aboriginal assertion based on available information. Second, the Crown must calculate the seriousness of the potentially adverse impact on an Aboriginal assertion[13].

Based on the precedents established in *Delgamuukw* (1997), the courts have been consistent in describing the required depth of consultation relative to the strength of an Aboriginal assertion. For these purposes, it is instructive to situate Aboriginal assertions along a continuum. *Gitxsan* (2002) described three levels of asserted Aboriginal rights. As ruled, "first, a *prima facie* case (that is, a reasonable possibility); second, a good *prima facie* case (that is, a reasonable probability); and third, a strong *prima facie* case (that is, a substantial probability)" (Gitxsan First Nation v. British Columbia, 2002).

In recognition of the diversity of proven and unproven claims, the Supreme Court of Canada established a consultation continuum. At one end, an Aboriginal right relates to the practices, customs and traditions integral to the culture of a particular Aboriginal group (Gogal, Riegert & Jamieson, 2006). At the opposite end, an Aboriginal title stands

[13] In the most simplistic terms, determining the scope of consultation requires the Crown to ask: What does the activity entail? Who must consult and who must be consulted? When must consultation occur? Why must consultation occur? How must consultation occur?

as an indefeasible interest in the land (Gogal, Riegert & Jamieson, 2006). At the low end of the consultation continuum, where an assertion is weak and material impact is minimal, providing notice of a pending decision to a First Nation may be procedurally sufficient to discharge the legal duty (Imai & Stacey, 2013). At the high end of the consultation continuum, where a strong assertion exists or is established, a more comprehensive process of consultation is required with the interest to substantively address the claim or concern of a First Nation (Fogarassy & Litton, 2005; Imai & Stacey, 2013). As described in *Haida* (2004), the duty to consult is greatest where "strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high" (Haida Nation v. British Columbia, 2004).

Where scope is an assessment of the seriousness and soundness of an Aboriginal assertion, the content of consultation is the substance of the process. At minimum, consultation involves the sharing of technical information about the proposed project. Where there is a strong *prima facie* case for the claim and the probability of infringement is high, the Crown must mandate a deeper level of discussion with the affected First Nation. As instructed in *Haida* (2004), the affected First Nation may be provided opportunity to "make submissions for consideration, formal participation in decision-making processes, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (Haida Nation v. British Columbia, 2004). Alternatively, where the claim is strong but the scope and significance of the impact is unclear, consultation may involve the affected First Nation conducting feasibility studies or traditional land or marine use studies to ascertain the

impact. As illustrated by Gogal, Riegert and Jamieson, involving affected First Nations in the development and decision-making of a project may also include First Nations participating in environmental and engineering studies and benefitting from project development in the form of economic and employment opportunities (2006).

In defining the process of consultation, the court has established broad procedural principles to be upheld by the Crown during the course of consultation. First, and similar to concepts of procedural fairness in administrative law, the process of consultation requires the parties to act in good faith. As was defined in *Mikisew* (2005), the consultative process must be enacted and completed with the genuine intention to substantively address the Aboriginal assertion (Fogarassy & Litton, 2005). It is, however, important to note that the responsibility to act in good faith is reciprocal. As Gogal, Riegert and Jamieson state clearly, First Nations cannot "frustrate attempts by the Crown or to consult with them by refusing to participate or by placing unreasonable conditions on government" (2006, p. 146). In fact, a refusal to participate in the consultation process may prevent a First Nation from claiming there was a lack of consultation at a later point.

The courts have also made clear that good faith consultation requires consideration of time. As an example, in *R. v. Secretary of State for Social Services* (1986), the secretary "failed to fulfill the duty to consult and stated that sufficient time must be given by the consulting party to the consulted party to enable it do that, and sufficient time must be available for such advice to be considered by the consulting party" (1986). In this context, sufficient is defined "as at least long enough to enable the relevant purpose to be fulfilled" (Gogal, Riegert & Jamieson, 2006, p. 141).

In summary of procedural principles, Isaac and Knox state that the duty to consult in its practical application must be reflective of the following:

> "(a) no unreasonable timelines be imposed, considering the relevant circumstances; (b) government positions or decisions are properly explained; (c) the aboriginal concern is genuinely considered and addressed; (d) the Crown deals with aboriginal people reasonably and takes their rights seriously; (e) there is no "sharp dealing"; and (f) *bona fide* attempts are made to accommodate the interests of aboriginal people made in the face of interference with aboriginal and treaty rights" (2004, p. 19).

Delegation of the Duty

In *Haida* (2004), the court clarified the central role project proponents maintain in the consultation process. Although the court clarified that the duty to act honourably cannot be divested by the Crown, procedural components of the duty can be delegated to a project proponent (Haida Nation v. British Columbia, 2004). In this context, the process of consultation can be practically integrated into regulatory reviews where the Crown is required to share information and enter into discussions with First Nations. To be certain, this does not mean that a project proponent owes an independent duty to consult.

The delegation of procedural components of the duty must be considered from a functional perspective. In many cases, the project proponent is well positioned to lead consultation where the discussion is focused on project scope and design. In these cases, it is assumed the project proponent has a greater depth of knowledge in design, construction and operation than that of the Crown or First Nation (Ritchie, 2013). Moreover, it is assumed that the project proponent may be in a stronger financial position

to support information sharing and complete critical steps in the permitting process where First Nations input is required.

Finally, the delegation of the duty can be considered a cornerstone of the regulatory review. In *Haida* (2004), the court clarified that the project proponent is not liable for failures of the Crown to fulfill its duty to consult. However, the prospect of a denied application, license or permit due to inadequate consultation serves as a strong incentive to provide proportionate and adequate support to the Crown in fulfilling its duties (Fogarassy & Litton, 2005). On this basis, the duty to consult is an additional cost to be absorbed by the project proponent in the regulatory review. In this new environment, the successful attainment of an environmental assessment certificate is contingent on the contributions of the project proponent to the consultation process.

The Duty to Accommodate

The duty to accommodate is the least defined component of the legal doctrine. It is a complex construct that must be understood as a complementary duty that arises from the process of consultation. From a timing perspective, discharging the duty to accommodate runs parallel to the fulfillment of the duty to consult (Fogarassy & Litton, 2005). In describing its purpose, *Haida* (2004) declared that "where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim" (Haida Nation v. British Columbia, 2004). As an example, mitigation measures designed to manage environmental degradation and maintain current levels of access to a particular resource is considered

fair accommodation of an Aboriginal assertion. Importantly, and as described in *Taku* (2004), accommodation of an Aboriginal assertion must be balanced with broader interests. The duty to consult and accommodate does not require the Crown and First Nation to agree. It mandates reasonable consideration and, where appropriate, compensation for Aboriginal interests in the context of competing societal interests.

Similar to consultation, accommodation is contingent on circumstance and may take diverse forms. Typically, the Crown fulfills its duty to accommodate by requiring amendments to the project or outlining environmental management or mitigation measures intended to protect, preserve or enhance a particular resource that relates to the ability of the affected First Nation to fully exercise its rights. Additionally, the project proponent may contribute to community-based initiatives as diverse as skills development and training, employment and entrepreneurial opportunities, social and cultural programs, and environmental management and monitoring. Increasingly, there has also been an interest for the project proponent to enter into a legal agreement with the affected First Nation that specifies economic and employment benefits as an offset to the impact of the proposed project. As these legal agreements are confidential, it is difficult to ascertain the financial compensation package. However, Impact Benefit Agreements (IBAs) in the mining and hydroelectricity sectors demonstrated that financial compensation packages provided to First Nations constituted a low percentage of the total capital costs invested in projects (Gogal, Riegert & Jamieson, 2006).

Consultation and Accommodation in Policy and Practice

As described in this chapter, the legal literature is primarily concerned with the evolution of core legal constructs relevant to the duty to consult and accommodate.

Although the legal literature provides a level of interpretation and direction for the continued evolution of core constructs, it does not evaluate the extent to which case law is interpreted, translated and represented in policies and practices of the Crown. The decisions of *Haida* (2004), *Taku* (2004) and *Mikisew* (2005) required the Crown, both federally and provincially, to revisit its policies, practices and guidelines with respect to resource development. In response to these changes, there has been an increasing academic interest in consultation from both a public policy and environmental management perspective. The remainder of this chapter will focus on the limitations of the duty to consult and accommodate as has been observed in its practical application.

First Nations Perspectives:

While it is not possible, nor desirable, to fully and accurately aggregate the preferences of individual First Nations and Tribal Councils, it is important to discuss the limitations of the duty to consult as a means to situate First Nations dissatisfaction with the process. In reviewing the decision of *Haida* (2004), it is clear that the duty to consult is intended to animate aspects of Section 35(1) and therefore must be taken as a constructive legal and political development for First Nations. However, despite these developments, there is continued dissatisfaction with the duty in its practical interpretation and application. In a report to First Nations in British Columbia, the First Nations Leadership Council (FNLC) concluded, "rather than building relationships, trust and momentum required for the transformational change that reconciliation requires, the Crown's approaches to consultation and accommodation are fuelling growing impatience, frustration and conflict" (2013, p. 7). First Nations dissatisfaction is evident when

considering the number of legal cases that have come forward related to the duty to consult. It is estimated that over 100 cases have been filed with the courts since 2004 on this matter alone (First Nations Leadership Council, 2013).

Procedural Limitations:

One of the most commonly cited procedural limitations of the duty to consult relates to the discretion of the Crown in the delegation of responsibilities to third parties. As described, it is common for the Crown to delegate procedural components of the duty to consult to project proponents in the pre-application phase of environmental assessment processes. As has been described in this chapter, delegation is a positive development to the extent that it encourages relationship building between the project proponent and communities, allows for a deeper discussion on project scope and design, and ensures First Nations interests are practically incorporated into applications. While permissible from a legal perspective, it is possible that this approach is neither meaningful, nor desirable for First Nations.

Ritchie posits three risks of delegation. First, it is common for large-scale projects to be subject to authorizations from multiple administrative decision-makers. While the Province of British Columbia and the Government of Canada have taken steps to harmonize regulatory responsibilities, it is common for the Crown to be represented by multiple entities during the course of consultation for a single project. This poses a direct challenge to the conceptualization of the Crown as an undivided entity. If the duty to consult is divided or delegated amongst multiple parties there is a risk that the government-to-government relationship embodied in the principle of reconciliation will

be diluted (Ritchie, 2013). Second, and similar to the first, "the more that consultation occurs between First Nations and non-Crown entities, the less it occurs between First Nations and the Crown" (Ritchie, 2013, p. 418). There is a risk that proponent-driven processes limits opportunities for the Crown and First Nations to discuss unresolved, rights-based issues that inevitably surface during the course of consultation. As Ritchie reflects, while the project proponent is well positioned to offer accommodations in the form of environmental management measures or employment opportunities in its capacity as a corporation, the project proponent cannot resolve rights-based issues inherent to Crown-Aboriginal relations (2013).

Third, Ritchie asserts that there is real risk that the duty to consult creates incentive for 'defensive consultation' whereby the Crown directs project proponents to fulfill consultation duties as a precautionary measure to avoid costly litigation (2013). As Ritchie asserts, "this may be a positive reaction in the sense that it may lead to a meaningfully fulfilled duty, or a negation reaction, adding to the already overwhelming referral process and burying First Nations further into an unproductive administrative process" (Ritchie, 2013, p. 419). These risks provide important points of reflection in the practical implementation of the duty to consult and will be discussed further in the conclusion of this thesis.

Capacity Constraints:

It must be stated that participation in consultation processes for large-scale projects such as a pipeline maintain considerable costs in terms of financial, technical and human capital. For many First Nations, participation in environmental assessment

processes requires the re-allocation of already limited resources (Booth & Skelton, 2011a; Booth & Skelton, 2011b). The alleviation of cost pressures associated with consultation is commonly cited as a best practice for project proponents to follow (Morellato, 2009; Meyers Norris Penny, 2009; Plate, Foy & Krehbiel, 2009). The concern for First Nations capacity to effectively engage in consultation has also been the subject of commentary by the courts. While there is no legal precedent for the provision of capacity funding to First Nations, the Ontario Superior Court of Justice commented that the "issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a level playing field" (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, 2006).

It is, however, important to note that the issue of capacity is not simply related to the availability of financial resources or the aptitude of First Nations to fully participate. In many cases, participation of First Nations is constrained by competing pressures and priorities. As the Supreme Court of British Columbia commented, "even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely fashion" (Tsilhqot'in Nation v. British Columbia, 2006). As an example, in February 2013, there were 2 liquefied natural gas projects in the initial stages of review by the Environmental Assessment Office (EAO) in British Columbia. By February 2014, there were 4 natural gas pipeline projects and 3 liquefied natural gas export facility projects under review by the EAO (Environmental Assessment Office, 2014). As demonstrated in the case studies to be discussed, First Nations have commonly cited concerns that the rigidity of timelines prescribed by the regulatory review and the

total volume of Crown referrals creates significant pressures to participate in a manner that is meaningful.

Cumulative Effects:

The final procedural limitation relates to the cumulative effect of Crown decisions on Aboriginal interests. The concept of cumulative effects can be defined in distinct, but interrelated contexts. As described in environmental management literature, cumulative environmental effects refer to the interaction and accumulation of impacts that result from human activities over a period of time and within a specific physical space (Tollefson & Wipond, 2004). The challenge, as Tollefson and Wipond articulate, is that broader ecological effects are the consequence of a multitude of minor, independent activities that, considered in isolation, can be overlooked until a time that significant or irreversible damage is caused (2004).

For many First Nations, an individual project proposal in the present cannot be divorced from the incremental impacts of past projects. While an environmental assessment may support the conclusion that present project activities will have a low impact on local environments, these additional impacts must be situated in its appropriate historical context where lands and resources in First Nation traditional territories have been repeatedly damaged, degraded and alienated since contact. First Nations have consistently communicated concern that the methodology employed by the EAO, which applies a project-by-project and permit-by-permit approach, is unable to fully account for infringements on Aboriginal interests that maintain both temporal and spatial dimensions (Booth & Skelton, 2011a; Booth & Skelton, 2011b).

In addition to concerns for cumulative environmental effects, there is increasing concern that consultation, as a legitimate process of participatory decision-making, poses a cumulative impact on Aboriginal interests. As described by Ritchie, there is a real risk that First Nations participation in consultation and accommodation constitutes consent to the continued erosion of Aboriginal interests through the gradual degradation of the land base upon which Aboriginal claims rest (2013). In accepting that the duty to consult is not a remedy for past infringements (Beckman v. Little Salmon/Carmacks First Nation, 2010) and does not constitute a requirement of consent (Haida Nation v. British Columbia, 2004), it is clear that a power imbalance exists between the Crown and First Nations in the process.

Discipline on Decision-Making:

In recognition that there are limitations to the duty, there is increasing attention to the extent to which legal liabilities, in the form of compensation or litigation, prevent the Crown from unintentionally or intentionally undervaluing Aboriginal assertions when it decides that an infringement of those assertions is defensible in the pursuit of broader economic benefits (Metcalf, 2008). As Metcalf argues, the concept of 'fiscal illusion' is relevant to a discussion of Crown-Aboriginal relations in the context of resource development. The term 'fiscal illusion' refers to circumstances where the Crown, unrestrained by the risk posed by legal or financial liabilities, will only account for economic benefits accruing to the state in transferring property rights and largely disregard the social or cultural value attached to rights that will be restricted (Metcalf, 2008). To put this in its appropriate context, it has been argued that the Crown will

continue to restrict Aboriginal rights in resource-based decisions due to a focus on economic benefits, including exports, employment and tax revenues, and a continued inability to cost and account for Aboriginal rights that often relate to non-market uses (Metcalf, 2008). For Metcalf, the propensity for these liabilities to influence Crown decision-making in a manner that more fully benefits First Nations depends on the relative political influence of First Nations, the cost-benefit calculation between market and non-market benefits of the proposed project, and the degree to which administrative decision-makers internalize the political costs posed by the liability (2008). This is an important and instructive theory for evaluating Crown decision-making that will be discussed in greater detail at the later stages of this thesis.

Conclusion

The legal literature on the subject of the duty to consult and accommodate exposes its complexity and its continued state of evolution. While the legal doctrine should not be interpreted or implemented in mere technical terms, it is instructive to summarize this section by defining what the duty is and what the duty is not. Based on the legal literature and case law, the contours of the duty to consult and accommodate is characterized by the following:

- At minimum in its application, the duty is consistent with principles of procedural fairness in administrative law whereby positions, interests and issues are afforded full and fair consideration in decision-making.
- The duty can be integrated into regulatory reviews where the process provides First Nations with notification and information in a timely manner, opportunity for direct consultation and dialogue, and opportunity for the submission of interests and issues for consideration by the decision-maker.

- It is intended as an interim measure to protect Aboriginal interests in the absence of an agreement that provides for the full and final settlement of those interests with the Crown.
- Its ultimate objective is advancing a long-term relationship based on mutual respect, recognition and reconciliation of Aboriginal interests.

Within these pronouncements, it is clear that the duty to consult and accommodate is not intended to account for or advance the following:

- The First Nation must establish a casual linkage between contemplated conduct and potentially adverse impacts or infringements on an Aboriginal interest in the present – the duty cannot address past conduct of the Crown.
- A decision to proceed with development is not contingent on the settlement of Aboriginal interests – the duty cannot be used to delay decisions of the Crown.
- The duty to accommodate does not necessarily constitute financial compensation – alteration of a proposed activity for the purposes of avoiding or mitigating potential impacts is fair accommodation.
- The duty does not constitute veto authority or a requirement to reach agreement.

While the duty to consult and accommodate maintains immense promise in terms of First Nations involvement in regulatory reviews, it is important to define its limitations and acknowledge that it is site-specific and highly contextual. It is on this basis that the process and outcomes of consultation presented in the case studies will be evaluated.

Chapter 3 – Theoretical Framework and Strategy of Inquiry

Introduction

This thesis is principally concerned with the ways in which institutional arrangements in the form of legislation, regulations, policies and standard operating procedures structure interactions between the Crown and First Nations in regulatory reviews associated with major resource projects. This thesis is predicated on an assumption that the current institutional framework that facilitates interactions between the Crown and First Nations, while reflective of core legal constructs prescribed by case law, imposes limits on the reconciliation of Aboriginal interests.

This chapter presents the Institutional Analysis and Development (IAD) framework as a strategy for inquiry. Using the IAD framework, I construct a conceptual map of interrelated rules that constrain the scope, content and outcomes of consultation and accommodation in the context of environmental assessment processes.

Institutions in Political Theory

Prior to discussing institutionalism as it pertains to the institutional analysis presented in this thesis, it is important to consider a set of characteristics common to institutionalism as a political theory. First, and as described by Peters, an institution is understood as a set of formal or informal structures that involve patterned and predictable interactions amongst individual actors (2012). Second, it is understood that institutions constrain or influence the behaviour of individual actors (Peters 2012). For the purposes of this thesis, institutions are defined broadly as a set of enduring and semi-autonomous structures, rules and standard operating procedures that define appropriate actions to be

taken by individual actors in specific situations and constrain, enable and empower actions of individual actors (March and Olsen, 2006). Further to this, institutions define entitlements and duties, which instills order in social interactions, applies limits on what constitutes appropriate actions, and restricts the possibility of pure pursuits based on individual interests (Weber, 1977; March and Olsen, 2006).

The study of institutions, or institutionalism, is a set of common conceptual foundations with respect to the definition and importance of institutions in advancing understandings of political phenomenon. Within new institutionalism, there are three distinct analytical approaches: sociological institutionalism, historical institutionalism, and rational choice institutionalism. While these analytical approaches maintain common precepts, each provides a distinct perspective on the processes by which institutions emerge, endure and evolve and the relationship between institutions and individual actors.

It is also instructive to make clear the distinction between old institutionalism and new institutionalism. While new institutionalism cannot be characterized as a unified political theory (Hall and Taylor, 1996), it is, as described by March and Olsen, the blending of non-institutional theories and the theoretical tenets of old institutionalism (1984). Prior to the proliferation of behavioural and rational choice approaches in the mid-twentieth century, institutional analysis maintained popular appeal with its focus on formal state structures and its strong comparative, contextual and normative components implied by its analytical approach (Peters, 2012). In this context, political theory posited institutions to be capable of "determining, ordering or modifying individual motives" (March and Olsen, 1984, p. 735). Further, due to its normative and comparative

dimensions, old institutionalism was primarily concerned with the configuration of institutions relative to the pursuit of optimum functions or outputs based on ideals of western democracy.

By the nineteen-fifties, the increasing complexity of social structures and positivist pursuits within social science resulted in a shift from the study of institutions at a macro-level toward methodological individualism. In summary of this shift, March and Olsen state that political theory began "to portray politics as a reflection of society, political phenomena as the aggregate consequences of individual behaviour, action as the results of choices based on calculated self-interest, history as efficient in reaching unique and appropriate outcomes, and decision-making and allocation of resources as the central *foci* of political life" (1984, p. 734). In this manner, politics was characterized as contextual, reductionist, utilitarian, functionalist and instrumentalist (March and Olsen, 1984).

In *The New Institutionalism: Organizational Factors in Political Life*, March and Olsen 'bring institutions back in' by proposing an interdependence between the actions of individual actors and semi-autonomous political structures (1984). In considering the causal position of political institutions, March and Olsen assert that institutions such as legislators, law courts or public agencies must be understood as "arenas for contending social forces" and "collections of standard operating procedures and structures that define and defend interests" (1984, p. 738). In this context, institutions can be characterized as a collection of values capable of influencing or constraining individual actions, not simply a benign force reflective of a particular social, cultural or political context. The study of institutions is therefore concerned with the ways in which potential interests and

preferences of actors may be influenced, limited or privileged by particular institutional arrangements.

New Institutionalism

The first of the three analytical approaches associated with new institutionalism is sociological institutionalism. Similar to organization theory, it is primarily concerned with the ways in which institutions display and diffuse symbols and meaning (Immergut, 1998). In this way, sociological institutionalism defines institutions not simply as rules, procedures and norms, but as "symbol systems, cognitive scripts, and moral templates that provides the frames of meaning guiding human actions" (Hall and Taylor, 1996, p. 947). Consistent with this definition, culture itself is understood as an institution (Zucker, 1991). Based on this understanding, the relationship between institutions and individual action is described as a process of socialization whereby institutions provide the "cognitive scripts, categories and models that are indispensible to action" (Hall and Taylor, 1996, p. 948). In this context, the actions of individuals are shaped by social convention where the social or cultural appropriateness of an action serves to reaffirm its validity.

The second, historical institutionalism, defines institutions as the "formal and informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy" (Hall and Taylor, 1996, p. 938). As an analytical approach, it is primarily interested in the construction, endurance and evolution of institutions (Sanders, 2006). As positioned by Sanders, historical institutionalism is based on "dense empirical description and inductive reasoning" (2006, p. 43) and dedicates its attention to the "long-term viability of institutions and its broad

consequences" (2006, p. 43). At its core, historical institutionalism describes institutions as contextually contingent, path dependent, and punctuated by significant structural shifts attributable to exogenous shocks (Hall and Taylor, 1996; Immergut, 1998). In contrast to rational choice institutionalism, historical institutionalism explores the ways preferences emerge and evolve over time based on historical precedents and ideas, interests and positions endogenous to an institution (Sanders, 2006).

The third, rational choice institutionalism is the "analysis of choices made by rational actors under conditions of interdependence" (Immergut, 1998, p. 12). At its core, this analytical approach is based on a set of micro-level assumptions about individual intentionality and motivation. Fundamentally, rational choice institutionalism assumes that an individual acts in a self-interested and instrumental manner by carefully calculating choices in the pursuit and potential attainment of pre-determined preferences or interests (Hall and Taylor, 1996). Based on this understanding, rational choice institutionalism sees politics as a collective action dilemma where actors with disparate preferences choose a course of action that is sub-optimal in satisfying multiple preferences due to the absence of institutional arrangements that facilitate strategic cooperation (Hall and Taylor, 1996). From the perspective of rational choice institutionalism, institutions serve to structure interactions in a way that reduces costs associated with transaction, production and influence (Hall and Taylor, 1996). Further, it is understood that the persistence of institutions is the result of its functions and benefits. Its design is both purposeful and intentional.

The methodological limitations of rational choice institutionalism must be acknowledged. First, it is understood that analysis at a micro-level may not fully account

for the cultural and social dimensions of strategic calculation. Second, the ability to reveal the real preferences of individual actors prior to an action are, in many instances, not possible. Finally, the assertion that individual actors design institutions in a way that enables the attainment of specific interests is predicated on assumptions of computational capabilities and strategic calculus at an individual level. In consideration of these limitations, there has been increasing interest in theoretical frameworks that adjust micro-level assumptions without deemphasizing the agency of individual actors in the determination of outcomes. Importantly, and in the context of this thesis, the use of rational choice institutionalism provides a stronger theory when describing the linkage between institutional design and patterns of interaction amongst individual actors. Fundamentally, it maintains utility in its descriptive capacity to demonstrate individual calculations of costs and benefits in the context of structured and repetitive interactions.

Institutional Analysis and Development Framework

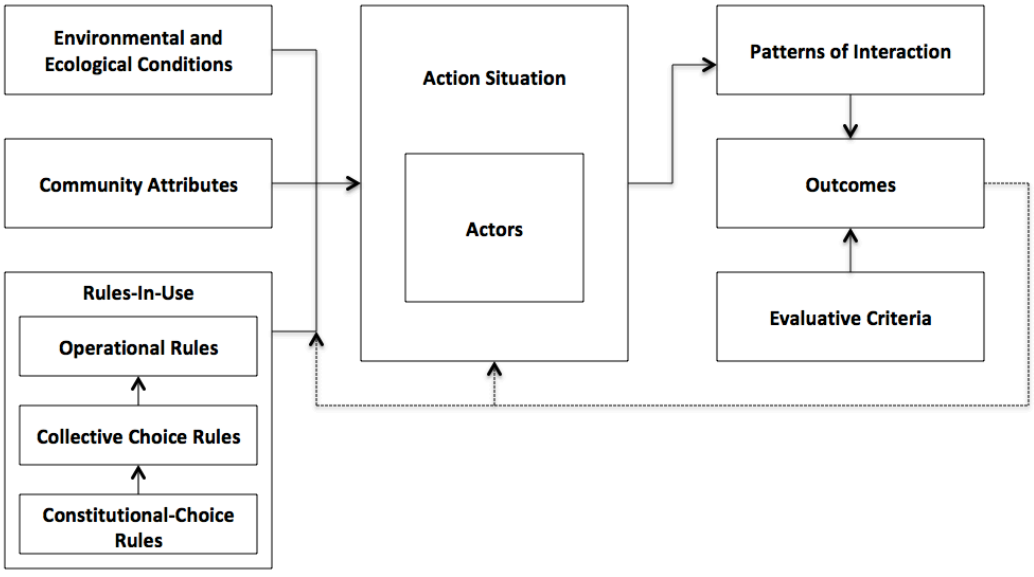
Background:

The Institutional Analysis and Development (IAD) framework is rooted in rational choice institutionalism. The IAD framework, created by Elinor and Vincent Ostrom, originated in academic literature associated with collective action dilemmas, particularly problems associated with the misappropriation or misallocation of resources in environmental management regimes. While the form of the IAD framework has evolved over time as per the work of Kiser and Ostrom (1982), Ostrom (1986, 1989, 1990, 1998, 2005, 2007b, 2010) and McGinnis (2000), the IAD framework has been principally applied to the study of institutional arrangements that accommodate enduring

common pool resource management regimes with respect to fisheries, forestry, and water resources (Ostrom 1990; 2001; 2009).

In describing the IAD framework, Ostrom defines and differentiates between multiple levels of analysis[14]. As a framework, the IAD framework constitutes institutional analysis at the greatest degree of generality. It is principally used to identify institutional variables and provides a common language in the comparison of theories (Ostrom, 2007). As depicted in *Figure 1*, it is a "multi-tier conceptual map" (Ostrom 2011, p. 8) and is therefore non-prescriptive and non-normative (Blomquist & deLeon 2011). It is used to simplify complex social and political situations and assists to coordinate "diagnostic, analytical and prescriptive capabilities" (Ostrom, 2007, p. 26). As Koontz describes, it provides a framework to deconstruct social situations by accounting for institutional rules that construct incentives and constraints for certain actions (Koontz 2003).

Figure 1. Institutional Analysis and Development (IAD) Framework.



[14] A framework identifies the key variables to be included in the analysis as a means to organize "diagnostic and prescriptive inquiry" (Ostrom, 2007, p. 25). In contrast, theories, many of which can be compatible with a single framework, allow the research to make assumptions about the phenomenon, its processes and probable outcomes (Ostrom, 2007; Ostrom 2011). At a greater degree of specificity, models allow the research to make precise assumptions about a limited set of variables (Ostrom, 2007; Ostrom 2011).

The Action Situation:

As depicted in *Figure 1*, the unit of analysis in the IAD framework is the action situation. It is the social space where, as described by McGinnis, "individuals observe information, select actions, engage in patterns of interaction, and realize outcomes from their interaction" (2011, p, 173). As the dependent variable, it enables the researcher to identify regularities in interaction amongst multiple actors and evaluate the result[15].

For the purposes of this thesis, the action situation is the direct or indirect interactions between the Crown and First Nations during the pre-application and application phases of environmental assessment processes mandated by the *Environmental Assessment Act* (2002). In the case studies presented, the action situation is composed of three distinct decision points. The first decision relates to determinations made by the Crown of the scope and content of consultation required with First Nations relative to the *prima facie* strength of Aboriginal claims in the proposed project area. The second decision relates to the selection of strategies and actions used by the Crown in discharging its legal liabilities, including the decision to delegate consultation duties to the project proponent in accordance with Section 11 of the *Environmental Assessment Act* (2002). The third decision relates to the final decision of the Ministers responsible in the issuance of an Environmental Assessment Certificate (EAC) to the project proponent pursuant to Section 17 of the *Environmental Assessment Act* (2002), which includes legal conditions of license intended to address stakeholder interests.

[15] As described by Ostrom, a common set of variables used to describe the structure of an action situation includes the set of actors, the specific positions to be filled by participants, the set of allowable actions and the linkage to outcomes, the potential outcomes that are linked to individual sequences of actions, the level of control each participant has over choice, the information available to participants about the structure of the action situation, and the costs and benefits – which serve as incentives and deterrents – assigned to actions and outcomes (2007; 2011).

The Actors:

The actor in an action situation refers to a single individual or a group of individuals representing the interests of a firm[16]. The term 'action' refers to a set of observable behaviours "to which the acting individual attaches a subjective and instrumental meaning" (Ostrom, 2007).

As the IAD framework is rooted in rational choice institutionalism, actors assume certain characteristics in an action situation. First, as a means to overcome methodological limitations, the IAD framework employs the concept of bounded rationality. The concept of bounded rationality applies limits to cognitive and computational capabilities, denies the availability of complete information and perfectly ordered preferences, and allows for interpretation, innovation and creativity at an individual level in circumstances of complexity and uncertainty (Dequech, 2001; Shepsle, 2006). Second, the IAD framework posits that rationality, defined in its simplest form as a process of balancing costs and benefits, is cognitively constrained by risk aversion (Shepsle, 2006).

These assumptions alleviate the methodological challenges associated with rationalism and allow for the incorporation of alternative assumptions when interpreting actions at an individual level. For instance, one of the innovations introduced by the IAD framework is the idea of adaptive learning. This concept concedes that actors make mistakes and, where appropriate or able, actors will adapt to changing circumstances (Ostrom, 2007; McGinnis, 2011). In summary, the IAD framework assumes that an actor

[16] As Ostrom describes, "an actor within an action situation includes assumptions about four clusters of variables: the resources that an actor brings to a situation, the valuation actors assign to states of the world and to actions, the way actors acquire, process, retain and use knowledge contingencies and information, and the processes actors use for selection of particular course of action" (2011, p. 11).

in an action situation evaluates contextual factors, produces outputs, evaluates outputs and generates information for adaptive learning, which in turn affects contextual factors (McGinnis, 2011).

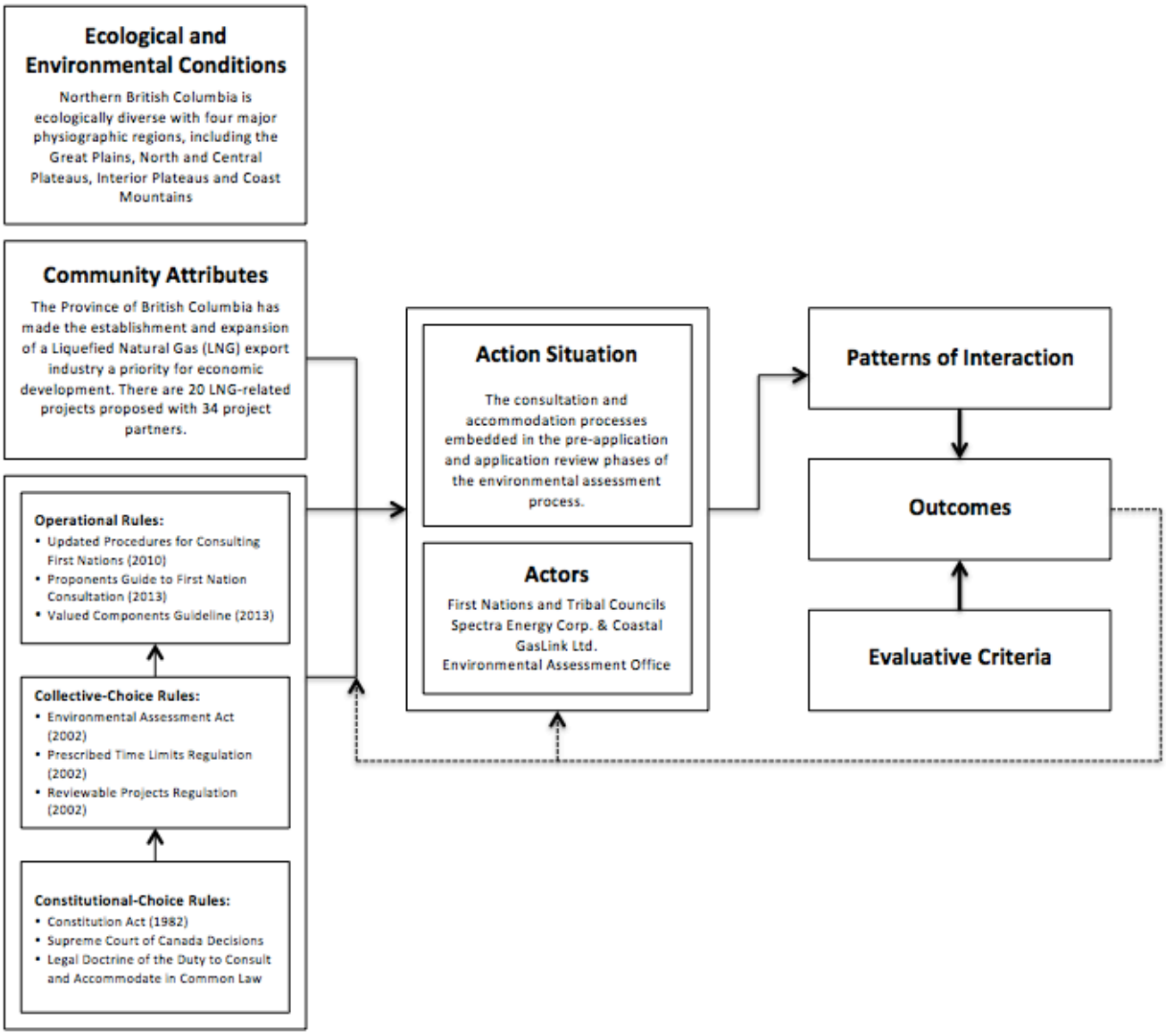
For the purpose of this thesis, actors are not identified on an individual basis, but rather as representatives of firms, which includes First Nations and Tribal Councils with asserted traditional territories located at least 2 kilometers from the conceptual corridor of the pipeline project, Coastal GasLink Pipeline Ltd. (Coastal GasLink Pipeline Project) and Spectra Energy Corp. (Westcoast Connector Gas Transmission Pipeline Project), and the British Columbia Environmental Assessment Office (EAO).

Institutional Variables:

As depicted in *Figure 1*, the IAD framework identifies three categories of institutional variables that may influence patterns of interaction within the action situation. If the action situation is the dependent variable, the independent variables are the attributes or preferences of actors within the action situation, the environmental or ecological conditions in which the action situation is embedded, and the rules used by actors within the action situation.

For the purposes of this thesis, it is posited that there are two primary institutional variables that influence the action situation. The first is the network of rules interpreted and implemented by administrative decision-makers employed by the EAO. The second is the economic and political environment, or preferences of actors within the action situation, that influence the strategies or actions taken by actors.

Figure 2. Application of the Institutional Analysis and Development Framework.



The first category relates to the explicit and implicit assumptions about the rules used to order relationships amongst individual actors (Imperial, 1999). In the context of the IAD framework, rules can be broadly defined as shared understandings of informal or formal prescriptions that prompt, prohibit or permit actions and the authorized penalties associated with malfeasance (Crawford & Ostrom, 1995; Ostrom, 2007). As social

constructions, rules are susceptible to problems of misunderstanding and lack of clarity (Ostrom 1997, 1999 & 2007). The IAD framework therefore directs the attention of the researcher to the rules-in-use rather than the rules-on-paper.

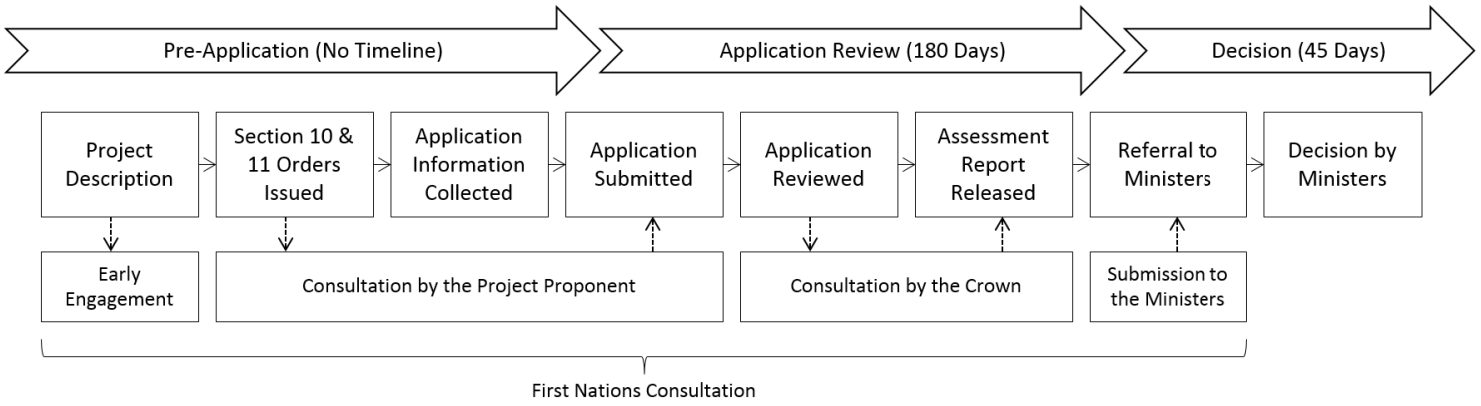
To reveal the rules-in-use, the IAD framework sets out three levels of interrelated rules. The first level, constitutional-choice rules, refers to the process by which collective choice rules are defined and changed (McGinnis, 2011). In the context of consultation, the emergence of legal doctrine of the duty to consult in common law is the significant result of rights-based litigation that advanced liberal interpretations of Section 35(1) of the *Constitution Act, 1982*. As is defined in common law, the Crown, as may be represented by the EAO, is required to consult and, where appropriate, accommodate First Nations when it contemplates conduct that may adversely impact Aboriginal interests. In addition, and as upheld in the decision of *Friends of the Oldman River Society v. Canada* (Minister of Transport), legislative power in regard to the environment with the division of powers in Sections 91 and 92 of the *Constitution Act, 1867* is shared between the federal and provincial governments (1992). As a result, the Province of British Columbia is accountable and responsible for creating legislation for the purposes of environmental assessments in relation to provincial statutes and permits.

The second level, collective-choice rules, defines the rules to be used in reconfiguring operational rules. This level involves policymaking, management and the adjudication of administrative decisions (Imperial, 1999). In cases of major projects, the *Environmental Assessment Act* (2002)[17] is the principal legal framework for conducting environmental assessment processes and discharging the legal duty to consult. From an

[17] The implementation of the Environmental Assessment Act (2002) is supported by 6 regulations, including the *Reviewable Projects Regulation, Prescribed Time Limits Regulation, Public Consultation Policy Regulation, Concurrent Approval Regulation, Environmental Assessment Fee Regulation, and Transition Regulation*.

applied perspective, environmental assessments and regulatory reviews are fundamentally functions of data collection used to inform decisions at later stages of the project development process (Lambrecht, 2013). On this basis, consultation with First Nations, while not defined as a requirement in the *Environmental Assessment Act* (2002), is practically integrated into the process.

Figure 3. Phases of the Environmental Assessment Process in British Columbia.



The *Environmental Assessment Act* (2002) also describes roles and responsibilities. It makes clear that the Ministers responsible fulfill decision-making functions of the Crown by requiring a review of proposed projects and issuing an Environmental Assessment Certificate (EAC) to project proponents. In support of this decision-making function, the *Environmental Assessment Act* (2002) mandates the Environmental Assessment Office (EAO) to conduct environmental assessments and make recommendations to the Ministers responsible on the results of those assessments. In relation to the duty to consult, the EAO maintains the discretion to determine the scope, procedures and methods of an environmental assessment, which may include the delegation of procedural components of consultation. The EAO does not, however,

maintain the authority to negotiate accommodation agreements with affected First Nations.

The final level, operational rules, refers to the day-to-day implementation of practical decisions by individuals mandated to take those actions (McGinnis, 2011). At this level, pursuant to the roles and responsibilities defined by the *Environmental Assessment Act* (2002), administrative decision-makers employed by the EAO maintain significant discretion in defining the scope, content and objectives of consultation. It is important to note that although the duty to consult has been defined as a matter of common law, there is no formal recognition of the duty to consult in legislation or regulation. In discharging its duties, those employed by the EAO refer to three policies: *Updated Procedures for Meeting Legal Obligations When Consulting*, *Accommodation Guidance* and *Preliminary Assessment*[18]. As Imperial posits, these operational rules dictate the types of information actors can exchange or withhold and what rewards or penalties may be applied to particular actions (1999). In the case of consultation, provincial policies provide guidance to administrative decision-makers in managing legal liabilities by translating complex and evolving legal constructs into a set of strategies and allowable actions.

Economic and Political Environment:

As discussed, it is important to acknowledge that actors operate within particular economic and political environments that present incentives for strategic action or serve to reinforce particular preferences. The environmental assessment processes for the

[18] The documents titled *Accommodation Guidance* and *Preliminary Assessment* are subject to cabinet confidence and are not publicly accessible documents.

Coastal GasLink Pipeline Project and Westcoast Connector Gas Transmission Pipeline Project must be situated in an appropriate economic and political context.

In the past decade, there has been increasing interest and investment in the development of unconventional natural gas reserves in North America. For Canada, demand for energy products in emerging market economies in the Asia-Pacific Region coupled with technological advancements in the form of horizontal drilling and hydraulic fracturing have made the recovery of unconventional natural gas commercially viable (Chong & Simikian, 2014). With 8 percent of the estimated total of technically recoverable natural gas globally, Canada is the third largest producer of natural gas products (KPMG, 2011). However, with United States natural gas imports projected to decline from 13 percent in 2008 to 1 percent in 2035 due to rapid increases in the development of domestic reserves of natural gas, Canada is now participating in an increasingly competitive space (KMPG, 2011). As Canada exports an estimated 50 percent of the natural gas it produces to the United States (KPMG, 2011), there has been an increasing interest in market diversification. To support this strategic pivot, energy producers must make significant investments in processing facilities that convert natural gas into liquefied natural gas that can be transported to emerging markets, including those in Japan, China and South Korea.

In 2012, British Columbia accounted for approximately 25 percent of total natural gas production in Canada (Chong & Simikian, 2014). In addition to conventional production capacity, the Montney Formation covering northeastern British Columbia and northwestern Alberta maintains one of the largest marketable unconventional gas reserves in the world (National Energy Board, 2013). Confronted by the reality of declining

demand in traditional markets, the ability to expand extraction requires significant investments in infrastructure for the transportation and exportation of the product. In 2012, the Province of British Columbia published its *Natural Gas Strategy*, which established government-wide targets and initiatives to support the expansion of extraction, transportation and exportation activities related to natural gas.

It is important to note that establishing an export industry for natural gas in Canada is contingent on stable prices and strong demand from the Asia-Pacific Region. It has been noted that market factors such as slower economic growth in Asia, lower prices due to increasing competition with renewable energy products, and increasing competition amongst exporters has created uncertainty in medium-term forecasts (International Energy Agency, 2015). While the establishment of an export industry continues to maintain prominence as a policy position, market factors and forecasts may create constraints on project proponents, ultimately affecting the actual number of projects that reach construction and production phases.

As demonstrated by its *Natural Gas Strategy*, the Province of British Columbia has made the establishment of an export industry for liquefied natural gas a key driver in its economic development agenda. As it relates to the operations of the EAO, the provincial Cabinet set a target of 100 percent compliance with the prescribed timelines for reviewing applications as per the *Prescribed Time Limits Regulation* for the 2014-2015 Fiscal Year (Province of British Columbia, 2014). The use of annual service plans to set performance benchmarks are one of the ways in which political positions are translated into operational priorities. While the EAO is mandated to operate as an independent agency, it is not insulated from predominant political pressures. It is

therefore posited that the strategic actions selected by administrative decision-makers employed by the EAO in the context of consultation and accommodation is constrained by the overarching preferences of political actors.

Chapter 4 – Coastal GasLink Pipeline Project

Introduction

This case study is intended to be a descriptive overview of the scope, content and overall process of consultation conducted and directed by the BC Environmental Assessment Office (EAO) in the issuance of an Environmental Assessment Certificate (EAC) to Coastal GasLink Pipeline Ltd. As per the Institutional Analysis and Development (IAD) framework, the action situation in this case is defined as the social space where the project proponent and representatives of the EAO consult First Nations in the pre-application and application review phases of the assessment process mandated by the *Environmental Assessment Act* (2002).

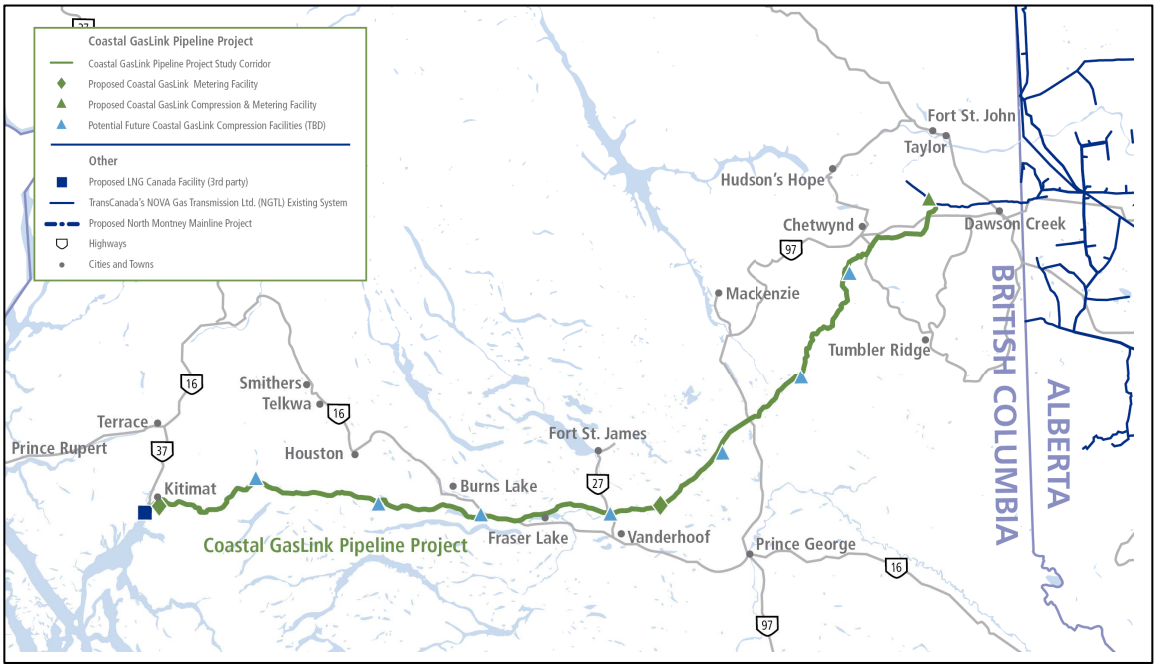
This case study is intended to describe the main mechanisms for, and depth of, consultation with First Nations potentially affected by project activities. In the conclusion of this case study, the action situation will be interpreted from two points of interest. First, I will consider the scope and content of consultation to assess its consistency and compatibility with the procedural and relational principles defined by constitutional-choice rules in the form of case law. Second, I will evaluate the extent to which the operational rules, or the rules-in-use, act as an incentive for the Crown to fully internalize the cost of Aboriginal interests in rendering its decision.

Proposed Coastal GasLink Pipeline Project

In October 2012, Coastal GasLink Pipeline Ltd. (‘Coastal GasLink’), a subsidiary of TransCanada Pipeline Ltd. (‘TransCanada’), released a preliminary project description

of the Coastal GasLink Pipeline Project. As depicted in Figure 4, this project description proposed the construction and operation of a natural gas pipeline from the community of Groundbirch in northeastern British Columbia to a proposed liquefied natural gas terminal facility near the municipality of Kitimat located on the north coast of British Columbia. In addition to the construction of the 650-kilometer long pipeline, it proposed the construction and operation of metering facilities, compressor stations, and hydrocarbon dew point control facilities. It also proposed the construction and decommissioning of temporary infrastructure required during the course of pipeline construction, including access roads, stockpile sites, contractor yards and construction camps. The total construction cost is estimated at $4 billion with a three-year construction plan (Coastal GasLink, 2012). The construction of the pipeline is a significant project in terms of its value, its direct and indirect economic benefit to communities along the pipeline corridor, and its contribution to the establishment of an export industry for natural gas in British Columbia.

Figure 4. Coastal GasLink Pipeline Project – Overview Map.



Estimated Impact of the Proposed Project

Based on the conceptual corridor in the project description, the pipeline would be approximately 650 kilometers in length, maintain a right-of-way[19] measuring 32 to 45 meters, cross approximately 900 watercourses in four major drainage basins, impact the proven and unproven traditional territories of 31 First Nations, cross several archaeological significant sites with signs of occupation over 12,000 years, and operate in close proximity to 70 Indian Reserves (Coastal GasLink, 2012).

In the project description, Coastal GasLink positioned the project as a key enabler to broader interests related to employment, regional economic growth, and establishing an export industry for liquefied natural gas. Based on economic modeling completed by Coastal GasLink, the project, with total construction costs expected to exceed $4 billion, is expected to result in an estimated equivalent of 37,201 person-years of employment[20], $1.4 billion in labour income in British Columbia, $0.5 billion in federal tax revenues, $0.2 billion in provincial tax revenues and $625 million in municipal revenues over the life of the proposed project (Coastal GasLink, 2012). While economic and employment modeling has been characterized as overly optimistic and inaccurate in certain cases[21], the inclusion of economic indicators is an important part of the application process where the Ministers responsible are required to adjudicate local environmental effects and broader economic interests.

[19] A pipeline right-of-way is a strip of land that is cleared and maintained along the pipeline corridor.
[20] A per person-year of employment is the equivalent of one full time employment (FTE) position for one calendar year (Grant Thornton, 2013).
[21] The Canadian Centre for Policy Alternatives argues that studies commissioned by government and project proponents tend to replicate common methodological challenges with input-output modeling and therefore include assumptions that reflect misleading economic and employment projections (2015).

Pre-Application Phase

In December 2012, the Environmental Assessment Office (EAO) determined that the project as proposed was reviewable under the *Reviewable Projects Regulation*. As a result, the EAO issued an Order regarding the proposed project under Section 10(1)(c) of the *Environmental Assessment Act* (2002). The Order stipulated that the project proponent must attain an Environmental Assessment Certificate (EAC) from the Province of British Columbia prior to proceeding with the permitting and construction phases of the project. For further instruction, and as required under regulations, the EAO issued an Order under Section 11 of the *Environmental Assessment Act* (2002) in March 2013, which outlined the scope, methods and procedures to be followed in fulfilling the assessment.

As described in the Order issued under Section 11, the assessment was to account for potential adverse environmental, economic, social, heritage and health effects, including consideration of cumulative effects. In addition to defining information and application requirements, the Order also defined the parameters of Aboriginal consultation. This section of the Order was important for three reasons. First, it required that affected First Nations be invited and included in multi-stakeholder working groups. Second, it identified the project assessment lead[22] as the person responsible for coordinating First Nations participation in consultation, which may include inviting affected First Nations to comment on draft Application Information Requirements and the list of Valued Components or, as may be requested, to meet directly with an affected

[22] According to the *Environmental Assessment Office User Guide* (2009), the project lead is the Project Assessment Director or Project Assessment Manager. As per Section 4 of the *Environmental Assessment Act* (2002), the Executive Director of the Environmental Assessment Office may delegate duties in accordance with written authority of the Office.

First Nation to discuss its Aboriginal interests in relation to the project. Third, in coordinating consultation, the project assessment lead was to assess the adequacy of the project proponent's response to Aboriginal concerns and review comments submitted by affected First Nations in referring the application for decision by the Ministers responsible.

It is important to note that the Order issued under Section 11 allowed for the federal Minister of the Environment to approve a request for substituting assessment processes required under the *Canadian Environmental Assessment Act, 2012* with provincially mandated environmental assessment processes. In December 2012, with the submission of the project description, the Canadian Environmental Assessment Agency (CEAA) commenced an environmental assessment for the project based on potentially adverse environmental effects and federal permissions that may be required pursuant to the *Fisheries Act*, *Species at Risk Act*, *Migratory Birds Convention Act* and *Navigable Waters Protection Act*. However, with the *Regulations Amending the Regulations Designating Physical Activities* under the *Canadian Environmental Assessment Act, 2012* in effect, the CEAA announced that the pipeline project was no longer a 'designated project' and immediately terminated the environment assessment process. While the Order states clearly that the project proponent must account for federal regulations as described above, this decision significantly reduced the role of the federal government. In effect, the federal Minister of the Environment divested decision-making authority in the application process and degraded the federal role to a function of monitoring and compliance in respect of specific federal statutes.

Assessing the Strength of Aboriginal Assertions:

With the issuance of the Order under Section 11 on March 8, 2013, the British Columbia Environmental Assessment Office (EAO) delegated procedural components of the consultation process to Coastal GasLink. This represents the first decision point in the consultation process. In assessing the strength of Aboriginal assertions along the conceptual corridor, the EAO determined that there were two categories of First Nations to be consulted. Consistent with the consultation continuum defined in *Haida* (2004), Schedule B of the Order listed 18 First Nations whose asserted traditional territories and treaty areas would be affected by a portion of the project. In accordance with the Order, First Nations identified in Schedule B were owed a more comprehensive consultation process whereby claims or concerns could be substantively addressed. In addition, Schedule C of the Order identified First Nations and Tribal Councils whose Aboriginal interests would be minimally impacted and were only owed notification.

Although an assessment of the strength of the *prima facie* claim for each First Nation is beyond the scope of this section, it is assumed that the categorization of Aboriginal interests in this way was appropriate with three exceptions. On February 21, 2014, the EAO issued a Section 13 Order that added Blueberry River First Nations and Doig River First Nation to Schedule B and added Gitga'at First Nation to Schedule C. These should not be seen as a failure on the part of the EAO to appropriately assess an Aboriginal assertion. The process of determining the strength of an Aboriginal assertion can be complicated due to unresolved territory disputes and an absence of information related to the assertion. It is, however, important to note that these decisions do pose legal

and procedural risks to the project. In certain cases, perceptions of exclusion or minimization of an Aboriginal assertion is not only damaging in terms of the relationship between the parties involved, it also poses risks that the depth of consultation was not commensurate with the strength of the *prima facie* claim.

Apart from defining the broad parameters of consultation, the Order clearly defined the procedural dimensions of consultation to be conducted with First Nations. The Order required that the project proponent develop an Aboriginal Consultation Plan within 60 days of the Order and prepare three reports on Aboriginal consultation at different stages in the consultation process. The Aboriginal Consultation Reports needed to include a summary of consultative activities, identify potential adverse impacts relative to Aboriginal interests, and describe how identified impacts would be avoided, mitigated, addressed or accommodated. Although the project assessment lead maintained responsibility for the overall process and its outcomes, decisions about the scope and content of consultation become the responsibility of the project proponent. In this context, the role of the project assessment lead, and by extension the Crown, shifts to a function of facilitation and evaluation whereby the EAO reviews progress in the consultation process and assesses the adequacy of mitigation measures proposed.

Early Engagement:

Prior to initiating the application process with the submission of the project description to the EAO in October 2012, Coastal GasLink undertook early engagement with First Nations potentially affected by the proposed project. In June 2012, prior to publicly announcing the project, Coastal GasLink notified First Nations located along the

conceptual corridor. As summarized in the Aboriginal Consultation Plan, early engagement maintained two principal purposes. First, the consultation team met with First Nations to discuss community capacity to determine if the First Nation had sufficient time and technical and financial resources to participate fully in the consultation process. As part of these discussions, and as reported by Coastal GasLink, a key point of discussion was the possibility of the proponent contributing capacity funding to First Nations to alleviate cost pressures associated with participation in the process (Coastal GasLink, 2013b). Second, discussions between Coastal GasLink and First Nations focused on the potential for local economic and employment opportunities. As reported by Coastal GasLink, an important part of this discussion was not only confirming interest in those opportunities, but also assessing the capacity of the First Nation to take advantage of those opportunities (Coastal GasLink, 2013b).

Importantly, early engagement undertaken by Coastal GasLink maintained modest objectives. It focused on relationship building, information sharing, building common understanding of consultation preferences and potential protocols, and initiating discussions on capacity funding and community readiness (Coastal GasLink, 2013a). It is important to note that early engagement of First Nations is an industry best practice, not a regulatory requirement. There are two important parts to this. As described in a best practice report related to First Nations participation in environmental assessments, "the earlier a First Nation can be engaged in an environmental assessment for a project, the more likely it is that First Nation issues can be adequately addressed in the assessment, and less likely it is that these issues will become contentious in latter stages of the assessment" (Plate & Foy, 2009, p. 25). Further, the interest on the part of the proponent

to build a good relationship with affected First Nations cannot be devalued. The best practice report states, "a proponent should meaningfully involve First Nations in these early planning and pre-development phases, and should be prepared to make commitments to meaningfully involve them in development, operations, and closure activities if the proposed project receives an environmental assessment certificate" (Plate & Foy, 2009, p. 22).

Scope and Content of Consultation

Proponent-Led Consultation:

In fulfillment of its obligations under the Order, Coastal GasLink submitted its first Aboriginal Consultation Report to the EAO on May 3, 2013. As this only reported on consultation activities up to April 5, 2013, it was primarily a summary of meetings with First Nations during the initial consultation period. With the two categories of consultation clearly defined, the first report demonstrated the depth of consultation planned. The points below present a summary of relevant consultation activities undertaken with affected First Nations listed under Schedule B of the Order:

- A proposed project fact sheet, maps and slides presentations were provided to First Nations during in-person meetings. A full project description was provided electronically to First Nations.
- First Nations were provided access to a Geographic Information System map.
- A field program information package outlining environmental and engineering field activities, including schedules and methodologies, was sent to First Nations electronically with an invitation for participation.
- 14 of the 17 First Nations identified under Schedule B of the Order received initial capacity funding, which was intended to address the concerns

communicated by First Nations about competing demands for time and resources as a result of multiple major projects under review in traditional territories.

- 16 of the 17 First Nations identified under Schedule B of the Order indicated an interest to participate in conducting a Traditional Land Use (TLU) study.

It is important to note that the report itself does not indicate whether First Nations are more or less supportive of the project as consultation progresses. Fundamentally, the report is a tool used to record, report and clarify the issues and interests of First Nations as communicated during the course of consultation. As a result of its early engagement, Coastal GasLink was able to identify a set of common concerns, which included issues related to environmental monitoring and management, adverse effects to fish, fish habitat and wildlife, capacity constraints to participate fully in consultation due to multiple projects under review in traditional territories, protection of Traditional Ecological Knowledge (TEK), and degradation of Treaty Land Entitlement (TLE) areas claimed by First Nations (Coastal GasLink, 2013b).

By April 2014, it is clear that Coastal GasLink maintained its level of consultation with affected First Nations. As described in the second Aboriginal Consultation Report submitted to the EAO in April 2014, Coastal GasLink continued its practice of information sharing with affected First Nations. The points below provide a summary of consultation activities undertaken by Coastal GasLink between April 2013 and March 2014:

- A draft project footprint map was shared with affected First Nations to support project agreement negotiations.
- The draft Application Information Requirements (AIR), which identifies the issues to be addressed in the assessment and the information that must be included in the application, was shared with First Nations for comment.

- 15 of 17 First Nations identified under Schedule B of the Order and 5 of the 12 First Nations identified under Schedule C of the Order received initial capacity funding. In addition, 13 of the 17 First Nations identified under Schedule B of the Order and three of the 12 First Nations identified under Schedule C of the Order received further capacity funding, which was intended to alleviate cost pressures associated with First Nations contributions to the regulatory review, including the identification of potential impacts on Aboriginal interests.
- 18 Traditional Land Use (TLU) studies were in progress with two First Nations in the negotiation phase to complete a TLU. Coastal GasLink stated that the information collected as part of the TLU studies informed its assessment of the potential for the proposed project to directly or indirectly impact current use of Crown land and environmental management and mitigation measures to limit these impacts.
- 16 First Nations participated in the collection of socio-economic baseline data with seven interim reports and six final reports received by Coastal GasLink.
- Coastal GasLink continued to discuss Impact Benefit Agreements (IBA) with affected First Nations as a means to promote economic participation, including opportunities related employment, education and training, community benefits, and contracting and procurement.

The third Aboriginal Consultation Report was submitted to the EAO on July 9, 2014. In preparing the application, the project proponent noted the following as part of its final report on the scope and content of consultation conducted[23]:

- A summary of issues identified during the course of consultation from June 2012 to July 2013 was provided to First Nations. As part of this, Coastal GasLink requested that First Nations review the summary report and identify any outstanding issues or discrepancies.

[23] It is important to note that the number of First Nations identified under Schedule B increased from 17 to 19 with the issuance of an Order under Section 13 by the EAO in February 21, 2014. This is the reason for the discrepancy in reporting between the second and third Aboriginal Consultation Report.

- A summary of the 2013 field program was shared with First Nations in March 2014.
- Coastal GasLink notified First Nations when submitting the draft application to the EAO, including instructions on how to submit comments to the EAO.
- Coastal GasLink provided information to First Nations affected by conceptual corridor revisions.
- 17 of 19 First Nations identified under Schedule B of the Order received initial capacity funding.
- 16 of 19 First Nations identified under Schedule B of the Order received further capacity funding.
- Of the eight First Nations invited to contribute Traditional Ecological Knowledge (TEK), eight First Nations declined.
- At the conclusion of the 2013 field program season, a Results Review Memo was prepared. Those First Nations that contributed field studies were invited to review the results to ensure its accuracy, completeness and confidentiality. Of the 17 First Nations that participated in field studies, eight First Nations requested a meeting to review the results.
- Of the 19 First Nations identified under Schedule B of the Order, 17 committed to complete a Traditional Land Use (TLU) study. Coastal GasLink informed those 17 First Nations that the deadline for submitting completed studies was January 2014. By March 2014, Coastal GasLink received 12 interim studies and progress reports to inform the application. These reports were referenced in, but not appended to, the formal application.
- Of the 19 First Nations identified under Schedule B of the Order, 15 committed to collect socio-economic baseline data with the support of Coastal GasLink. By July 2014, Coastal GasLink received nine interim reports and 10 final reports from participating First Nations. Only those reports submitted before January 2014 informed the Coastal GasLink application.
- Of the 19 First Nations identified under Schedule B of the Order, 16 received term sheets for an agreement. By July 2014, Coastal GasLink had participated in

60 project agreement meetings and 100 contracting and employment meetings with First Nations listed under Schedules B and C of the Order.

In reviewing the scope and content of consultation as described in the three reports, it is clear that Coastal GasLink took significant steps to consult First Nations along the conceptual corridor. As demonstrated by the activities above, a significant volume of technical information was disclosed to First Nations during the course of consultation. In addition, Coastal GasLink made efforts to invite and involve First Nations in data collection. While there was reluctance to share TEK and TLU studies were incomplete, this did not preclude First Nations participation in the process. In many ways, Coastal GasLink worked to alleviate costs and constraints to effective consultation by entering into legal and funding agreements with First Nations listed under Schedules B and C of the Order. This sentiment was clearly shared by the EAO. As per its responsibilities, the EAO reviewed and approved each of the three reports with no comments or recommendations (Environmental Assessment Office, 2014a).

Provincial-Led Consultation:

In the pre-application stage, consultation undertaken by Coastal GasLink was complemented by consultation conducted directly by the EAO with affected First Nations. From the perspective of the EAO, there were two primary channels for consultation. First, as per the Order under Schedule 11, those First Nations listed under Schedule B were invited to participate in four multi-stakeholder working group meetings, which focused on the selection of the Valued Components (VC) and Application Information Requirements (AIR). These meetings are most appropriately characterized as

forums for information sharing and technical dialogue whereby participating First Nations provide local perspective to specific components of the assessment methodology. Second, and consistent with case law, the EAO entered into government-to-government consultation with First Nations listed under Schedules B and C of the Order. However, it is important to note that the EAO only consulted two of the 31 First Nations potentially impacted by the proposed project in the pre-application phase.

Application Phase:

On March 12, 2014, Coastal GasLink formally submitted its application for an Environmental Assessment Certificate (EAC) to the EAO. The 7,200-page application is characterized by its detail and complexity. Section 1 of the application provided an overview of the proposed pipeline route and activities in the construction, operation, decommissioning and abandonment phases of the project. Sections four to 10 of the application assessed the adverse effects of the project as proposed in Section 1 on the geophysical environment, atmospheric environment, aquatic environment, vegetation, wetlands and wildlife. As per the listed of Valued Components submitted to and approved by the EAO, the application described how Coastal GasLink would monitor, mitigate or compensate for effects to each sub-component of the categories listed above. The application also assessed adverse effects to the economy and employment, land and resource use, local and regional infrastructure, sites of historical and cultural significance, and human health. Although an exhaustive examination of the adequacy of environmental and socio-economic mitigation measures proposed in the application is beyond the scope

of this thesis, it is important to evaluate the ways in which First Nations issues and interests are reflected in the application.

Section 23 of the application presented the results of consultation with First Nations identified under Schedules B and C of the Order. The 697-page report included baseline data relevant to the proposed project, including information on the practices, customs and traditions of each First Nation affected by the project as identified through background research and direct engagement efforts. To support the synthesis of this information, the proponent created eight broad, rights-based categories that related to traditional land and resource use. These categories provided consideration for hunting, trapping, fishing, plant gathering, trails and travelways, habitation sites, gathering sites, and sacred areas. Where possible, Section 23 included more detailed information on uses, sites and activities potentially affected by the project as proposed. The collection of this information was supported and supplemented by Traditional Land Use (TLU) studies completed by affected First Nations and, to the extent disclosed, Traditional Ecological Knowledge (TEK).

Section 23 of the application took an additional step in this analysis by isolating issues specific to individual First Nations and proposed mitigation measures to address them. These measures took three forms. First, where a concern could be duly addressed by fulfilling regulatory requirements, Coastal GasLink simply re-stated its intention to adhere to established regulations, standards and guidelines set by provincial and federal regulatory agencies (Coastal GasLink, 2014a). For example, concerns for adverse affects on fish and fish habitat could be addressed by following conditions under *Fisheries Act* authorizations (Coastal GasLink, 2014a).

Second, where First Nations access to land and resources was temporarily or permanently disrupted, altered or impeded, Coastal GasLink proposed specific measures to mitigate the impact. As land and resource use has spatial and temporal properties, these measures must be site-specific and account for seasonality. For example, Coastal GasLink proposed to reduce land disturbance by using previously disturbed areas for stockpile and temporary construction campsites (Coastal GasLink, 2014a). In certain cases, where specific sites had been identified as significant for fishing, hunting, trapping or plant gathering, Coastal GasLink proposed to maintain access to those sites as appropriate, adhere to site-specific timing constraints, record and avoid the area where possible, and implement alternative site-specific mitigation strategies as may be recommended by the affected First Nation (Coastal GasLink, 2014a). In rare cases, where mitigation measures could not adequately protect an ecological area, Coastal GasLink proposed to re-align the proposed route (Coastal GasLink, 2014a). At minimum, Coastal GasLink made a commitment in the application to distribute construction schedules, maps and other relevant information on anticipated trail, road and area closures to First Nations to inform them of the presence of construction activity (Coastal GasLink, 2014a).

Finally, issues and interests identified by First Nations provided baseline data in the design and development of project management and operations plans. These plans identified specific measures to be implemented by Coastal GasLink and its contractors during all phases of construction. In many cases, specific mitigation measures proposed by Coastal GasLink in Section 23 reference one of the 17 project management and operations plans to be developed and implemented during the three-year construction period. For example, Coastal GasLink made a commitment to implement the

Environmental Management Plan, Access Control Management Plan, Reclamation Plan, and Chemical and Waste Management Plan as a measure to reduce the potential adverse effects on subsistence hunting and wildlife habitat (Coastal GasLink, 2014a).

Assessment Report and Recommendations to Cabinet:

With the submission of the application, the responsibility for concluding the application and assessment, including consultation activities, shifted back to the EAO. In accordance with the *Environmental Assessment Act* (2002), the submission of the application is followed by a 180-day review period whereby the public is able to comment on the contents of the application. In this period, there was a moderate increase in consultation undertaken by the EAO. As an example, the EAO consulted with the Office of the Wet'suwet'en on six occasions, the Haisla First Nation on two occasions, and the Nak'azdli Band, Nadleh Whute'en First Nation, Saik'uz First Nation and Carrier Sekani Tribal Council on one occasion (Environmental Assessment Office, 2014a).

Based on the results of consultation and a review of the application, the EAO released an Assessment Report in October 2014. It is important to note that the report does not replicate the content presented in the application submitted by Coastal GasLink. It is intended to be an independent assessment of information submitted to the EAO during the pre-application and application phases of the process. As the key document supporting the decision of the Ministers responsible for issuing the Environmental Assessment Certificate (EAC), it recommends a set of mitigation measures[24] to be incorporated into the design of the project, including site and route selection, project

[24] The BC Ministry of Environment considers mitigation to be any practical means or measures taken to avoid, minimize, restore on-site, compensate, or offset the potential adverse effects of a project (Environmental Assessment Office, 2014).

scheduling, project design, and construction and operational procedures (Environmental Assessment Office, 2014a). It also identifies a set of residual impacts remaining after the implementation of all mitigation measures (Environmental Assessment Office, 2014a).

Similar to Sections four to 10 of the application submitted by Coastal GasLink, Part B of the Assessment Report describes a set of mitigation measures related to the list of Valued Components. For each of the valued components, the report describes the mitigation measures identified by the project proponent, additional mitigation measures to be implemented by the project proponent, and recommendations concerning long-term and cumulative environmental effects.

Part C of the Assessment Report deals with First Nations consultation directly. Interestingly, the release of the report was delayed by 30 days to allow the EAO to consider the consequences of the *Tsilhqot'in Nation v. British Columbia* decision where the Supreme Court of Canada clarified the test for Aboriginal title (Environmental Assessment Office, 2014a). As a result of *Tsilhqot'in* (2014), the EAO reassessed the strength of claimed Aboriginal title within the conceptual corridor, conducted additional consultation with First Nations to appropriately assess the strength of Aboriginal claims, and considered approaches to be taken in the accommodation of Aboriginal interests relative to the seriousness of the claim in a manner consistent with case law (Environmental Assessment Office, 2014a). In the end, *Tsilhqot'in* (2014) did not significantly change the contents of the report and the recommendations of the EAO. It was determined by the EAO that consultation undertaken with First Nations identified under Schedule B of the Order was sufficient in its scope and consistent with case law.

The Assessment Report clearly articulated common issues, concerns or interests amongst First Nations. The table below presents a summary of high-level concerns as articulated by affected First Nations during the course of consultation.

Table 1. Common Issues, Concerns and Interests**.**

Issue, Concern or Interest	Description	Environmental Assessment Office Response
Capacity and Time Constraints	The prescribed timelines of permitting processes and increases in the rate of natural resource development in Northern British Columbia constrains the capacity of First Nations to effectively engage in the environmental assessment process.	The EAO provided technical training sessions to First Nations in 2013, provided one-time, lump-sum capacity funding to First Nations based on the total number of projects in an area, encouraged the project proponent to provide capacity funding to First Nations, and hosted regional workshops in 2013 and 2014 on regulatory processes and roles.
Adequacy of the Effects Assessment	First Nations communicated concerns about the baseline study methodology.	The EAO was satisfied that the application reflected the contents of the Application and Information Requirements (AIR) and the additional baseline and field studies that may be required in the fulfillment of permitting requirements.
Conversion of a Natural Gas Pipeline to an Oil Pipeline	First Nations communicated concern about the potential for a natural gas pipeline to be converted into an oil pipeline.	The EAO made clear that the project proponent must adhere to the environmental assessment certificate, including the legally binding certified project description that designates the pipeline as transporting natural gas.
Location of Construction Camps and Facilities	First Nations communicated concern that site-specific impact such as construction camps, access roads, temporary bridges and storage areas were not adequately assessed.	The EAO made clear that the construction phase of the project, including permitting for construction camps and ancillary facilities, was the purview of the BC Oil and Gas Commission (OGC). Additionally, the EAO required that the project proponent continue to consult First Nations in the construction phase to determine if measures can be taken to mitigate site-specific impacts.
Cumulative Environmental Effects	First Nations communicated concern that environmental assessment processes do not adequately account for past, present and foreseeable industrial activity in traditional territories.	The EAO examined and assessed cumulative environmental effects relative to each Valued Component (VC) in Part B of the Assessment Report.
Synchronous Permitting	First Nations communicated concerns that coordinated permitting processes between the EAO and OGC creates additional demand on First Nation capacity.	The EAO and OGC coordinated permitting processes under an interdepartmental Memorandum of Understanding (MOU), which allowed project proponents to apply for site-specific permits as it proceeded with the broader environmental assessment process. It is the perspective of the EAO that this create efficiencies in consultation by allowing First Nations to comment on each component of the project without the need for multiple meetings.

In addition to broad concerns with environmental assessment and permitting processes, the Assessment Report indicates where there is a high propensity for the construction of pipelines, compressor stations, access roads and construction camps to directly impact Aboriginal interests. For the purposes of preparing its assessment, the EAO limits Aboriginal interests to six categories. The table below presents a description of the category, potentially adverse impacts relative to that category, and the recommendations of the EAO in mitigating or managing those impacts.

Table 2. Summary of Probable Impacts to Aboriginal Interests.

Category	Description	Environmental Assessment Office Response
Hunting	Based on a common concern related to the continued erosion of wildlife populations, First Nations identified a number of species of specific concern along the conceptual corridor.	The EAO concluded that there is potential for disruption to subsistence hunting and trapping during construction and operation and that this may result in changes to the local harvesting locales, disturbance to wildlife resources, increased public access to traditional hunting areas and increased harvesting pressure. The EAO anticipated that the current level of disturbance within the wildlife study area would increase from 32.2 percent to 36.4 percent based on an accumulation of infrastructure and forestry activities. In its recommendations, the EAO stated that sufficient accommodation of Aboriginal interests with respect to hunting and trapping is achievable by implementing site-specific and species-specific mitigation strategies and management plans, continued consultation with First Nations during construction, completion of Traditional Land Use (TLU) studies prior to construction, collaboration on field studies, and requiring the retention of environmental inspectors during the course of construction.
Trapping	First Nations identified a number of species that may be impacted by project activities and in turn impede traditional trapping activities.	
Fishing	Although many of the traditional fishing sites identified by First Nations were not located within the conceptual corridor, First Nations identified a total of 52 fish species within the 1,085 watercourses to be crossed by the proposed pipeline.	The EAO concluded that there is potential for residual effects on fish and fish habitat during construction and operation and that this may result in limited access or increased public access to traditional fishing areas, changes to local harvesting locales and broader ecological effects. In its recommendations, the EAO stated that the majority of measures to minimize impact to fish and fish habitat were based on project design, construction methods and route selection. In two cases, an alternative route was selected to protect species at risk. In addition, the EAO sets out site-specific and species-specific mitigation strategies and monitoring plans to be developed by the project proponent and any applicable federal and provincial legislation or regulation.

Category	Description	Environmental Assessment Office Response
Gathering	First Nations indicated an interest to protect plants and berries used for subsistence and medicinal purposes.	The EAO concluded that it does not predict significant residual effects for ecological communities of concern or plant species of concern as identified by affected First Nations. In its recommendations, the EAO stated that sufficient accommodation of Aboriginal interests with respect to plants of concern is achievable by managing the footprint of construction activities, re-vegetating affected areas, and continued consultation with First Nations during construction.
Archaeology and Cultural Heritage	In completing the required Archaeological Impact Assessment (AIA), the project proponent identified 30 previously unrecorded archaeological sites and five previously unrecorded historic sites.	The EAO concluded that there is potential for the disturbance of archaeological sites and loss of site-specific archaeological information during construction. In its recommendations, the EAO required that the implementation of a contingency plan and protocol in cases where a heritage site is discovered during construction.
Aboriginal Title	The EAO considered short-term and long-term impacts to Aboriginal title. In the short-term, it is anticipated that project activities may disrupt subsistence activities and access to resources for the purposes of hunting, trapping, fishing and plant gathering. In the long-term, right-of-way clearing and access roads may disrupt trails, travelways and access to resources.	In its assessment of the proposed project timeline, the EAO concluded that the majority of impacts would be confined to a three-year construction period. In addition, as there was no contemplation of transferring land ownership to the project proponent, the majority of lands used for the pipeline would not be subject to exclusive use or occupation. Finally, the EAO contemplated the potential for a First Nation to establish title on lands used for the pipeline. The EAO concluded that statutes that provide for the safe operation of pipelines would fetter the decision-making authority of that First Nation.

Decision of the Ministers Responsible:

Based on the conclusions of the Assessment Report, the final recommendations of the Executive Director of the EAO were submitted to the Ministers of Environment and Natural Gas Development on October 8, 2014. In its recommendations, the EAO concluded that, based on the depth of consultation conducted and the re-assessment of the strength of claimed Aboriginal title, the legal duty to consult had been fully discharged. The EAO acknowledged First Nations concerns with respect to the assessment

methodology, particularly the limitations of the assessment in considering cumulative environmental effects, but concluded that the environmental mitigation measures proposed as part of the overall project design provided a mechanism to minimize impacts to Aboriginal interests (Environmental Assessment Office, 2014e). It was further concluded that benefits to First Nation communities in the form of employment and contracting opportunities, capacity funding, provincial environmental programs, and the negotiation of project agreements provided a measure of economic inclusion for First Nations as the project progresses (Environmental Assessment Office, 2014e).

In consideration of the advice and recommendations of the EAO, the Ministers of Environment and Natural Gas Development issued an Environmental Assessment Certificate (EAC) to Coastal GasLink on October 23, 2014. In consideration of Aboriginal interests, the EAC mandated the project proponent, as a condition of approval, to ensure First Nations had access to project areas for subsistence activities, to continue its consultation with First Nations throughout the construction phases of the project, and to consider the contents of traditional use studies that may be submitted to the project proponent at a later date (Environmental Assessment Office, 2014c). From the perspective of the Ministers responsible, these conditions constituted appropriate accommodation in addition to site-specific environmental mitigation and management measures intended to minimize impacts to Aboriginal interests.

Analysis and Discussion

Commentary on the Scope and Content of Consultation:

In reviewing the three Aboriginal Consultation Reports and the Application submitted by Coastal GasLink and the Assessment Report released by the EAO, the action situation, or the interactions amongst actors, is characterized by its technical complexity and immensity in terms of information exchanged. At the onset of the assessment, the EAO issued an Order under Section 11 of the *Environmental Assessment Act* (2002). As the duty to consult and accommodate is not defined under provincial legislation or regulation, the Order serves as the primary legal mechanism by which the duty to consult, as a constitutional-choice rule, is translated into operational rules. In effect, the Order established clear expectations for consultation to be conducted by Coastal GasLink in supporting the EAO to fulfill procedural responsibilities as defined in constitutional-choice rules.

In reviewing actions taken to implement the Order, it is clear that Coastal GasLink took significant steps to consult First Nations listed under Schedule B of the Order. First, in an effort to alleviate the cost pressures associated with First Nations participation in the assessment process, Coastal GasLink provided initial or full capacity funding to 17 of the 19 First Nations listed under Schedule B of the Order. Second, in an effort to define site-specific Aboriginal interests potentially impacted by the project, Coastal GasLink provided support for 12 of the 19 First Nations listed under Schedule B to complete an interim Traditional Land Use (TLU) study to inform the application. Third, where First Nations demonstrated a strong *prima facie* claim to Aboriginal title as

defined by provincial authorities, there was a measurable increase in the amount of meetings between Coastal GasLink and those First Nations[25].

On this basis, it is evidenced that the Order issued by the EAO acted as an efficient policy instrument whereby complex constitutional-choice rules were translated into operational rules that established a minimum standard of consultation in the fulfillment of legal commitments. By legally embedding a procedural duty to consult and, where appropriate, accommodate First Nations in the Order issued by the EAO, Coastal GasLink was confronted by a real risk that poor consultation would result in a denied application. As a result, the Order issued by the EAO provided a strong institutional incentive for Coastal GasLink to interact with First Nations in a manner consistent with the standards set at a constitutional-choice level. This result must be viewed positively.

Commentary on Accommodation:

As a result of this consultation, there are many cases where accommodation of Aboriginal interests was requested or required. In reviewing the Application submitted by Coastal GasLink and the Assessment Report prepared by the EAO, there is evidence of hundreds of small, site-specific accommodations in the form of environmental management and mitigation measures or modifications in project design. These measures or modifications, often based on input and information provided by First Nations, were intended to minimize the impact of project activities on resources in recognition that the ability of First Nations to exercise constitutionally protected rights depends, in large part, on the abundance of resources in local environments.

[25] As demonstrated in Appendix A, Coastal GasLink met with First Nations demonstrating a strong *prima facie* claim a minimum of 20 times during the pre-application and application review phases of the assessment process.

While these mitigation measures must be understood as meaningful attempts to avoid, mitigate or otherwise accommodate adverse impacts to Aboriginal interests as directed by the Order issued by the EAO, these measures did not necessarily account fully for the cultural or economic components of the interest. The duty to accommodate in this context was interpreted in limited terms. As described by the Carrier Sekani Tribal Council in a critique of these processes, the assessment methodology used by the EAO measured impacts in a linear and scientific manner that does not account for cultural or spiritual activities or the impacts on Aboriginal rights and title (2007). Similar to the duty to consult, the methodology of environmental assessment is not entrenched in legislation or regulation. It is rather represented in the *Guideline for the Selection of Valued Components and Assessment of Potential Effects* (2013), which serves as the standard operating procedure for identifying components of scientific, ecological, economic, social, cultural archaeological or historical value. This guide does not, however, account for First Nations perspectives on the selection of valued components. In this context, the measurement of valued components was, at times, limited in its ability to account for impacts to Aboriginal interests not defined in purely scientific terms. This is further complicated by the fact that the standard operating procedures as described by the *Updated Procedures for Meeting Legal Obligations When Consulting First Nations* (2010) does not reference a responsibility for provincial authorities to compensate a First Nation adversely affected by project activities. Taken together, these operational rules limit the ability of First Nations to define Aboriginal interests in non-market based terms and quantify the impact in a manner that presents an argument for proportional compensation.

The issues associated with appropriate accommodation must be linked to an additional dilemma within the action situation. In its assessment, the EAO identified four First Nations as demonstrating a strong *prima facie* claim to Aboriginal title within the project area as proposed. This included the Haisla Nation, Wet'suwet'en, Stellat'en First Nation and Nadleh Whute'n First Nation. Within the entire assessment, potential impacts to the Aboriginal interests of the Wet'suwet'en were the only impacts classified as moderate to serious. While the assessment of cumulative environmental effects is referenced in Section 11(2)(b) of the *Environmental Assessment Act* (2002), there was minimal instruction provided and, as a result, was subject to significant interpretation at an operational level. In many cases, as argued by the Carrier Sekani Tribal Council, "proponents are permitted to use an inappropriately large study area for the assessment in order to conclude that the incremental impact of the project is insignificant when compared to similar impacts within the study area" (2007, p. 8). As a result, with one exception, all identified impacts to Aboriginal interests in the Assessment Report were listed as low.

Finally, it is instructive to determine the extent to which these institutional arrangements provided incentive for the reconciliation of Crown-Aboriginal interests in lands and resources. In the end, the Ministers responsible issued an Environmental Assessment Certificate (EAC) to Coastal GasLink on the basis that the broader economic benefits and strategic interests posed by the project offset temporary disturbances and alterations to traditional subsistence activities. In reviewing the outcomes of the process, it is evident that the Crown, represented by the Province of British Columbia in this case, maintained a policy preference for entering into revenue sharing agreements with First

Nations as a measure of social and economic inclusion[26]. As of June 2015, the Ministry of Aboriginal Relations and Reconciliation had concluded eight revenue sharing agreements with First Nations in relation to the Coastal GasLink Pipeline Project. It is important to note that these agreements do not constitute recognition of Aboriginal rights and title. These agreements are intended to provide financial benefits to First Nations on a project-by-project basis and contingent on projects meeting specific milestones in terms of construction, operation and output. While these do not provide for the reconciliation of respective assertions, the proposition of revenue sharing with First Nations affected by project activities must be viewed positively.

[26] The 2014-2015 – 2016-2017 Summary Service Plan for the Ministry of Aboriginal Relations and Reconciliations sets a target of 4 agreements with First Nations per year to be negotiated on a case-by-case basis for the purposes of revenue sharing in the sectors of mining, oil and gas, and tourism.

Chapter 5 – Westcoast Connector Gas Transmission Pipeline Project

Introduction

Similar to the previous chapter, this case study presents a descriptive overview of the scope, content and overall process of consultation conducted and directed by the British Columbia Environmental Assessment Office (EAO) in the issuance of an Environmental Assessment Certificate (EAC) to Spectra Energy for the Westcoast Connector Gas Transmission Pipeline Project. Consistent with the Institutional Analysis and Development (IAD) Framework, the action situation in this case is defined as the social space where the project proponent and representatives of the Crown consult First Nations in the pre-application and application review phases of the assessment process mandated by the *Environmental Assessment Act* (2002).

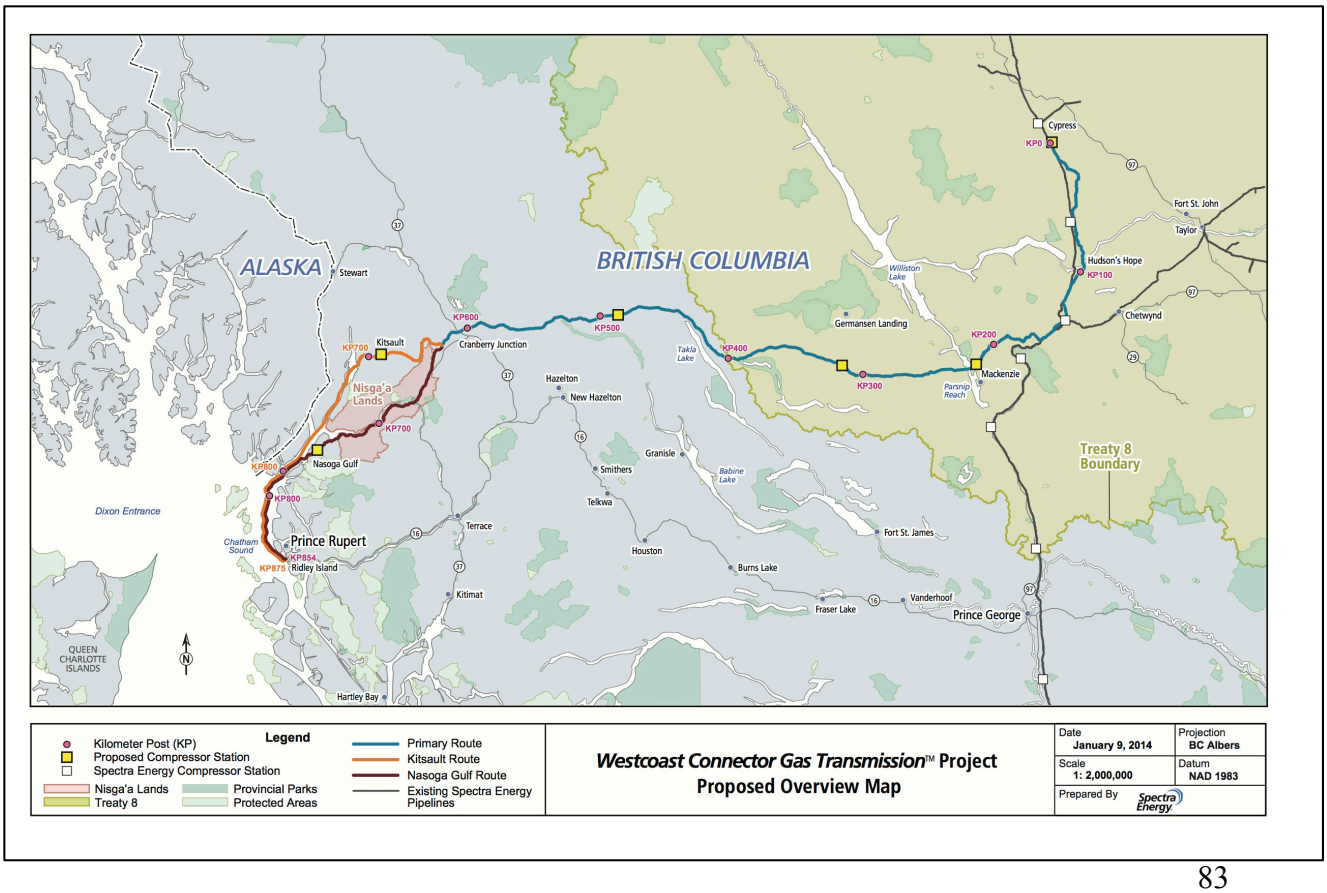
This case study is intended to describe the main mechanisms for, and depth of, consultation with First Nations potentially affected by project activities. In the conclusion of this case study, the action situation will be interpreted from two points of interest. First, I will consider the scope and content of consultation to assess its consistency and compatibility with the procedural and relational principles defined by constitutional-choice rules in the form of case law. Second, I will evaluate the extent to which the operational rules, or the rules-in-use, act as an incentive for the Crown to fully internalize the cost of Aboriginal interests in rendering its decision.

Proposed Westcoast Connector Gas Transmission Pipeline Project

In October 2012, Spectra Energy made public a project description for the construction and operation of a natural gas pipeline that, if completed, would connect

unconventional natural gas reserves in the northeastern portion of British Columbia to tidewater on the north coast of British Columbia. The pipeline as proposed would involve the construction of a pipeline system consisting of one or two parallel pipelines, approximately 851 to 872 kilometers in length (Spectra Energy, 2012). As depicted in *Figure 5*, the proposed pipeline would start in Cypress, located approximately 210 kilometers south of Fort Nelson, and terminate at a marine terminal on Ridley Island, located near the city of Prince Rupert (Spectra Energy, 2012). The proposed project would include the construction and operation of two metering facilities, five compressor stations and the construction and decommissioning of temporary infrastructure associated with pipeline construction, including access roads, stockpile sites, contractor yards and construction camps. The total construction cost is estimated to be $6 to $8 billion depending on the final project design (Spectra Energy, 2012).

Figure 5. Westcoast Connector Gas Transmission Pipeline Project – Overview Map.



Estimated Impact of the Proposed Project

The scale of the project is best characterized by its estimated economic and environmental impact. As described in the application, the first pipeline as proposed would be approximately 854 to 862 kilometers in length based on final route selection, maintain a 55-meter right-of-way within a 400-meter conceptual corridor, contain 100 to 200 kilometers of marine pipeline, and maintain the possibility of expansion with the installation of a second, parallel pipeline (Spectra Energy, 2014a). The construction of the first pipeline is scheduled to start in 2016 and conclude in 2019 (Spectra Energy, 2014a). If deemed commercially viable, the construction of the second pipeline is scheduled to start in approximately 2020 to 2023 with the completion of additional compression stations by 2026 (Spectra Energy, 2014a).

In its application, Spectra Energy established a clear connection between the project and government goals for economic growth. With a total capital cost of $9.5 billion for construction and operation over a 50-year period, the project is expected to provide long-term economic benefits and contribute to the establishment and expansion of an export industry for natural gas in British Columbia (Spectra Energy, 2014a). Based on the construction of two parallel pipelines, the project is expected to generate $5 billion in provincial and federal income taxes, $2 billion in fuel taxes, and $5 billion in provincial carbon taxes over its operational lifetime (Spectra Energy, 2014a). As presented by the EAO, direct project-related employment is expected to total 18,598 person-years for the first four-year construction period with 119 direct full-time equivalent positions once the first pipeline is operational (2014g). Based on its projections, it is clear that Spectra Energy positioned the project as one of strategic

importance in terms of its immediate economic and employment benefits regionally and its broader potential to enable the proliferation of an export industry provincially.

Pre-Application Phase

In a letter dated November 9, 2012, the BC Environmental Assessment Office (EAO) confirmed that the project as proposed was reviewable under the *Reviewable Projects Regulation*. To this end, the EAO issued an Order regarding the proposed project under Section 10(1)(c) of the *Environmental Assessment Act* (2002). The Order stipulated that Spectra Energy required an Environmental Assessment Certificate (EAC) prior to proceeding with permitting or construction phases of the project. In addition to this, and as required under the regulation referenced above, the EAO issued an Order under Section 11 of the *Environmental Assessment Act* (2002) in May 2013 outlining the scope, methods and procedures for the assessment.

As described in the Order issued under Section 11, it was determined that the assessment must account for potential adverse environmental, economic, social, heritage and health effects, including consideration of cumulative effects. Moreover, the Order established clear parameters for consultation with First Nations potentially affected by the project. As described, First Nations would be invited to participate as members of the multi-stakeholder working group and to provide comments on key documents resulting from the assessment, including the Application Information Requirements (AIR), the list of Valued Components (VCs), the Application submitted by the project proponent, and the Assessment Report prepared by the EAO. Importantly, the Order also reaffirmed the role of the Project Assessment Lead, an employee of the EAO, to ensure adherence to the

notification and consultation requirements set out by the Order within prescribed timelines and to assess the adequacy of consultation conducted.

In addition to setting out the timing and content of consultation, the Order was the main mechanism for the delegation of procedural components of consultation to Spectra Energy. In effect, the Order required that the project proponent develop an Aboriginal Consultation Plan and prepare three reports on consultation with Aboriginal groups at different stages in the assessment process. Taken together, these documents serve as the primary tool for the EAO to track the depth of consultation conducted, isolate Aboriginal interests relative to specific project sites, and describe how identified impacts will be avoided, mitigated or otherwise accommodated in project design. Although the Order affirmed the EAO as the agency ultimately accountable for the overall process and its outcomes, significant components of the consultation process, both procedurally and substantively, were seen as the responsibility of the project proponent.

Due to the length and linear nature of pipeline projects, the project as proposed interacts with a diversity of Aboriginal interests. In contrast to the Coastal GasLink Pipeline Project, the Westcoast Connector Gas Transmission Pipeline Project interacts with territories covered by both historic and modern treaties. As a result, the Order issued under Section 11 stipulated specific consultation requirements in respect of the *Nisga'a Final Agreement* (1999). Consistent with the consultation provisions in the *Nisga'a Final Agreement*, the Order set out a parallel consultation process to ensure full and fair consideration by the Crown of any issues or interests presented by the Nisga'a Nation. It required that plans, reports and publications to be prepared by the project proponent include a separate section outlining issues of interest to the Nisga'a Nation. It also

afforded the Nisga'a Nation the opportunity to prepare a separate written submission to the Ministers responsible when the application was referred for final decision. While the Order delegated procedural components of consultation with the Nisga'a Nation, it made clear that the project proponent "must comply with additional procedural direction by the project assessment lead, at any time, regarding consultation with the Nisga'a Nation, to enable BC to comply with applicable provisions of the Nisga'a Final Agreement" (Environmental Assessment Office, 2013c, p. 16). In this case, where the Nisga'a Nation has concluded an agreement with the Crown that provides legal finality to Aboriginal rights and title, there is no uncertainty with respect to the status of settlement lands that the proposed pipeline would impact. There is, therefore, a significantly higher legal liability that required the Crown to conduct consultation in a manner that respected legally defined interests.

Finally, it is important to note that the proposed project was not subject to a federal assessment pursuant to the *Canadian Environmental Assessment Act* as a result of amendments to the *Regulations Designating Physical Activities* in October 2013. In effect, these amendments removed non-National Energy Board-regulated pipelines from the purview of the federal government (Environmental Assessment Office, 2014g). While existing federal legislation, regulation and permitting requirements applied to the project[27], the federal role in formal consultation with First Nations was negligible in the absence of a federal assessment.

[27] As the proposed project interacts with marine environments, federal legislation and regulations play prominently in the permitting phases of the project. Applicable legislation includes the *Fisheries Act, Canadian Environmental Protection Act, Species at Risk Act, Navigation Protection Act, Canada Marine Act,* and *Migratory Birds Convention Act.*

Assessing the Strength of Aboriginal Assertions:

Prior to issuing the Order under Section 11 to Spectra Energy, the EAO assessed the strength of Aboriginal assertions potentially affected by project activities as a means to determine which First Nations would be consulted and to what depth this consultation would occur. Those First Nations with proven or unproven traditional territory located within two kilometers of the conceptual corridor were listed under Schedule B of the Order. Those First Nations with traditional territory located within 30 kilometers of the conceptual corridor were listed under Schedule C of the Order. Consistent with the consultation continuum defined by *Haida* (2004), the 16 First Nations initially identified under Schedule B of the Order were owed a deeper level of consultation whereby claims or concerns could be substantively addressed during the course of consultation. In contrast, those First Nations and Tribal Councils listed under Schedule C of the Order were only owed notification, as impacts to Aboriginal interests were understood to be minimal. The Nisga'a Nation was purposefully excluded from Schedules B and C in respect of provisions related to consultation in the *Nisga'a Final Agreement* (1999).

Although an assertion of Aboriginal rights and title is not subject to significant alteration, it is possible for affected First Nations to submit empirical evidence to the EAO as a means to strengthen its claim. In three cases, the EAO amended Schedules B and C of the Order issued under Section 11 to reflect the following:

- On July 9, 2013, the EAO added the Dene Tha First Nation to Schedule C.
- On February 21, 2014, the EAO moved Doig River First Nation from Schedule C to Schedule B.
- On May 29, 2014, the EAO moved Prophet River First Nation from Schedule C to Schedule B.

These amendments should be viewed positively from a procedural perspective. It is clear that the ability to codify Aboriginal assertions is complex and, as a result, requires a degree of adaptability on the part of the EAO in adequately discharging its duties.

Early Engagement:

In 2011, Spectra Energy began a process of engagement with potentially affected First Nations. At the beginning, and as characterized by the project proponent, these discussions were informal with the modest intention of introducing the proposed project to those First Nations in close proximity to the conceptual corridor (Spectra Energy, 2013a). In the development of the project description, these discussions shifted to matters such as routing options, capacity funding, key contacts in the community, preferred methods of communication, methods to collect information on Traditional Land Use (TLU) and Traditional Ecological Knowledge (TEK), and community involvement in field studies (Spectra Energy, 2013b). A similar communication approach was taken with the Nisga'a Nation starting in early 2012. However, as conducting surveys and field studies on Nisga'a Lands required Spectra Energy to apply for particular permits, it is evident that a deeper level of disclosure was required in discussing the proposed project with the Nisga'a Nation at these initial stages (Spectra Energy, 2013b).

Scope and Content of Consultation

Proponent-Led Consultation:

In July 2013, Spectra Energy submitted its first Aboriginal Consultation Report to the EAO in accordance with the requirements set out in the Order issued under Section

11. This initial report provides perspective on the consultation approach taken with affected First Nations. In reviewing this report, it is clear that the early engagement undertaken by the project proponent provided a clear conduit for information sharing with communities. By the time the first report was submitted, the project proponent had already provided First Nations listed under Schedules B and C and the Nisga'a Nation copies of the project description, maps of the proposed project route, and its proposed plan for continued consultation (Spectra Energy, 2013b). Building from its early engagement effort, it is also clear that the project proponent made the provision of capacity funding a priority. By July 2013, the project proponent had provided initial or full capacity funding to 12 of the 16 First Nations listed under Schedule B of the Order and the Nisga'a Nation. In addition, the project proponent had provided one-time funding to three of the eight First Nations and Tribal Councils listed under Schedule C of the Order (Spectra Energy, 2013b).

In this time, the project proponent also initiated discussions with affected First Nations about the possibility of completing Traditional Land Use (TLU) studies and collecting Traditional Ecological Knowledge (TEK). As reported by the project proponent, 10 of the 16 First Nations listed under Schedule B were participating in TLU studies by the time the first report was submitted. Similarly, the project proponent reported continued dialogue with the Nisga'a Nation on the possibility of Nisga'a Nation representatives assisting with site-specific field studies (Spectra Energy, 2013b).

With the submission of the second Aboriginal Consultation Report in December 2013 it is clear that consultation with First Nations had continued and increased in its

relative frequency and depth. The points below provide a summary of consultation activities undertaken by Spectra Energy between July 2013 and December 2013:

- At minimum, First Nations listed under Schedules B and C of the Order received the project description and maps of the proposed project.
- The draft Application Information Requirements (AIR), which identifies the issues to be addressed in the assessment and the information that must be included in the application, was shared with First Nations listed under Schedules B and C of the Order for consideration and comment.
- By December 2013, full capacity funding had been provided to 11 of the 16 First Nations listed under Schedule B of the Order and one-time funding had been provided to three of the nine First Nations and Tribal Councils listed under Schedule C.
- The project proponent notified all First Nations listed under Schedule B of the Order of field studies to be completed within traditional territories. By December 2013, 13 of the 16 First Nations listed under Schedule B of the Order had participated in field studies in some form.
- In addition to the nine public open houses hosted by the project proponent, eight open houses were hosted in First Nation communities and three open houses were hosted in Nisga'a Nation villages.

The third and final Aboriginal Consultation Report was submitted to the EAO in June 2014. This 138-page report presents a summary of consultation activities completed between January 2014 and June 2014. In reviewing the report, it is evident that Spectra Energy prioritized the provision of technical and financial support to affected First Nations for the purposes of more clearly defining Aboriginal interests with respect to

project activities. The points below provide a summary of key activities initiated or completed by June 2014[28]:

- The project proponent provided initial or full capacity funding to 15 of the 18 First Nations listed under Schedule B of the Order for the purposes of alleviating cost pressures associated with participation in the regulatory review. By September 2014, the project proponent had also tabled principles and objectives for Impact Benefit Agreements (IBAs) with all 18 First Nations listed under Schedule B of the Order (Environmental Assessment Office, 2014g).
- 16 of 18 First Nations listed under Schedule B of the Order participated in site-specific field studies, which included marine monitoring, wildlife surveys, archeological studies, training programs, and the collection and interpretation of field data.
- 14 of 18 First Nations elected to complete Traditional Land Use (TLU) studies as a way to inform project design. It is important to note that no First Nations elected to share Traditional Ecological Knowledge (TEK) with the project proponent.
- 11 of 18 First Nations elected to complete socio-economic studies as a way to inform the overall assessment of socio-economic effects and to identify project-specific economic and employment opportunities.

In addition to consultation with First Nations listed under Schedule B of the Order, Spectra Energy consulted the Nisga'a Nation at the deepest level required by the consultation continuum defined by *Haida* (2004). As per Chapter 10 of the *Nisga'a Final Agreement*, the project proponent was required to "assess whether the project can reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands, or Nisga'a interests set out in the Agreement and, where appropriate, make recommendations to prevent or mitigate those effects" (Environmental

[28] It is important to note that the number of First Nations identified under Schedule B increased from 16 to 18 with the issuance of Orders under Section 13 by the EAO in February 21, 2014 and May 29, 2014, which, in effect, moved two First Nations from Schedule C to Schedule B.

Assessment Office, 2014g). Further, and consistent with the *Nisga'a Final Agreement*, the project proponent was required to "assess the effects of the project on the existing and future economic, social and cultural wellbeing of Nisga'a citizen" (Environmental Assessment Office, 2014g). While regulations established under the *Environmental Assessment Act* provide for a process whereby environmental, economic and cultural effects can be evaluated, the *Nisga'a Final Agreement* provides a legal basis for a parallel process focused on the identification and mitigation of specific interests of importance to the Nisga'a Nation. In fulfillment of these provisions, the project proponent was required to prepare and make public a supplementary environmental effects assessment and an assessment of economic, social and cultural wellbeing specific to the issues, impacts and interests that pertain to rights exhaustively defined by treaty.

Application Phase:

On March 21, 2014, Spectra Energy announced the submission of its Environmental Assessment Certification Application to the EAO. The 8,000-page application included detailed descriptions of project components, including summaries of studies conducted relative to environmental, social and economic effects and the anticipated benefits of the project.

In respect of Aboriginal interests, Section 11 of the application included information on the practices, traditions and customs of each potentially affected First Nation in a manner that supports the assessment of current or customary uses of land and resources. In this context, Aboriginal interests were limited to a set of site-specific activities, which included hunting, trapping, fishing and plant gathering (Spectra Energy,

2014a). Within these categories, the application was intended to estimate impacts to subsistence activities (e.g. trails, travelways and habitation sites) and cultural pursuits (e.g. gathering places and sacred sites), propose measures to avoid, mitigate or otherwise accommodate probable impacts, and estimate the residual effect of those impacts after the full implementation of measures proposed.

The measures proposed by Spectra Energy typically took two forms. First, where there was a high propensity for the alteration of resources or disruption of practices integral to subsistence or tradition in the construction phase of the project, it was common for the project proponent to adjust the timing, intensity or location of activities. As an example, the project proponent consistently referenced an interest to complete pre-construction Traditional Land Use (TLU) studies with the affected First Nation to avoid ecologically or culturally sensitive sites or implement site-specific environmental management measures to reduce the significance of the impact (Spectra Energy, 2014a). In select cases, an Aboriginal interest may influence a decision related to the selection of the pipeline route. For example, Spectra Energy adjusted approximately 40 kilometers of the proposed pipeline as a direct result of consultation conducted with the Gitanyow Nation (Spectra Energy, 2014a).

Second, where an Aboriginal interest was interpreted as a general concern relating to environmental alteration and degradation, it was common for the project proponent to simply restate its intention to strictly adhere to regulations, standards and guidelines set by provincial and federal regulatory agencies (Spectra Energy, 2014a). In these cases, the project proponent committed to a process of continued consultation with affected First

Nations during the construction and operation phases of the project as opposed to proposing site-specific mitigation measures (Spectra Energy, 2014a).

Assessment Report and Recommendations to Cabinet:

With the submission of the application in March 2014, the responsibility for concluding the application and assessment shifted back to the EAO. In accordance with the *Environmental Assessment Act* (2002), the submission of the application was followed by a 180-day review period whereby the public is able to comment on the contents of the application.

Based on the results of consultation and a review of the application, the EAO released an Assessment Report in November 2014. It is important to note that the report does not replicate the content presented in the application submitted by Spectra Energy. It is intended to be an independent assessment of information submitted to the EAO during the pre-application and application phases of the process. As the key document supporting the decision of the Ministers responsible for issuing the Environmental Assessment Certificate (EAC), it recommended a set of mitigation measures[29] to be incorporated into the design of the project, including route selection, project scheduling, project design, and construction and operational procedures to be followed (Environmental Assessment Office, 2014g). It also identified a set of residual impacts remaining after the implementation of appropriate mitigation measures, understood as the long-term impacts of the project (Environmental Assessment Office, 2014g).

[29] The BC Ministry of Environment considers mitigation to be any practical means or measures taken to avoid, minimize, restore on-site, compensate, or offset the potential adverse effects of a project (Environmental Assessment Office, 2014).

The Assessment Report was composed of four parts. Parts A and B of the report provided an overview of the assessment process and presented the results of the assessment of potentially adverse environmental, economic, social, heritage and health effects pursuant to the Order under Section 11 of the *Environmental Assessment Act* (2002). In relation to the duty to consult, Parts C and D presented the results of consultation with First Nations listed under Schedules B and C of the Order and the Nisga'a Nation. Similar to the application submitted by Spectra Energy, these sections defined Aboriginal interests on a site-specific basis and affirmed or proposed additional measures to be implemented by the project proponent to avoid, minimize or otherwise accommodate Aboriginal interests in the construction and operation of the pipeline. The Assessment Report did not constitute a decision of the Crown to approve or deny the project as proposed. It was the substantive result of the assessment and therefore described conditions under which the project would be considered economically, environmentally and legally viable.

Interestingly, and similar to the Assessment Report for the Coastal GasLink Pipeline Project, the *Tsilhqot'in Nation v. British Columbia* (2014) decision required the EAO to reassess the adequacy of consultation activities conducted by the project proponent in the pre-application phase. As part of this, the EAO reassessed the strength of claimed Aboriginal title within the conceptual corridor, conducted additional consultation with First Nations, and considered approaches to be taken in the accommodation of Aboriginal interests relative to the seriousness of the claim in a manner consistent with case law (Environmental Assessment Office, 2014g). As articulated in the report, the EAO determined that the level of consultation completed

prior to the submission of the application was commensurate with the strength of claim to Aboriginal title. As a result, there were no changes to the scope and content of consultation undertaken.

In addition to site-specific interests, the Assessment Report demonstrated issues of common interest or concern to First Nations affected by the project as proposed. The table below presents a summary of high-level concerns as articulated by First Nations during the course of consultation.

Table 3. Common Issues, Concerns and Interests**.**

Issue, Concern or Interest	Description	Environmental Assessment Office Response
Capacity and Time Constraints	In February 2013, there were two liquefied natural gas projects in the initial stages of review by the EAO. By February 2014, there were four natural gas pipeline projects and three liquefied natural gas terminal facility projects under review by the EAO. First Nations communicated concern that the timelines prescribed by the regulatory review and the total number of projects proposed constrained the ability of First Nation communities to fully consider components of the projects and participate in each process.	In recognition that this was the most commonly cited concern with respect to the process, the EAO took the following steps: • The EAO offered training opportunities to First Nations and hosted regional workshops with First Nations to discuss natural gas projects on a regional basis and discuss regulator roles and regulatory process. • The EAO appointed a First Nations LNG Lead to facilitate both project-specific consultation and strategic-level regional workshops. • The EAO and the project proponent provided initial or full capacity funding to First Nations listed under Schedule B of the Order as a way to alleviate cost and capacity constraints.
Adequacy of the Effects Assessment	First Nations communicated concerns about the baseline study methodology.	The EAO was satisfied that the application reflected the contents of the Application and Information Requirements (AIR) and the additional baseline and field studies that may be required in the fulfillment of permitting requirements.
Conversion of a Natural Gas Pipeline to an Oil Pipeline	First Nations communicated concern about the potential for a natural gas pipeline to be converted into an oil pipeline.	The EAO noted that the Minister for Natural Gas Development communicated an interest to First Nations to develop a regulation under the *Oil and Gas Activities* that would prohibit the conversion of a pipeline for purposes other then the transportation of natural gas as per the legally binding project description.
Cumulative Environmental Effects	First Nations communicated concern that the process does not adequately account for past, present and foreseeable development in traditional territories.	The EAO examined and assessed cumulative environmental effects relative to each Valued Component (VC) in Part B of the Assessment Report.

Issue, Concern or Interest	Description	Environmental Assessment Office Response
Location of Construction Camps and Facilities	First Nations communicated concern that site-specific impact such as construction camps, access roads, temporary bridges and storage areas were not adequately assessed.	The EAO made clear that the construction phase of the project, including permitting for construction camps and ancillary facilities, is the purview of the BC Oil and Gas Commission (OGC). The EAO was satisfied that subsequent phases of the project provide opportunity for the project proponent to consult First Nations to determine if site-specific measures are required to avoid or minimize impact to an Aboriginal interest.
Economic Benefits	First Nations consistently communicated an interest to accrue economic benefits relative to develop in traditional territories.	In addition to economic benefit agreements that the project proponent may conclude with an affected First Nation, the BC Ministry of Aboriginal Relations and Reconciliation pursued project-specific agreements with First Nations along the conceptual corridor of the pipeline.
Effective Environmental Management	First Nations requested clarity from the EAO on the process for implementing and enforcing Environmental Management Plans (EMPs), including the response protocol in the event of unforeseen circumstances and accidents.	The EAO required that a certified company representative responsible for environmental inspection be on-site during construction phases to ensure compliance with site-specific conditions and the implementation of the Environmental Management Plans (EMPs).

In addition to broad-based concerns with environmental assessment and permitting processes led by the EAO, the Assessment Report indicated where there was a high propensity for the construction of pipelines, compressor stations, access roads and construction camps to impact Aboriginal interests. Similar to the Assessment Report for the Coastal GasLink Pipeline Project, the EAO defined Aboriginal interests as practices relating to land and marine use, archaeology and cultural heritage, and Aboriginal title. *Table 4* presents a description of each category considered, potentially adverse impacts relative to that category, and the recommendations of the EAO in mitigating or managing those impacts.

Table 4. Summary of Probable Impacts to Aboriginal Interests.

Category	Description	Environmental Assessment Office Response
Hunting	First Nations identified the most commonly hunted species that may be impacted, which included moose, deer, elk, mountain goat, bear and mountain sheep. First Nations also communicated concern that local and regional study areas used for the assessment were unable to account for variability in wildlife populations and site-specific effects on wildlife.	The EAO concluded that the project as proposed will result in the loss, alteration and fragmentation of wildlife habitat, disturbances during construction, and increased mortality risk for wildlife. As an example, the residual effect to caribou is expected to be significant. With respect to traditional land use, the EAO concluded that there is potential for disruption to hunting and trapping during construction and operation and that this may result in changes to the local harvesting locales, disturbance to wildlife resources, increased public access to traditional hunting areas and increased harvesting pressure. In conclusion, the EAO anticipated that the current level of disturbance within the wildlife study area would increase from 9.3 percent to 11 percent. In its recommendations, the EAO stated that sufficient accommodation of Aboriginal interests with respect to hunting and trapping is achievable by implementing site-specific and species-specific mitigation strategies and management plans, continued consultation with First Nations during construction, completion of Traditional Land Use (TLU) studies prior to construction, collaboration on field studies, and requiring the retention of environmental inspectors during the course of construction.
Trapping	First Nations identified a number of species that may be impacted by project activities and in turn impede traditional trapping activities.	
Fishing	Although most of the terrestrial fishing sites identified by First Nations were not located within the conceptual corridor, First Nations communicated concern about impacts to freshwater fish, marine fish and fish habitat in both marine and freshwater environments. The EAO identified 62 fish species within the 344 to 464 watercourses crossed by the project as proposed. 9 of the 62 fish species are currently listed as species at risk.	The EAO concluded that the project as proposed will result in the alteration or loss of fish habitat, increased suspended sediment concentrations, increased mortality and injury to fish, temporary blockage of fish movements, increased fish mortality due to increased access, and disturbance of in-stream habitat due to increased access. With respect to traditional and currently land use, the EAO concluded that there is potential for limited access or increased public access to traditional fishing areas, which may result in changes to the local harvesting locales, broader ecological effects, and increased pressure on fish populations. In its assessment, the EAO concluded that the magnitude of adverse effects on fish and fish habitat were low at a regional and watershed level. Further, the EAO considered the effectiveness of the mitigation measures proposed to be high. These measures included a combination of site-specific mitigations, project design details relating to watercourse crossings, route location, and adherence to federal and provincial regulatory requirements.

Category	Description	Environmental Assessment Office Response
Gathering	First Nations indicated an interest to protect plants and berries used for subsistence and medicinal purposes.	The EAO concluded that it does not predict significant residual effects for ecological communities of concern or plant species of concern as identified by affected First Nations. In its recommendations, the EAO stated that sufficient accommodation of Aboriginal interests with respect to plants of concern is achievable by managing the footprint of construction activities, re-vegetating affected areas, continued consultation with First Nations during construction, and the full implementation of Environmental Management Plans (EMPs).
Marine Environment	The conceptual corridor includes two marine-based routing options. The Nasoga Route includes 103 kilometers of marine pipeline and the Kitsault Route includes 182 kilometers of marine pipeline.	The EAO concluded that residual effects in the marine environment are not expected to be significant. The primary residual effects are expected to be on near shore fish habitat, but there would be no significant adverse effects on fish and fish habitat or contamination of seafood. In its recommendations, the EAO concluded that the project proponent must develop 12 management plans under a more comprehensive Marine Environmental Management Plan that specifies mitigation measures to avoid and minimize effects to the marine environment.
Archaeology and Cultural Heritage	The Archaeological Impact Assessment (AIA) was not completed.	The EAO concluded that the magnitude of impacts on archeological and cultural heritage sites would be low, but there is potential to impact portions of archaeological sites of moderate or high value. At the time of preparing the report, neither the EAO nor the project proponent was able to fully quantify the specific number of archaeological sites that would be impacted by project activities due to a delay in completing the required archaeological impact assessment. It was noted that
Aboriginal Title	The EAO considered short-term and long-term impacts to Aboriginal title. In the short-term, it is anticipated that project activities may disrupt subsistence activities and access to resources for the purposes of hunting, trapping, fishing and plant gathering. In the long-term, right-of-way clearing, access roads and marine-based routing may disrupt trails, travelways and limit access for land and marine uses.	In its assessment of the proposed project timeline, the EAO concluded that the majority of impacts would be confined to a four-year construction period. In addition, as there is no contemplation of transferring land ownership to the project proponent, the majority of lands used for the pipeline would not be subject to exclusive use or occupation by the project proponent. Finally, and in the event a First Nation establishes title on land occupied by the pipeline, the First Nation would maintain authority over the use of surface areas. This authority would, however, be limited by provincial and federal statutes that regulate the safe operation of the pipeline in perpetuity.

Decision of the Ministers Responsible:

Based on the conclusions of the Assessment Report, the recommendations of the Executive Director of the EAO were submitted to the Ministers of Environment and Natural Gas Development on November 3, 2014. In its recommendations, the EAO made clear that it was satisfied with the depth of consultation conducted in coordination with the project proponent. The EAO also confirmed that it was satisfied with the full scope of measures proposed to avoid, mitigate or otherwise accommodate Aboriginal interests as were identified during consultation. As part this, the EAO recommended that mitigation measures be codified as conditions to be attached to the Environmental Assessment Certificate (EAC) if issued.

On the advice of the EAO, the Ministers of Environment and Natural Gas Development issued an EAC to Spectra Energy on November 25, 2014. In framing its decision, and consistent with the recommendations of the EAO, the Ministers responsible concluded that the consultation process provided for fair consideration of First Nations issues and interests. Although the decision of the Ministers responsible acknowledged that impacts to Aboriginal interests were probable, they were confident that the legal conditions attached to the EAC adequately addressed those impacts. Finally, and most importantly, the Ministers concluded that Aboriginal interests must be situated in the context of the broader economic and social benefits of the proposed project regionally and provincially. On this basis, the EAC was issued.

Analysis and Discussion

Commentary on the Scope and Content of Consultation:

In reviewing the three Aboriginal Consultation Reports and Application submitted by Spectra Energy and the Assessment Report prepared by the EAO, the action situation, or the interactions amongst actors, is most appropriately characterized by its technical complexity. The amount of information collected, tracked and disseminated during the course of consultations with First Nations was immense. From a procedural perspective, it is clear that the Crown, whether directly or indirectly in coordination with the project proponent, conducted consultation in a manner consistent with the procedural dimensions of the duty as described in constitutional-choice rules. The Crown, as represented by the EAO, provided information to First Nations at each phase of the assessment process and provided time and resources for First Nations to consider the contents of that information as it related to site-specific interests in the project.

Within the action situation, the primary mechanism influencing the scope and content of consultation is the Order issued by the EAO under Section 11 of the *Environmental Assessment Act* (2002). As was described in this case study, the Order is the primary instrument used by the EAO to identify First Nations whose asserted traditional territories may be affected by project activities and define the scope and content of consultation to be conducted with those First Nations. In effect, the Order is a policy instrument whereby the complexity of constitutional-choice rules in the form of case law and operational rules in the form of provincial policy and guidelines converge as a set of rules to be followed by the project proponent in the assessment process.

In assessing the contents of the Order issued by the EAO, it is evidenced that the determination of the scope and content of consultation is influenced by two institutional variables. First, it is clear that the scope and content of consultation reflects the policy preferences described in the *Updated Procedures for Meeting Legal Obligations When Consulting First Nations* (2010). In many ways, the *Updated Procedures* (2010) accentuates the procedural dimensions of the duty. The Order, therefore, defined consultation as a process of information sharing whereby potentially affected First Nations would receive, review and submit comments to the EAO within prescribed timelines (Environmental Assessment Office, 2013c). It does not describe how First Nations input will influence decisions of the Crown apart from providing a conduit whereby Aboriginal interests can be isolated, tracked and addressed on a site-specific basis. The Order also reinforces the policy preference of the Crown to delegate procedural components of the duty to the project proponent. Consistent with the *Updated Procedures* (2010), the Order reduces the role of the Crown to an accountability and adjudication function whereby the Crown monitors consultation conducted by the project proponent and collects information in support of its decision-making.

The second institutional variable influencing the scope and content of consultation is the structure of the environmental assessment process as defined by provincial regulations and guidelines. As mandated by the Order, Crown consultation with First Nations must move with the timelines and phases prescribed by the *Prescribed Time Limits Regulation* under the *Environmental Assessment Act* (2002). As evidenced in the table citing common concerns, this can apply considerable pressure on those First Nations tasked with responding to multiple projects under review within traditional

territories. In addition to capacity challenges, the full consideration of Aboriginal interests can be constrained by the methodology for assessing key values. As the Order described, a key part of the consultation process was providing opportunity for First Nations to comment on the list of Valued Components, which define specific environmental, social, economic and cultural values to be considered in the assessment. The Order does not, however, establish a clear connection between the identification of Aboriginal interests and the list of Valued Components. The result is a consultation process whereby First Nations interests are viewed simultaneously as highly contextual, or contingent on access to specific sites for subsistence activities, or exceptionally broad as First Nations social, economic and cultural interests are absorbed into a broader assessment of values relevant to non-Aboriginal stakeholders. Fundamentally, the assessment process as defined by regulations and guidelines, is unable to fully account for non-market values and provides minimal differentiation between Aboriginal and non-Aboriginal perspectives.

Finally, it is informative to consider the depth of consultation conducted, directly or indirectly, by the Crown. In reviewing the three Aboriginal Consultation Reports and Application submitted by Spectra Energy and the Assessment Report prepared by the EAO, it is clear that the project proponent took significant steps to fulfill its procedural duties as delegated by the Crown. There are three indicators that present evidence of this. First, in response to commonly cited concerns, Spectra Energy proactively provided initial or full capacity funding to 15 of the 18 First Nations listed under Schedule B of the Order for the purposes of alleviating cost pressures associated with participation in the assessment process. Second, and as a method to identify and incorporate site-specific

Aboriginal interests into the design of the project, Spectra Energy provided support for 16 of 18 First Nations listed under Schedule B of the Order to participate in site-specific field studies. Third, and most importantly, Spectra Energy took significant steps to meet with First Nations listed under both Schedules B and C on multiple occasions[30].

It is therefore argued that the Order issued under Section 11 serves as a strong incentive for the project proponent to consult First Nations as a means to reduce its exposure to regulatory risks, including the prospect of a denied application due to its failure to fulfill consultation duties delegated by the EAO. While consultation conducted by the project proponent is only one part of the process, the depth of discussions with First Nations should be viewed positively in terms of space created for the project proponent to secure a social license for the project.

Commentary on Accommodation:

While the consultation process was appropriate from a procedural perspective, it is critical to also assess accommodation measures resulting from consultation. As described, the Order issued under Section 11 mandated representatives of the EAO and the project proponent to identify Aboriginal interests and, where appropriate, propose measures to avoid, mitigate, address or otherwise accommodate potential adverse impacts on the interest. It is important to note, however, that the Order did not define the substance of accommodation. In reviewing the recommendations made by the EAO, it is clear that accommodation is primarily influenced by the *Updated Procedures* (2010), which describes accommodation options as mitigation, avoidance, proposal modification,

[30] As demonstrated in *Appendix B*, Spectra Energy met with 11 of the 18 First Nations listed under Schedule B of the Order a minimum of 10 times during the pre-application and application review phases of the assessment process.

land protection measures and impact monitoring. The result, as described in the recommendations made by the EAO, is hundreds of small, site-specific accommodations in the form of environmental management and mitigation measures or modifications in project design. These measures or modifications are described as a direct response to input or information provided by First Nations. These accommodations are based on an assumption that minimizing environmental impact will enable First Nations to exercise constitutionally protected rights in a manner that is unimpeded or only marginally impacted.

These mitigation measures must be understood as meaningful attempts to avoid, mitigate or otherwise accommodate adverse impacts to Aboriginal interests as directed by the Order issued under Section 11. It is, however, important to acknowledge the limitations of the accommodation measures proposed. First, as defined by the *Updated Procedures* (2010), administrative decision-makers representing the Crown do not maintain the authority to offer accommodation in the form of financial compensation. As a result, and consistent with the mandate of the EAO as defined by the *Environmental Assessment Act* (2002), it is evidenced that accommodations take the form of site-specific environmental mitigation measures or project modifications for the purposes of protecting valued environmental components. The limited availability of accommodation options to administrative decision-makers is further reinforced when considering the limitation of the environmental assessment process itself. As was described above, the methodology of environmental assessment is defined by *Guideline for the Selection of Valued Components and Assessment of Potential Effects* (2013), which serves as the standard operating procedure for identifying components of scientific, ecological,

economic, social, cultural archaeological or historical value. This guide does not, however, account for First Nations perspectives on the selection of valued components. In this context, the measurement of valued components is, at times, limited in its ability to account for impacts to Aboriginal interests not defined in purely scientific terms. When taken together, there is no means or methodology to assess the extent to which project activities will diminish the value of lands and resources that may be subject to strong assertions of Aboriginal title.

In its assessment, the EAO identified three First Nations with strong *prima facie* claims to Aboriginal title within the conceptual corridor, which included Gitanyow First Nation, Lax Kw'alaams First Nation and Metlakatla First Nation. It is interesting to note that in no case, including those cases where *prima facie* claims to Aboriginal title were defined as strong, were impacts to Aboriginal interests categorized as moderate or serious. Without discussing the environmental modeling methodologies used by the EAO in determining the extent of the impact to an Aboriginal interest, it is evident that there are two primary reasons for the categorization of impact as low. First, as defined by constitutional-choice rules, the duty to consult and accommodate only applies to the activity as proposed in present. It is not a remedy for past or incremental infringements to Aboriginal interests. Second, and as reinforced by operational rules, the environmental assessment process is not designed to account for more intrinsic interests arising from Aboriginal assertions.

Conclusion and Key Findings

Scope and Content of Consultation:

In both cases studies, it is clear that the depth of consultation was commensurate with the strength of the *prima facie* claim. At minimum, First Nations and Tribal Councils potentially affected by project activities received notification as the assessment process proceeded. Where a more comprehensive consultation process was owed, First Nations were provided opportunity to comment on key components of the environmental assessment, including the selection of Valued Components (VC), Information Application Requirements (IAR), the Application and the Assessment Report. Additionally, where First Nations cited concerns with the project design, it is clear in both case studies that the project proponents took steps to include First Nations in field studies and discussions related to route selection. While the content of consultation varied due to the diverse interests and issues that arise in the context of a linear pipeline project, the scope and content of consultation was procedurally sufficient to satisfy the duty to consult.

It is, however, important to consider the scope and content of consultation relative to the research question posed at the beginning of this thesis. The process of consultation is, as defined by operational rules, a function of information sharing to support the affected party to prepare its view on the matter and, as may be appropriate, for the affected party to present those views for full and fair consideration by the decision-maker. From this perspective, and comparable to the conclusion of Lambrecht (2013), the practical integration of consultation within an environmental assessment process is

acceptable on the basis that a robust regulatory review can adequately anticipate impacts on Aboriginal interests.

There is, however, reason for caution in accepting this conclusion in full. A continued challenge for consultation in its practical application is the uncertainty associated with contested Aboriginal claims. The case law advocates for a principle-based approach to consultation on the basis that Aboriginal assertions are highly contextual. To describe this differently, constitutional-choice rules advance a more flexible framework whereby the Crown uses contextual analysis to determine the scope and content of consultation owed to an individual First Nation on a claims-specific basis. In the context of constructing a pipeline, where project activities will affect multiple First Nations and Tribal Councils, a high degree of uncertainty and complexity arises due to the diversity of unproven and proven Aboriginal rights and title. In response, the EAO has devised a more formulaic approach whereby the scope and content of consultation is determined on the basis of geographic proximity to the proposed pipeline as opposed to the anticipated impact of project activities on particular Aboriginal assertions of rights and title.

While the approach employed by the EAO ensures First Nations and Tribal Councils will not be excluded from the process, it does present evidence of defensive consultation as has been described by Ritchie (2013). As demonstrated by patterns of interaction in both cases, it is clear that administrative decision-makers, confronted by uncertainty with respect to Aboriginal clams, direct the project proponents to conduct consultation in a manner commensurate with strong assertions and serious impacts without fully contemplating contextual factors. As an example, and as advocated by the

EAO in the *Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process* (2013), the project proponents in the case study, as a matter of best practice, default to traditional use studies and socio-economic studies as the preferred tool to define Aboriginal interests in relation to a project. In many cases, however, these studies were not completed within the prescribed timelines of the process and were not provided consideration as part of the final decision. Additionally, there is minimal evidence to support a conclusion that completing these studies provide clarity to Aboriginal claims relative to the time and resources required to complete them. This is not to devalue this effort as a collaborative exercise or support the conclusion that a framework for defining Aboriginal assertions is not required. The risk is, as has been presented, that the EAO, principally concerned with managing its legal liabilities, consistently mandates deep consultation without due consideration of the real interests of First Nations in particular contexts. The result, as cited by First Nations, is consultation fatigue where First Nations participate in technically and administratively onerous processes without certainty that interests will be provided protection.

Accommodation of Aboriginal Interests:

In both case studies, the consultation process revealed a duty to accommodate Aboriginal assertions. In reviewing patterns of interaction within the action situation, accommodation measures most predominantly take the form of site-specific environmental mitigation measures or modifications in project design. In both case studies, the result is hundreds of small, site-specific accommodations intended to reduce residual effects on local environments. As has been described in the case studies, these

technical measures and modifications must be understood as meaningful attempts to manage environmental pressures where it is understood that First Nations ability to exercise constitutionally protected rights is contingent on the availability of and access to resources of significance. On this basis, and trusting that these measures and modifications are technically sound, it is concluded that the environmental assessment process does provide a degree of interim protection to Aboriginal interests in the form of environment protections.

The use of environmental mitigation measures as accommodation, however, is not without its limitations. In many respects, accommodation in this form is a direct reflection of the ways in which the EAO defines Aboriginal interests. As defined by the Crown in the *Updated Procedures* (2010), Aboriginal interests are only defined in terms of practices, customs and traditions integral to the distinctive culture of First Nations. While this definition reflects the core tenets of constitutional-choice rules defined in the decision of *Van der Peet* (1996), it confines Aboriginal assertions to a set of subsistence activities. This precludes broader definitions of Aboriginal interests that relate to the "inescapable economic component" of Aboriginal title referenced in Delgamuukw (1997). The challenge in this context is two-fold. First, the methodology associated with the selection of valued components for the environmental assessment is not designed to account for intrinsic or unique values in lands and resources that may form the basis of an Aboriginal assertion. Second, and as an extension of the first dilemma, it is difficult to determine an appropriate compensation value that is commensurate with the restriction of an existing Aboriginal right or a future use of the land base that is subject to ongoing negotiation and litigation between the Crown and First Nations. In the absence of a

formula or framework for calculating a market-based value commensurate with the infringement or the overall devaluation of the land interest, the full articulation and advancement of the assertion by First Nations in its interactions with the Crown is limited.

The tendency to define Aboriginal rights and title only in terms of subsistence activities in the case studies presented is subsequently reinforced as the standard operating procedure by the limited mandate of the EAO. As per collective-choice rules, the EAO is not a body for determining rights, nor does the EAO have the authority to negotiate accommodation agreements with affected First Nations. As demonstrated in both case studies, the only policy tool available to the EAO in accommodating Aboriginal assertions is recommending conditions of approval in the form of environmental mitigation or management measures and modification in project design. In cases where the EAO is not supported by those representatives of the Crown with mandates to negotiate with affected First Nations, there is no mechanism for the Crown and First Nations to discuss or deliberate the limited characterization of Aboriginal interests as part of the process.

Although accommodation within the environmental assessment process is limited, it is important to acknowledge accommodation in alternative forms. In both case studies, the Crown, as represented by the BC Ministry of Aboriginal Relations and Reconciliation, had presented financial compensation packages to those First Nations listed under Schedule B of the Orders issued under Section 11. Although these agreements are not intended to be financial compensation commensurate with the seriousness of the impact relative to Aboriginal interests, revenue sharing with First

Nations must be understood as a constructive development in the context of consultation conducted by the Crown. In addition to revenue sharing, the Ministry of Aboriginal Relations and Reconciliation also introduced the Liquefied Natural Gas Environmental Stewardship Initiative (LNGESI) program as a measure to support environmental monitoring and environmental enhancement in collaboration with First Nations affected by pipeline projects. In the decisions of the Ministers responsible, this program is framed as a key measure to address First Nations issues and interests with respect to environmental protection and performance.

Consultation and Accommodation as a Discipline on Crown Decision-Making:

In theory, the probable infringement of Aboriginal rights and title, whether temporary or permanent, poses a liability for administrative decision-makers in two forms. First, there is an ever-present risk that the scope and content of consultation and accommodation is not fulfilled in a manner commensurate with the strength of a *prima facie* claim or the initial assessment of the *prima facie* claim is inaccurate. If not remedied, there is a real risk that First Nations or Tribal Councils will file for a judicial review as a means to assess the adequacy of consultation. As an example, in December 2014, the Carrier Sekani Tribal Council filed for a judicial review of the decision to issue an Environmental Assessment Certificate (EAC) to Coastal GasLink Pipeline Ltd.

Second, where administrative decision-makers do not bear the costs of a legal or financial liability directly, the only cost is political. As an example, the *2014-2015 – 2016-2017 Summary Service Plan for the BC Ministry of Environment* sets a target for the EAO to complete 100 percent of environmental assessments within the 180-day

review period pursuant to the *Prescribed Time Limits Regulation* (Province of British Columbia, 2014). In this case, failure to fulfill the duty to consult in a manner consistent with provincial standards can create costly delays in the assessment and approval process. In a political environment where the expedient establishment of an export industry is contingent on the creation of costly infrastructure, internal political costs provide strong incentive to conduct consultation in a manner that fully discharges legal liabilities. It is evident that this incentive exists in both case studies, where decisions of the Project Assessment Lead are susceptible to a high degree of scrutiny by the Executive Director of the EAO who maintains a much closer connection to the political process due to required referral of recommendations to the Ministers of Environment and Natural Gas Development as part of the project approval process.

In the interests of limiting exposure to legal action, it is evident that the EAO directed and coordinated a deep level of consultation with First Nations whose traditional territories were within 2 kilometers of the conceptual corridor. When confronted with uncertainty in terms of the potential impact to Aboriginal interests, there is incentive for administrative decision-makers to conduct a deep level of consultation as a precautionary measure when confronted by the costs of litigation both financially and politically. In many ways, the threat of litigation serves as a strong incentive for the Crown, or the project proponent as directed, to begin building a relationship with First Nations as a means to ascertain issues and interests that may require accommodation. As demonstrated in the case studies, the project proponents met with First Nations multiple times and provided opportunity to comment on each component of the assessment process.

However, when assessed from an alternative perspective, the case studies demonstrate that this acts as an incentive for the Crown to arbitrarily download large volumes of technical information on First Nations that may or may not have the required capacity to review and appropriately respond. While the provision of capacity funding was prioritized in both case studies, there is a real risk of an information asymmetry where power imbalances endure due to the high costs of reviewing project components in terms of time and technical resources. The most commonly cited concern in the assessment process by First Nations was capacity constraints. In this context, it is concluded that First Nations are not able to consider and fully cost project impacts, which, in turn, compromises First Nations capacity to enter into a fully informed consultation with the Crown in respect of impacts to Aboriginal interests, potential mitigation measures, and commensurate levels of compensation.

On the Question of Reconciliation:

Finally, I return to the question posed at the beginning of this thesis. In consideration of the case studies, does the legal doctrine of the duty to consult create incentives for the Crown and First Nations to enter into negotiations as an alternative to costly litigation? The simple answer is no. This is not to conclude that the implementation of the duty to consult does not provide a measure of interim protection to Aboriginal interests in the absence of settlement agreements with the Crown. It is clear, however, that the duty to consult does not afford First Nations a more advantageous position in Crown decision-making. The substantive result of consultation in most cases is the implementation of hundreds, if not thousands, of minor adjustments in project

design intended to avoid or minimize restrictions on Aboriginal rights. There is a real risk that the duty to consult, when implemented in a manner that discharges minimum legal liabilities, serves as instrument of justified infringement that is unable to slow the steady erosion of lands and resources. When implemented correctly, the duty to consult provides minimal incentive for the Crown to address issues related to Aboriginal rights and title that inevitably arise. The result is, as described by many, a death by a thousand cuts as lands and resources are repeatedly diminished with minimal incentive to address the underlying claims.

Cases Cited:

Beckman v. Little Salmon/Carmacks First Nation, 3 SCR 103 (2010). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7896/index.do.

Calder v. Attorney-General of British Columbia, SCR 313 (1973). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do.

Delgamuukw v. British Columbia, 3 SCR 1010 (1997). Retrieved from https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do.

Guerin v. The Queen, 2 SCR 335 (1984). Retrieved from https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do.

Haida Nation v. British Columbia (Minister of Forests), 3 SCR 511 (2004). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do?r=AAAAAQAFaGFpZGEB.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 3 SCR 388 (2005). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2251/index.do?r=AAAAAQAHZmlyZWFybQAAAAAB.

R. v. Gladstone, 2 SCR 723 (1996). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1409/index.do.

R. v. Sparrow, 1 SCR 1075 (1990). Retrieved from https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do.

R. v. Van der Peet, 2 SCR 507 (1996). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1407/index.do.

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2 SCR 650 (2010). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7885/index.do.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 3 SCR 550 (2004). Retrieved from http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2190/index.do.

Tsilhqot'in Nation v. British Columbia, 2 SCR 256 (2014). Retrieved from https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

Bibliography:

Aligica, P.D., & Boettke, P. (2011). The Two Social Philosophies of Ostroms' Institutionalism. *The Policy Studies Journal, 39*(1), 29-49.

Bankes, N. (1998). Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights. *University of British Columbia Law Review, 32*(2), 317-351.

Bell, C. (1998). Canadian Supreme Court: Delgamuukw V. British Columbia. *Internal Legal Matters, 37*, 261-342.

Bird, B. (2011). Federal Power and Federal Duty: Reconciling Sections 91(24) and 35(1) of the Canadian Constitution. *Appeal Review of Current Law and Law Reform, 16*, 3-14.

Blomquist, W., & deLeon, P. (2011). The Design and Promise of the Institutional Analysis and Development Framework. *The Policy Studies Journal, 39*(1), 1-6.

Booth, A., & Skelton, N. (2011a). Improving First Nations' participation in environmental assessment processes: recommendations from the field. *Impact Assessment and Project Appraisal, 29*(1), 49-58.

Booth, A., & Skelton, N. (2011b). Industry and government perspectives on First Nations' participation in the British Columbia environmental assessment process. *Environmental Impact Assessment Review, 31*, 216-225.

Borrows, J. (1994). Constitutional Law from a First Nations Perspective: Self-Government and the Royal Proclamation. *University of British Columbia Law Review, 28*(1), 1-48.

Borrows, J. (1997). The Trickster: Integral to a Distinctive Culture. *Constitutional Forum, 8*(2), 27-32.

Borrows, J. (1998). Frozen Rights in Canada: Constitutional Interpretation and the Trickster. *American Indian Law Review, 22*(1), 37-64.

Borrows, J. (1999). Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia. *Osgoode Hall Law Journal, 37*(3), 537-596.

Borrows, J., & Rotman, L. (1998). The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference? *Alberta Law Review, 36*(1), 9-45.

Bryant, M. (1993). Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law. *University of British Columbia Law Review, 27*(1), 19-49.

Bushouse, B. (2011). Governance Structures: Using IAD to Understand Variation in Service Delivery for Club Goods with Information Asymmetry. *The Policy Studies Journal, 39*(1), 105-119.

Carlson, K. (2005). Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title. *Arizona Journal of International & Comparative Law, 22*(3), 449-503.

Chong, J., & Simikian, M. (2014). Shale Gas in Canada: Resource Potential, Current Production and Economic Implications (Publication No. 2014-08-E). Ottawa, Ontario: Economics, Resources and International Affairs Division, Parliamentary Information and Research Service. Retrieved from http://www.parl.gc.ca/Content/LOP/ResearchPublications/2014-08-e.htm.

Christie, G. (2001). Delgamuukw and the Protection of Aboriginal Land Interests. *Ottawa Law Review, 32*(1), 85-115.

Christie, G. (2003). Law, Theory and Aboriginal Peoples. *Indigenous Law Journal, 2*, 67-115.

Christie, G. (2005). A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation. *Windsor Yearbook of Access to Justice, 23*(1), 17-53.

Christie, G. (2006). Developing Case Law: The Future of Consultation and Accommodation. *University of British Columbia Law Review, 39*(1), 139-184.

Coastal GasLink Pipeline Ltd. (2012). *Coastal GasLink Pipeline Project: Project Description*. Calgary, Alberta.

Coastal GasLink Pipeline Ltd. (2013a). *Coastal GasLink Pipeline Project: Aboriginal Consultation Plan*. Calgary, Alberta.

Coastal GasLink Pipeline Ltd. (2013b). *Coastal GasLink Pipeline Project: Aboriginal Consultation Report 1*. Calgary, Alberta.

Coastal GasLink Pipeline Ltd. (2013c). *Selection of Valued Components*. Calgary, Alberta.

Coastal GasLink Pipeline Ltd. (2014a). *Application for an Environmental Assessment Certificate*. Calgary, Alberta.

Coastal GasLink Pipeline Ltd. (2014b). *Coastal GasLink Pipeline Project: Aboriginal Consultation Report 2*. Calgary, Alberta.

Coastal GasLink Pipeline Ltd. (2014c). *Coastal GasLink Pipeline Project: Aboriginal Consultation Report 3*. Calgary, Alberta.

Coates, K. (2008). *The Indian Act and the Future of Aboriginal Governance in Canada*. Vancouver, British Columbia: National Centre for First Nations Governance.

Coates, K., & Poelzer, G. (2011). Defining Indigenous Space: The Constitutional Development of Aboriginal Property and Resource Rights in Canada. *Georgetown Journal of International Affairs, 11*, 7-16.

Constitutional Conference, Part V of the *Constitution Act*, *1982* being Schedule B to the *Canada Act 1982* (U.K.), 1983.

Coyle, M. (2003). Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples. *Alberta Law Review, 40*(4), 841-866.

Crawford, S., & Ostrom, E. (1995). A Grammar of Institutions. *American Political Science Review, 89*(3), 582-600.

Curran, D., & M'Gonigle, M. (1999). Aboriginal Forestry: Community Management as Opportunity and Imperative. *Osgoode Hall Law Journal, 37*(4), 711-774.

Dahl, R. (1961). The Behavioural Approach in Political Science: Epitaph for a Monument to a Successful Protest. *American Political Science Review, 55*(4), 763-772.

Dequech, D. (2001). Bounded Rationality, Institutions and Uncertainty. *Journal of Economic Issues, 35*(4), 911-929.

Doerr, A. (1997). Building new orders of government – the future of aboriginal self-government. *Future of Aboriginal Self-Government*, 274-289.

Dufraimont, L. (2010). From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada. *University of Toronto Faculty of Law Review, 58*(1), 1-30.

Environmental Assessment Office. (2013a). *Guide to Involving Proponents When Consulting First Nations in the Environmental Assessment Process*. Victoria, British Columbia.

Environmental Assessment Office. (2013b). *Schedule A to Order under Section 11 of the Act: Scope, Procedures and Methods for the Environmental Assessment of the Proposed Coastal GasLink Pipeline Project*. Victoria, British Columbia.

Environmental Assessment Office. (2013c). *Schedule A to Order under Section 11 of the Act: Scope, Procedures and Methods for the Environmental Assessment of the Proposed Natural Gas Transmission System – Northeast British Columbia to the Prince Rupert Area Project*. Victoria, British Columbia.

Environmental Assessment Office. (2014a). *Coastal GasLink Pipeline Project Assessment Report*. Victoria, British Columbia.

Environmental Assessment Office. (2014b). *Environmental Assessment Certificate # E14-03*. Victoria, British Columbia.

Environmental Assessment Office. (2014c). *Reasons for Ministers' Decision – Coastal GasLink Pipeline Project*. Victoria, British Columbia.

Environmental Assessment Office (2014d). *Reasons for Ministers' Decision – Westcoast Connector Gas Transmission Project.* Victoria, British Columbia.

Environmental Assessment Office. (2014e). *Recommendations of the Executive Director – Coastal GasLink Pipeline Project*. Victoria, British Columbia.

Environmental Assessment Office (2014f). *Recommendations of the Executive Director – Westcoast Connector Gas Transmission Project.* Victoria, British Columbia.

Environmental Assessment Office (2014g). *Westcoast Connector Gas Transmission Project Assessment Report*. Victoria, British Columbia.

Fidler, C., & Hitch, M. (2007). Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice. *Environments Journal Volume, 35*(2), 49-69.

First Nations Leadership Council. (2013). *Advancing an Indigenous Framework for Consultation and Accommodation in BC*. West Vancouver, British Columbia.

Fogarassy, T., & Litton, K. (2005). Consultation with Aboriginal Peoples: Impacts on the Petroleum Industry. *Alberta Law Review, 42*(1), 41-73.

Godlewska, C., & Webber, J. (2003). The Calder Decision, Aboriginal Title, Treaties and the Nisga'a. In H. Foster & H. Raven (Eds.), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (pp. 1-33). Vancouver, British Columbia: University of British Columbia Press.

Gogal, S., Riegert, R., & Jamieson, J. (2006). Aboriginal Impact and Benefit Agreements: Practical Considerations. *Alberta Law Review, 43*(1), 129-157.

Goodin, R. (1996). Institutions and their Design. In R. Goodin (Ed.), *The Theory of Institutional Design* (p. 1-53). Cambridge, United Kingdom: Cambridge University Press.

Grant Thornton. (2013). Employment Impact Review. Victoria, British Columbia: Ministry of Energy, Mines and Natural Gas. Retrieved from http://www.empr.gov.bc.ca/OG/Documents/Grant_Thornton_LNG_Employment_Impacts.pdf.

Hall, P., & Taylor, R. (1996). Political Science and the Three New Institutionalisms. *Political Studies, 44*, 936-957.

Heikkila, T., Schlager, E., & Davis, M. (2011). The Role of Cross-Scale Institutional Linkages in Common Pool Resource Management: Assessing Interstate River Compacts. *The Policy Studies Journal, 39*(1), 121-145.

Henderson, J. (2006). Aboriginal and Treaty Rights and Tribunals. *Canadian Journal of Administrative Law & Practice, 19*(1), 1-37.

Hurley, M. (2000). *The Crown's Fiduciary Relationship with Aboriginal Peoples*. Ottawa, Ontario: Library of Parliament.

Imai, S., & Stacey, A. (2013). Moving Backwards: Does the Lack of Duty to Consult Create the Right to Infringe Aboriginal and Treaty Rights? *Comparative Research in Law & Political Economy, No. 13*. Retrieved from http://digitalcommons.osgoode.yorku.ca/clpe.

Immergut, E. (1998). The Theoretical Core of the New Institutionalism. *Politics Society, 26*(1), 5-34.

Imperial, M. (1999). Institutional Analysis and Ecosystem-Based Management: The Institutional Analysis and Development Framework. *Environmental Management, 24*(4), 449-465.

International Energy Agency. (2015). Medium-Term Market Report: Market Analysis and Forecasts to 2020. Paris, France: International Energy Agency. Retrieved from http://www.iea.org/Textbase/npsum/MTGMR2015SUM.pdf.

Isaac, T., & Knox, A. (2004). Canadian Aboriginal Law: Creating Certainty in Resource Development. *University of New Brunswick Law Journal, 53*, 3-42.

Isaac, T., & Knox, A. (2005). Canadian Aboriginal Law: Creating Certainty in Resource Development. *Journal of Energy & Natural Resources Law, 23*(4), 427-464.

Junger, R., & Robinson, N. (2011). Administrative Law Remedies in the Aboriginal Law Context. *Canadian Journal of Administrative Law & Practice, 25*, 56-77.

Kelly, J., & Murphy, M. (2001). Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada's Legal Rights Jurisprudence. *Canadian Journal of Law and Society, 16*, 3-27.

Koontz, T. (2003). *An Introduction to the Institutional Analysis and Development (IAD) Framework for Forest Management Research*. Paper presented at First Nations And Sustainable Forestry: Institutional Conditions for Success, Vancouver, British Columbia. Columbus, Ohio: The Ohio State University School of Natural Resources.

KPMG International. (2011). *Shale Gas – A Global Perspective*. Retrieved from http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/shale-gas-global-perspective.pdf.

Kymlicka, K. (1995). *Multicultural Citizenship: A Liberal Theory of Minority Rights.* Oxford: Clarendon Press.

Lambert, D. (1998). Van Der Peet and Delgamuukw: Ten Unresolved Issues. *University of British Columbia Law Review, 32*(2), 249-270.

Lawrence, S., & Macklem, P. (2000). From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult. *The Canadian Bar Review, 79*, 252-279.

Lyon, N. (1988). An Essay on Constitutional Interpretation. *Osgoode Hall Law Journal*, 26(1), 97-126.

Malloy, J. (2001). Double Identities: Aboriginal Policy Agencies in Ontario and British Columbia. *Canadian Journal of Political Science, 34*(1), 131-155.

March J., & Olsen J. (2006). Elaborating the New Institutionalism. In R. Rhodes, S. Binder & B. Rockman (Eds.), *The Oxford Handbook of Political Institutions* (3-22). New York, NewYork: Oxford University Press.

McGinnis, M. (2011). An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework. *The Policy Studies Journal, 39*(1), 169-183.

McGinnis, M., & Ostrom, E. (2010). Reflections on Vincent Ostrom, Public Administration, and Polycentricity. *Public Administration Review, 72*(1), 15-25.

McGinnis, M., & Walker, J. (2010). Foundations of the Ostrom workshop: institutional analysis, polycentricity, and self-governance of the commons. *Public Choice, 143*, 293-301.

McFarlane, P. (1993). *Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement*. Toronto, Ontario: Between the Lines.

McNeil, K. (1982). The Constitutional Rights of the Aboriginal Peoples of Canada. *Supreme Court Law Review, 4,* 255-265.

McNeil, K. (1997). Aboriginal Title and Aboriginal Rights: What's the Connection? *Alberta Law Review, 36*(1), 117-148.

McNeil, K. (2005). Aboriginal Rights, Resource Development, and the source of the Provincial Duty to Consult in Haida Nation and Taku River. *Supreme Court Law Review, 29*(2), 447-460.

McNeil, K. (2006). Aboriginal Title and the Supreme Court: What's Happening? *Saskatchewan Law Review, 69*, 281-308.

McNeil, K. (2010). Reconciliation and Third-Party Interests: Tsilhqot'in Nation v. British Columbia. *Indigenous Law Journal, 8*(1), 7-25.

Metcalf, C. (2008). Compensation as Discipline in the Justified Limitation of Aboriginal Rights: The Case of Forest Exploitation. *Queen's Law Journal, 33*, 385-452.

Morellato, M. (2009). *Crown Consultation Policies and Practices Across Canada*. Ottawa, Ontario: National Centre for First Nations Governance.

Mullan, D. (2008). The Duty to Consult Aboriginal Peoples – The Canadian Example. *Canadian Journal of Administrative Law & Practice, 22*, 107-131.

Mullan, D. (2010). The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog? *Canadian Journal of Administrative Law & Practice, 24*, 233-260.

Murphy, M. (2004). Looking Forward without Looking Back; Jean Chretien's Legacy for Aboriginal-State Relations. *Review of Constitutional Studies, 9*(1), 151-169.

Nahwegahbow, D.C., & Richmond, D.O. (2007-2008). Impact of the 1982 Constitution on First Nations: Reflections on Section 35: Whether the *Constitution Act* has made a difference for First Nations? *National Journal of Constitutional Law, 23*, 153-171.

National Energy Board. (2013). Energy Briefing Note: The Ultimate Potential for Unconventional Petroleum from the Montney Formation of British Columbia and Alberta. Ottawa, Ontario: National Energy Board. Retrieved from http://www.empr.gov.bc.ca/OG/Documents/Report%20-%20The%20Ultimate%20Potential%20for%20Unconventional%20Petroleum%20from%20the%20Montney%20Formation%20of%20British%20Columbia%20and%20Alberta.pdf.

Newman, D., & Schweitzer, D. (2008). Between Reconciliation and the Rule(s) of Law: Tsilhqot'in Nation. v. British Columbia. *University of British Columbia Law Review, 41*(2), 249-276.

Oakerson, R., & Parks, R. (2011). The Study of Local Public Economies: Multi-organization, Multi-level Institutional Analysis and Development. *The Policy Studies Journal, 39*(1), 147-167.

Ochman, P. (2008). Recent Developments in Canadian Aboriginal Law: Overview of Case Law and of Certain Principles of Aboriginal Law. *International Community Law Review, 10*, 319-350.

Ostrom, E. (2005). *Understanding Institutional Diversity*. Princeton, New Jersey: Princeton University Press.

Ostrom, E. (2007). Institutional Rational Choice: An Assessment of the Institutional Analysis and Development Framework. In P. Sabatier (Ed.), *Theories of the Policy Process* (p. 21-64). Boulder, Colorado: Westview Press.

Ostrom, E. (2011). Background on the Institutional Analysis and Development Framework. *The Policy Studies Journal, 39*(1), 7-27.

Pentney, W. (1988). The Rights of Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee. *University of British Columbia Law Review, 22*.

Polski, M. & Ostrom, E. (1999). *An Institutional Framework for Policy Analysis and Design*. Paper presented at Political Theory and Policy Analysis, Bloomington, Indiana. Indiana University Department of Political Science.

Promislow, J. (2013). Irreconcilable? The Duty to Consult and Administrative Decision Makers. *Constitutional Forum, 22*(1), 63-79.

Province of British Columbia. (2010). *Updated Procedures for Meeting Legal Obligations When Consulting First Nations*. Victoria, British Columbia.

Province of British Columbia (2014a). Ministry of Aboriginal Relations and Reconciliation 2013-2014 Annual Service Plan Report. Victoria, British Columbia: Province of British Columbia. Retrieved from http://www.bcbudget.gov.bc.ca/2014/sp/pdf/ministry/arr.pdf.

Province of British Columbia. (2014b). Ministry of Natural Gas Development and Minister Responsible for Housing 2013-2014 Annual Service Plan Report. Victoria, British Columbia: Province of British Columbia. Retrieved from http://bcbudget.gov.bc.ca/Annual_Reports/2013_2014/pdf/ministry/mngd.pdf.

Reddekopp, N. (2013). Theory and Practice in the Government of Alberta's Consultation Policy. *Constitutional Forum, 22*(1), 47-62.

Ritchie, L. (2013). Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation. *University of British Columbia Law Review, 46*(2), 398-438.

Russell, P. (1982). The effect of a Charter of Rights on the policy-making role of Canadian courts. *Canadian Public Administration, 25*(1), 1-33.

Sanderson, C., Bergner, K. & Jones, M. (2012). The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty. *Alberta Law Review, 49*, 821-854.

Schmidt, V. (2008). Discursive Institutionalism: The Explanatory Power of Ideas and Discourse. *Annual Review of Political Science, 11*, 303-326.

Schmidt, V. (2010). Taking Ideas and Discourse Seriously: Explaining Change through Discursive Institutionalism as the Fourth 'New Institutionalism'. *European Political Science Review, 2*(1), 1-25.

Shepsle, K. (2006). Rational Choice Institutionalism. In R. Rhodes, S. Binder & B. Rockman (Eds.), *The Oxford Handbook of Political Institutions* (p. 23-38). New York, New York: Oxford University Press.

Slattery, B. (1984). The Hidden Constitution: Aboriginal Rights in Canada. *The American Journal of Comparative Law,* 32(2), 361-391.

Slattery, B. (1987). Understanding Aboriginal Rights. *The Canadian Bar Review,* 66, 727-783.

Slattery, B. (2000). Making Sense of Aboriginal and Treaty Rights. *The Canadian Bar Review, 79*, 197-224.

Sossin, L. (2009). The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights. *Canadian Journal of Administrative Law & Practice, 23*, 93-113.

Spectra Energy. (2012). *Project Description: Proposed Natural Gas Transmission System – Northeast British Columbia to the Prince Rupert Area*. Houston, Texas.

Spectra Energy. (2013a). *Aboriginal Consultation Plan*. Houston, Texas.

Spectra Energy. (2013b). *Aboriginal Consultation Report 1*. Houston, Texas.

Spectra Energy. (2013c). *Aboriginal Consultation Report 2*. Houston, Texas.

Spectra Energy. (2014a). *Environmental Assessment Certificate Application*. Houston, Texas.

Spectra Energy. (2014b). *Aboriginal Consultation Report 3*. Houston, Texas.

Treacy, H., Campbell, T., & Dickson, J. (2007). The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development. *Alberta Law Review, 44*(3), 571-618.

Turpel, M. (1989-1990). Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences. *Canadian Human Rights Yearbook, 6*, 4-45.

Tzimas, E. (2005). Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation. *Supreme Court Law Review, 29*(2), 461-484Walkem, A. (2003). Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning. In H. Bruce & A. Walkem (Eds.), *Box or Treasures or Empty Box? Twenty Years of Section 35* (pp. 195-197). Penticton, British Columbia: Theytus.

Weber, M. (1977). *Peasants into Frenchmen: The Modernization of Rural France*. London, United Kingdom: Chatto and Windus.

Zucker, L. (1991). The Role of Institutions in Cultural Persistence. In W. Powell & P. DiMaggio (Eds.), *The New Institutionalism in Organizational Analysis* (p. 83-107). Chicago, Illinois: The University of Chicago Press.

Appendix A – Summary of Consultation with First Nations on Coastal GasLink Pipeline Project

First Nations	Strength of Title Claim[31]	Scope of Consultation (# of meetings)[32]	Capacity Funding[33]	Content of Consultation (information provided by or exchanged with Spectra Energy)					
				Project Description	Aboriginal Consultation Plan and Reports	Draft Application Information Requirements	Field Permit Notification or Participation	Participated in Traditional Land Use (TLU) Study	Participated in Socio-Economic Study (SES)
Blueberry River First Nation	Treaty 8	22	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Doig River First Nation	Treaty 8	11	EAO – Y CGL – Y	Y	Y	Y	N	Y	Y
Fort Nelson First Nation	Treaty 8	-	EAO – N	-	-	-	-	-	-
Halfway River First Nation	Treaty 8	13	EAO – N	-	-	-	-	-	-
McLeod Lake Indian Band	Treaty 8	16	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Prophet River First Nation	Treaty 8	-	EAO – N CGL – N	-	-	-	-	-	-
Saulteau First Nations	Treaty 8	22	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
West Moberly First Nations	Treaty 8	27	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Chesletta Carrier Nation	Weak	-	EAO – N	-	-	-	-	-	-
Lake Babine First Nation	Weak	-	EAO – N	-	-	-	-	-	-
Lheidli-T'enneh	Weak	42	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Nadleh Whut'en First Nation	Strong	32	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y

[31] The environmental assessment process is not a rights-determining process. However, for the purpose of determining the level of consultation required relative to the strength of Aboriginal rights and title, the Environmental Assessment Office (EAO) is required to define whether a *prima facie* claim to Aboriginal title is weak, moderate or strong. In determining the strength of an individual claim, the EAO, working with the Ministry of Justice and Ministry of Aboriginal Relations and Reconciliation as appropriate, reviews ethnographic and historic records, information submitted by the First Nation as part of treaty negotiations, and additional information that may be submitted by the First Nation during the environmental assessment process to determine if the claim is consistent with test relating to sufficient and exclusive occupation as described in *Tsilqot'in Nation v. British Columbia* (2014).

[32] The number of meetings is an indicator of the frequency of consultation with the affected First Nation in the pre-application and application phases of the project. It does not provide indication of the quality, timeliness or meaningfulness of consultation.

[33] The Environmental Assessment Office (EAO) offered or provided capacity funding to those First Nations listed under Schedule B of the Order in the amounts of $5,000 in the pre-application phase and $10,000 in the application phase. The purpose and amount of funding provided by Spectra Energy to First Nations listed under Schedules B and C of the Order is confidential.

Nak'azdil Band	Weak	32	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Nazko First Nation	Weak	-	EAO – N	-	-	-	-	-	-
Saik'uz First Nation	Weak	29	EAO – Y CGL – Y	Y	Y	Y	Y	Y	N
Stellat'en First Nation	Strong	32	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Tl'azt'en Nation	Weak	-	EAO – N CGL – N	-	-	-	-	-	-
Yekooche First Nation	Weak	10	EAO – y CGL – Y	Y	Y	Y	Y	Y	Y
Wet'suwet'en	Strong	42	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Nee-Tahi-Buhn Band	Weak	24	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Office of the Wet'suwet'en	Strong	21	EAO – Y CGL – Y	Y	Y	Y	Y	N	N
Skin Tyee Nation	Strong	30	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Burns Lake Band	Strong	30	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Wet'suwet'en First Nation	Strong	42	EAO – Y CGL – Y	-	-	-	-	-	-
Gitga'at First Nation	Weak	-	EAO – N	-	-	-	-	-	-
Kitselas First Nation	Weak	37	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y
Lax Kw'alaams Nation	Weak	7	EAO – N	-	-	-	-	-	-
Metlakatla First Nation	Weak	-	EAO – N CGL – N	-	-	-	-	-	-
Haisla Nation	Strong	23	EAO – Y CGL – Y	Y	Y	Y	Y	Y	Y

Appendix B – Summary of Consultation with First Nations on Westcoast Connector Gas Transmission Project

First Nations	Strength of Title Claim[34]	Scope of Consultation (# of meetings)[35]	Capacity Funding[36]	Content of Consultation (information provided by or exchanged with Spectra Energy)					
				Project Description	Aboriginal Consultation Plan and Reports	Draft Application Information Requirements	Field Permit Notification or Participation	Participated in Traditional Land Use (TLU) Study	Participated in Socio-Economic Study (SES)
Blueberry River First Nation	Treaty 8	10 +	ES – Y EAO – Y	Y	Y	Y	Y	N	N
Doig River First Nation	Treaty 8	1 – 5	ES – Y EAO – Y	Y	Y	Y	Y	Y	Y
Halfway River First Nation	Treaty 8	6 – 10	ES – Y EAO – Y	Y	Y	Y	Y	Y	Y
McLeod Lake Indian Band	Treaty 8	10 +	SE – N EAO – Y	Y	Y	Y	Y	N	N
Prophet River First Nation	Treaty 8	1 – 5	SE – N EAO – Y	Y	Y	Y	N	N	Y
Saulteau First Nations	Treaty 8	1 – 5	SE – Y EAO – Y	Y	Y	Y	Y	Y	Y
West Moberly First Nations	Treaty 8	10	SE – Y EAO – Y	Y	Y	Y	Y	Y	N
Tsay Keh Dene Nation	Weak	N/A	SE – Y EAO – Y	Y	Y	Y	N	Y	N
Nak'azdli Band	Moderate	10 +	SE – Y EAO – Y	Y	Y	Y	Y	Y	N
Takla Lake First Nation	Weak to Moderate	10 +	SE – Y EAO – Y	Y	Y	Y	Y	Y	Y
Lake Babine Nation	Weak	20 +	SE – N EAO – Y	Y	Y	Y	Y	Y	N
Gitxsan (Huwlip)	Weak	10 +	SE – Y EAO – Y	Y	Y	Y	Y	Y	Y
Gitanyow	Strong	6 – 10	SE – Y	Y	Y	Y	Y	Y	N

[34] The environmental assessment process is not a rights-determining process. However, for the purpose of determining the level of consultation required relative to the strength of Aboriginal rights and title, the Environmental Assessment Office (EAO) is required to define whether a *prima facie* claim to Aboriginal title is weak, moderate or strong. In determining the strength of an individual claim, the EAO, working with the Ministry of Justice and Ministry of Aboriginal Relations and Reconciliation as appropriate, reviews ethnographic and historic records, information submitted by the First Nation as part of treaty negotiations, and additional information that may be submitted by the First Nation during the environmental assessment process to determine if the claim is consistent with test relating to sufficient and exclusive occupation as described in *Tsilqot'in Nation v. British Columbia* (2014).

[35] The number of meetings is an indicator of the frequency of consultation with the affected First Nation in the pre-application and application phases of the project. It does not provide indication of the quality, timeliness or meaningfulness of consultation.

[36] The Environmental Assessment Office (EAO) offered or provided capacity funding to those First Nations listed under Schedule B of the Order in the amounts of $5,000 in the pre-application phase and $10,000 in the application phase. The purpose and amount of funding provided by Spectra Energy to First Nations listed under Schedules B and C of the Order is confidential.

			EAO – Y						
Kitselas	Weak	6 – 10	SE – Y EAO – Y	Y	Y	Y	Y	Y	Y
Kitsumkalum First Nation	Weak	6 – 10	SE – Y EAO – Y	Y	Y	Y	Y	Y	Y
Lax Kw'alaams	Strong	5	SE – Y EAO – Y	Y	Y	Y	Y	N	Y
Metlakatla First Nation	Strong	4	SE – Y EAO – Y	Y	Y	Y	Y	Y	Y
Gitxaala First Nation	Weak	1	SE – Y EAO – Y	Y	Y	Y	Y	Y	Y
Treaty 8 Association	N/A	1 – 5	SE – N EAO – N	Y	Y	Y	N	N	N
Carrier Sekani Tribal Council	N/A	0	SE – N EAO – N	Y	Y	Y	N	N	N
Tl'azt'en Nation	Weak	5 – 10	SE – N EAO – N	Y	Y	Y	N	N	N
Yekooche First Nation	Weak	1 – 5	SE – N EAO – N	Y	Y	Y	N	N	N
Dene Tha' First Nation	Treaty 8	1 – 5	ES – Y EAO – N	Y	Y	Y	N	N	N
Fort Nelson First Nation	Treaty 8	1 – 5	SE – N EAO – N	Y	Y	Y	N	N	N