

DISCOURSE AND DISEMPOWERMENT: EXAMINING INDIGENOUS
CONSULTATION POLICY IN NOVA SCOTIA

by

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DEDICATION

“If you don’t know history, then you don’t know anything. You are a leaf that doesn’t know it is part of a tree.”

- Michael Crichton

This work is dedicated to my ancestors, lost and then found.

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ABSTRACT

This research focuses on the duty to consult as exercised currently in Nova Scotia, to explore whether or not government discourses of reconciliation have led to formal policy changes, which recognize the sovereignty of Indigenous peoples as separate nations. The research conducts a historical-discursive institutional analysis to examine the legislative relationship between Indigenous peoples and colonial governments. The analysis shows that institutions, and the dominant ideas of Indigenous peoples which influenced them, developed alongside the priorities of the settler-state. Racist, paternalistic, and assimilatory discourses have worked to justify government policies which deny the sovereignty and rights of Indigenous peoples, as dictated by the historic treaties signed between Indigenous peoples and the Crown. While consultation is recognized by the provincial government in theory, in practice, colonial discourses from Canada's past undermine the possibility for meaningful consultation and ultimately, reconciliation.

LIST OF ABBREVIATIONS USED

CDA	Critical Discourse Analysis
CEAA	Canadian Environmental Assessment Agency
DI	Discursive Institutionalism
DTC	The duty to consult
EA	Environmental Assessment
FPIC	Free, prior and informed consent
HI	Historical Institutionalism
INAC	Indigenous and Northern Affairs Canada (previously known as AANDC Aboriginal Affairs and Northern Development Canada)
KMKNO	Kwilmu'kw Maw-klusuaqn Negotiation Office (also known as Mi'kmaq Rights Initiative)
MEKS	Mi'kmaq Ecological Study
MOU	Memorandum of Understanding
OAA	Office of Aboriginal Affairs (Nova Scotia Office)
NI	“New” or “Neo” Institutionalism
RCAP	Royal Commission on Aboriginal Peoples
TEK	Rational Ecological Knowledge
TOR	Mi'kmaq–Nova Scotia–Canada Consultation Terms of Reference
TRC	Truth and Reconciliation Commission (of Canada)
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples.

GLOSSARY

Aboriginal/Aboriginal peoples: this is the collective noun used for reference to Indigenous peoples in the *Constitution Act 1982*. It includes *Indians, Inuit* and *Metis* peoples. This is a legal definition and can be/has been used interchangeably with terminology such as: *First peoples, First Nations* and *Indigenous peoples*.

First Nation(s): this term is sometimes used to identify Indigenous peoples within Canada who are neither Métis nor Inuit. It was meant to replace usage of the term Indian in common practice, as the term Indian (when used generally outside of legal reference to the Indian Act 1876) is thought of by many Indigenous peoples to carry racist connotations. This term includes both status and non-status Indians.

Note: the author uses First Nation(s) throughout this research to refer specifically to the names of Indigenous communities (e.g. Sipekene'katik First Nation).

Indian: refers to the legal identity of an Indigenous person who is registered under the *Indian Act 1876*. Presently, this term is considered to carry racist connotations and typically, is only used in direct quotations, in discussions of history for clarity/accuracy, or in some instances regarding legal/constitutional matters.

Note: the author of this research uses the term *Indian*, only when citing direct quotations or referring to terminology from historical periods in Canada and Nova Scotia, when it was the standard term used.

Indigenous person/peoples: this is a collective noun which includes First Nations, Inuit, Métis. The usage of this term has become popular both in Canada, and by Indigenous peoples, organizations and movements around the world.

Note: the term *Indigenous*, is the preferred term used by the author throughout this research to refer, in general, to Indigenous peoples (e.g. all Indigenous peoples in Nova Scotia, Indigenous peoples in Canada) whereas in other cases, the author may refer to specific groups of Indigenous peoples by name (e.g. Sipekene'katik, Mi'kmaq, Misikew Cree).

Métis: Métis peoples are peoples with mixed Indigenous and European ancestry. According to the Métis National Council, the term Métis refers to a person who self-identifies as Métis, is of historic Métis Nation Ancestry and is accepted by the Métis Nation.

Mi'kmaq: preferred term of the Mi'kmaq peoples in Nova Scotia. Mi'kmaq is a plural noun, though there is some variation in how the plural vs. singular is spelled amongst people and scholars, the author uses the term Mi'kmaq consistently (unless using a direct quote).

Note: For more information on the correct use of Indigenous Terminology, please see Indigenous Corporate Training Inc. www.ictinc.ca

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CHAPTER 1

INTRODUCTION

Canada's history as a settler society has resulted in the creation of a federal state, seeking to cater to the diverse settler nationalities that took part in founding it. Federalism and the division of power has been a central element in Canada's institutions since its confederation in 1867, but it has also been a main point of contention. What is federalism? This would depend on who was asked. In its most simple explanation, federalism can be understood as "a particular set of governing institutions in which authority is divided between two or more constitutionally distinct orders of government" (Robinson, Simeon & Wallner, 2014, p. 65). Within a federal arrangement, neither order of government is subordinate to the other. Each order has an independent base of political legitimacy, and a set of powers it is free to exercise over a given jurisdiction. These powers are established within a constitution, to legally define the jurisdiction and powers of each order of government. In Canada, we see this division in sections 91, and 92 of the Constitution Act, which assigns particular powers and responsibilities to the federal and provincial governments.

With a traditional focus on the provincial and federal division of powers and on matters of Quebec nationalism, Indigenous peoples, the *First Nations* of Canada, have largely been excluded from federal institutions within Canada. Questions of Indigenous sovereignty predate the confederation of Canada. Since the arrival of Europeans, Indigenous peoples have continuously challenged the authority of governments, be they French, British or Canadian, to claim jurisdiction over their lands (Dacks, 2001, p. 303; Ladner, 2005, p. 923).

For some, the recognition and affirmation of Indigenous and treaty rights in Section 35 of the *Constitution Act 1982* creates the possibility for Indigenous self-government. It raises the possibility of “decolonization” because of the official recognition of Indigenous peoples, their rights and their right to self-government. Others assert that it did not ‘create’ the possibility for Indigenous self-government, because the rights of Indigenous people to self-govern cannot be granted by the Canadian state, the right is inherent. Either way, the recognition within the constitution enabled Canada’s model of federalism to be challenged by Indigenous activism through the rise of rights-based constitutional visions (Abele & Prince, 2006; Papillion, 2012; Rocher & Smith, 2003, p. 38) which asserted that “[...] the spirit and the intent of Section 35(1), then, should be interpreted as recognizing and affirming Aboriginal legal orders, laws and jurisdictions [...]” (Ladner, 2006, p. 13). There is however much disagreement with regards to how Indigenous sovereignty ought to be recognized and structured within Canada.

There are Indigenous scholars and activists who strongly advocate for a rejection of the Canadian state and its policies. They call for less state intervention and the ability to exercise authority in their own jurisdictions over matters such as community membership, access to natural resources and the protection of lands. In many instances, Indigenous peoples are “likely to understand the state as an oppressor that has been economically and politically strong at the direct expense of [Indigenous] nations” (Green, 2001, 715-716; MacDonald, 2011, 263). Therefore it is in the best interest of Indigenous nations across Canada to resist further encroachment on Indigenous existence and identity by settler state (Alfred & Corntassel, 2005 p. 599)

Taiiaki Alfred and Jeff Corntassel assert (2005, p. 598) that presently in Canada, many Indigenous peoples have embraced the Canadian government's label of "Aboriginal", along with the "limited notion of postcolonial justice framed within the institutional construct of the state" (Alfred et al., 2005, p. 598). To simply incorporate Indigenous forms of self-government into the existing constructs of the Canadian state would be to continue to subsume Indigenous existences into the constitutional system and body politic of the Canadian state (Alfred et al., 2005, p. 598).

While it is true that Canada as a state has historically been the oppressor, many have questioned just how "separate" Indigenous and Canadian nations could be (Cairns, 2000; Flanagan, 2008; Lacombe, 2017; MacDonald, 2010; MacDonald 2011; Williams, 2004). There is merit in the argument that any modern forms of Indigenous self-government must be included in and formally recognized by Canada's federal institutions in some way. However, many who argue for such institutional changes caution that it must be done in a very cautious and pragmatic way, that is reflective of Indigenous peoples and not of colonial government structures (Cairns, 2000; Kimlyca, 1995; MacDonald, 2011, Lacombe, 2017, p. 65-66).

First Peoples have unique needs and expectations. It would be misguided for those designing new forms of self-government to model them too closely on established governance structures. A pragmatic approach to federalism in the Aboriginal context must strive to adopt a wider normative lens that is conscious of corrective justice objectives—a framework stressing the return of that which was acquired wrongfully, such as land and institutional power (Lacombe, 2017 p. 66)

Therefore if any of Canada's federal institutions were to change to formally recognize and incorporate Indigenous self-government, it would be adamant to avoid a

prescriptive approach to federations in the Indigenous context. Lacombe asserts (2017, p. 65) we cannot simply prescribe the common structures of state-based federations (monarchical or republican executive power, civilian or common law tradition, etc.) to Indigenous forms of governance, because they may be a poor fit for communities that wish to include more traditional forms governance in their federalist arrangements. According to Alan Cairns, Indigenous peoples need to participate on some level within the Canadian state. Though Indigenous communities are different from Canadian society, they are “penetrated societies.” Even if federal institutions were adapted to include some form of Indigenous self-government, they would not be able to exist as a wholly separate society with minimal relations with the Canadian state and society. Therefore Cairns promotes a pragmatic, broader understanding of federalism that bears in mind the history of Indigenous nations as Canada’s First Peoples. In his seminal book *Citizens Plus: Aboriginal Peoples and the Canadian State* (2000), Cairns asserts that Indigenous peoples should be understood as “Citizens Plus.” His proposed model acknowledges Indigenous difference fashioned by history and the continued desire of Indigenous peoples to resist further submergence into the Canadian state, or Canadian identity.

To date, the nature of federalism has not been changed or adapted in any constitutional sense to make room for Indigenous self-government. Though Canada’s institutions have not changed to incorporate Indigenous sovereignty, the evocation of such concepts as Indigenous rights, self-determination and treaty recognition, have created a critical shift in political discourse in Canada, establishing the need to confront, apologize for, and reconcile wrongdoings against Indigenous peoples that occurred as a part of Canada’s colonial past.

What is reconciliation and how are Canadian governments attempting to address it? The concept of reconciliation means different things to different people, communities, institutions and organizations (Truth and Reconciliation Commission of Canada [TRC], 2015, p. 16). To some, reconciliation “is about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people, going forward” (TRC, 2015, p. 6). For others, reconciliation is not only about atoning for past atrocities, but for taking concrete steps to right past wrongs. This includes recognition-based approach to reconciliation. Reconciliation in which the Canadian state recognizes the inherent right of Indigenous peoples to self-govern. Reconciliation in which the marginalization of Indigenous peoples and the exploitation stops and Canada adopts land claims policies that are consistent with the “recognition of Indigenous peoples’ historical and legal interests in their lands, their right to decide how their lands are developed (or not developed) and their right to benefit from their lands” (McIvor, 2018, p. 143). Reconciliation that recognizes Indigenous law and the treaties that were signed in good faith between Indigenous nations and the Crown (McIvor, 2018; TRC, 2015 p. 9)

So, how have Canadian governments approached Indigenous self-government, and concepts such as Indigenous rights and title? Arguably, Canadian governments have not done much by way of reinforcing such rights, rather it has been decisions handed down from the Supreme Court of Canada that have largely dictated the ways in which certain Indigenous rights ought to be recognized by government. Decisions from landmark cases such as *R v. Sparrow* (1990), *Haida Nation v. British Columbia* (2002), *Taku River Tlingit First Nation v. British Columbia* (2004), *Mikisew Cree First Nation v. Canada* (2005) and

Rio Tinto (2010), have reinforced the inherent rights of Indigenous peoples to conduct traditional practices such as hunting and fishing, their inherent right to self-government and the Crown's duty to consult (DTC). The DTC, found in Section 35(1), is triggered when government actions threaten adverse effects to Indigenous rights and lands. The Crown is constitutionally obligated to consult with the Indigenous peoples impacted by the proposed plans in order to uphold the Honour of the Crown in all dealings with Indigenous peoples. The Honour of the Crown is a concept with deep historic roots, which recognizes the existence of Indigenous peoples on lands prior to colonization and that many Indigenous peoples reconciled their claims to land through negotiated treaties with the Crown. Therefore in all of the Crown's dealings with Indigenous peoples, the Crown must act honourably. Canada's courts have asserted that Section 35(1) of the *Constitution Act, 1982* establishes a solid constitutional base for the treaties signed between Indigenous peoples and the Crown and so, Indigenous peoples are entitled to just settlement of their claims (Slattery, 2005, p. 2).

The DTC is frequently triggered by proposed actions by government or industry, that poses some impact to Indigenous lands, or Indigenous activities that take place on the lands in question. Most often, such proposed actions constitute the extraction or use of natural resources on said lands (e.g. mining, forestry, pipeline construction, etc.). Whereas the need respect Indigenous title and claims to lands and resources has been pinpointed as an integral component to reconciliation (McIvor, 2018), upholding the DTC can be understood as part of a process of fair dealing and reconciliation with Indigenous peoples (Newman, 2009, p. 33). Thus, improved consultation has become a central concept within government discourses of reconciliation, both provincially and federally.

Similar to the concept of reconciliation, the concept of consultation is slightly ambiguous. As a result, government, industry and Indigenous nations continue to disagree on what it takes to fulfil the DTC. There is no clear-cut, all encompassing, Canada-wide, detailed definition of what consultation needs to look like in every case, however a number of general principles and minimal requirements have been established through case law¹.

First, the DTC is different than consultations that may take place with the general public. This is because the DTC is a constitutional duty owed solely to Indigenous people that exists because Indigenous peoples existed on these lands, with their own laws and customs, prior to the arrival of Europeans. Second, consultation must begin in the earliest stages of planning. Third, governments must listen carefully to the concerns of Indigenous peoples, and must show that they have worked in good faith to minimize adverse effects on Indigenous rights and treaty rights. This means that governments should be open to including Indigenous suggestions into revised plans, or abandoning proposals altogether. Lastly, “consultation is not addition” (McIvor, 2018, p. 120), it is not a matter of adding up the number of meetings and ticking odd boxes to determine whether or not consultation has been adequate (McIvor, 2018, p. 119-121).

While current government discourses incite notions of strengthened reconciliation and improved consultation, how does consultation actually play out in practice? This paper asserts that while consultation is recognized by federal and provincial governments in theory, in practice, Canadian governments are not willing to sacrifice any level of power or autonomy to reconcile the right to Indigenous self-government. The colonial discourses

¹ Such cases include: *Haida Nation v. British Columbia*, 2004; *Taku River Tlingit First Nation v. British Columbia*, 2004; *Mikisew Cree First Nation v. Canada*, 2005; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010; *Beckman v. Little Salmon/Carmacks First Nation*, 2010.

from Canada's past, which are based upon dominance and power over Indigenous peoples, are still very present in current consultation policies and processes. Discourses evoking the return to a "nation-to-nation" relationship, and improved cooperation and consultation with Indigenous peoples are not truly reflected in policy. Instead, they act as a distraction to portray a willingness to recognize Indigenous sovereignty, while governments continue exert power over Indigenous peoples in order to pursue their own economic best interests at the expense of Indigenous peoples and their lands.

1.1 CHAPTER BREAKDOWN.

The second and following chapter of the research provides an overview of the literature, as well as information on the influential theories and the methodology used in this research. The literature review delves into important concepts necessary to understand the research, such as the constitutionally enshrined duty to consult and accommodate, as well as the concept of Indigenous and treaty rights.

The chapter provides a basic legal understanding of the duty to consult and how the duty has been recognized or approached by the federal government. The chapter also discusses the supposed ambiguity concerning the true definition of consultation, and how such ambiguity enables malleability when approached by governments and third parties, such as industry proponents.

This chapter provides an overview of several theories that will be applied in later analysis. The chapter provides an outline of various veins of new or "neo" institutional approaches that will be used to trace the relationship between the colonial and Canadian state and Indigenous peoples. The chapter delves into the historical and discursive institutionalist approaches to exemplify the ways in which ideational power, examined

through the colonial discourses constructing Indigenous peoples, have influenced the ways in which Indigenous peoples have been addressed by the Canadian state over time. Such discourses examined in this chapter include those of racism and extermination, victimization and assimilation, and those discourses which constitute the return to a nation-to-nation relationship.

The third chapter of the research, entitled “Discourse and Dis-empowerment: Establishing Colonial Discourses,” explores the relationship between Indigenous peoples and colonial governments over time in Canada and Nova Scotia. With a focus on the relationship established through formal institutions of government and legislation, as well as more informal institutions, such as common practices and discourses regarding Indigenous-Crown relations. The chapter carries out a mixed historical-discursive institutional analysis and tracks specific time frames along with the changing discourses framing Indigenous peoples, ultimately influencing the methods in which colonial governments attempted to treat with, or “deal with” Indigenous peoples.

The fourth chapter of the research, entitled “Moving Beyond Colonialism? An Analysis of Consultation Policy in Nova Scotia,” conducts an analysis of Nova Scotia’s current consultation policy, and processes, as introduced by the provincial Liberal Government in 2015. This analysis provides detail on the roles and responsibilities of various actors identified in legislation and on the actual processes or stages of consultation as laid out by the province. The chapter explores different aspects of consultation, such as how it is defined and who has the power to define it within legislation.

The policy itself is then linked to some of the discourses revealed in chapter three, showing that while discourses employed by governments regarding Canada’s relationship

with Indigenous peoples may be changing, the policies defining consultation, and the procedural aspects of consultation as they unfold in practice, have not changed with those discourses, but instead, resonate with past treatment and framing of Indigenous peoples as “subject to” the settler state.

The fifth chapter of the research, entitled “From Policy to Practice: Alton Gas Case Study” provides an example of Nova Scotia’s current consultation policy in practice in Nova Scotia. This chapter illustrates the problems identified in policy analysis in chapter four, and shows how they negatively impact consultation in practice with Mi’kmaq peoples in Nova Scotia.

The case study examined in this chapter is the Alton Natural Gas project. As interviews were not conducted as part of this research, the case study examines court documents, press releases, letters, and statements from the impacted Indigenous communities, as well as documents published by the third party proponent (Alton Gas) regarding their efforts to consult and cooperate with Indigenous peoples. The analysis incorporates a media analysis of reporting on the Alton Gas case study in mainstream media, to better reflect the ways in which Indigenous peoples and their rights were framed to the general public in respect to this issue.

CHAPTER 2

LITERATURE REVIEW AND METHODOLOGY

2.1 UNDERSTANDING THE DUTY TO CONSULT

At its root, the DTC was meant to foster a respectful and honourable relationship with the Indigenous peoples that settlers encountered when they first set foot onto North American shores. The DTC aimed to sustain a peaceful coexistence between very different groups of people. Today, honouring and strengthening the DTC is reflected in the overarching goal of reconciliation between the government of Canada and Indigenous peoples. Simply put, the DTC echoes a duty owed to Indigenous peoples, to consult with them before taking action that may impact their land or their rights however, defining the DTC is not a simple task. With the DTC, there always exists a chance of legal uncertainty due to the varying theoretical underpinnings that have structured the DTC over Canada's history (Newman, 2009, p. 34).

Over the various series of events that ultimately shaped Canada as we know it now, the DTC has taken different shapes and arguably, supported the achievement of different goals. In chapters to follow, this research will reveal how the understanding of the DTC has been impacted by several periods of Canada's history, however for the sake of giving a general introduction, the focus will be on the duty to consult as a legal duty of the Crown owed to Indigenous nations in Canada.

In his book *Revisiting the Duty to Consult Aboriginal Peoples* (2009) Dwight Newman provides a detailed explanation of the DTC in its legal sense as a constitutionally enshrined obligation. Section 35(1) of the *Constitution Act 1982* recognizes and avows the rights of

Indigenous peoples. Section 35(1) affirms all existing treaty rights of the Indian, Inuit and Métis peoples of Canada, and also included in Section 35(1), is the DTC.

The DTC is meant to be a proactive measure, meaning the Crown must carry out its duty prior to a potentially harmful action. How is it determined which actions require consultation? One theory, which has perhaps become the most commonly applied, is the triggering test (Lambrecht, 2013; Newman, 2009; Stevenson, 2017). The DTC is triggered when government actions threaten adverse effects to Indigenous rights and lands. Newman (2009) further defines the possible “action” in question, by breaking the test down into three elements (p. 37). First, is the Crown’s knowledge (actual or constructive) of a potential Indigenous claim (on land) or right (such as the right to carry out traditional activities such as hunting or fishing). Second, is the contemplated Crown conduct and third, is the potential that this contemplated conduct may adversely affect an Indigenous right or claim.

Actual knowledge of Indigenous title or claim is the most straight-forward trigger, whereas constructive knowledge of Indigenous title or claim is more complicated. This is because constructive knowledge refers to lands that are only suspected to have been traditionally occupied by Indigenous peoples. It is increasingly unclear as to what “contemplated” Crown conduct entails, as the Supreme Court of Canada has never developed a specific definition. The complexity resulting from the lack of definition can be exemplified by the issuance of exploratory permits to industry proponents, particularly extractive industries. Should the Crown be required to consult upon the issuance of an exploratory permit? Or, does the Crown’s DTC only trigger when a larger and more formal project develops?

Generally speaking, minimal requirements as established by case law dictate that consultation must begin in the earliest stages of planning, however with no specific rules around consultation with the issuance of exploratory permits, government relies a great deal on their own interpretations of early engagement.

Should an Indigenous community challenge the actions/contemplated actions of the Crown, it must demonstrate a causal connection between the proposed/actual Crown conduct and the potential adverse impact on the Indigenous claim or right(s) (Newman, 2013, 46). However, as Newman points out there is no clear-cut definition of adequate or meaningful consultation and the DTC may vary in each case; hence the development of the Supreme Court's Spectrum Analysis (2013, p. 89).

The spectrum of the DTC arises from two primary factors, one being the strength of the Indigenous claim, and the other being the seriousness of the impact of contemplated Crown conduct on that claim (Newman, 2013, p. 94). On the weaker end of the spectrum, there may be a weak, or ill-defined Indigenous claim, which would necessitate only minimal consultation. On the other end of the spectrum, there may be a strong, or *prima facie* case for the Indigenous claim. Meaningful consultation then, according to the case law of the Supreme Court of Canada, does not necessarily mean maximum consultation in every instance, but can vary according to where the claim sits on the spectrum.

The DTC is not simply a constitutional obligation of the Crown but is also rooted in upholding the Honour of the Crown. Perhaps one of the most important things to consider about the DTC is that it is forward looking, attaching itself only to future impact (Newman, 2013, 15). One concept intrinsically wrapped in future relations with the Crown

and Indigenous peoples is fair dealings and reconciliation and therefore, the Honour of the Crown is always at stake in dealings with Indigenous peoples (Newman, 2013, 33).

The federal government has been charged to act in the best interest of Indigenous peoples, this is referred to as the government's fiduciary responsibility (Newman, 2009, 16; Province of Nova Scotia, 2015, 9). Though the federal government is understood as the main source of authority for Indigenous affairs in Canada, decisions made by the Supreme Court of Canada have established the fact that the duty to consult also applies to provincial and territorial governments, the most recent of these Supreme Court decisions being the *Tsilhqot'in* decision² in 2014.

In the *Tsilhqot'in* decision the Supreme Court of Canada "disregarded existing law and dramatically reduced the federal government's role when a province proposes to undertake activity that could negatively affect [Indigenous] and treaty rights" (McIvor, 2018, p. 16). The *Tsilhqot'in* and Grassy Narrows appeal questioned what limits exist on provinces that propose to make use land for activities such as forestry, mining and other purposes pursuant to treaties. Ultimately, the Court ruled that treaties were signed with the Crown, not the federal government. Therefore "provinces could 'stand in Canada's shoes' with respect to the fulfillment and infringement of Treaty rights" (MacIvor, 2018, p. 16).

The *Tsilhqot'in* decision is therefore quite likely to significantly influence the nature and scope of protections for the constitutional rights guaranteed to Indigenous peoples. This decision greatly increases provincial authority to legislate in ways that may overstep the rights of Indigenous peoples. In addition, this decision is quite divergent to the traditional understanding of the relationship between Indigenous peoples and the

² *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44

Crown in right of Canada, in which Indigenous peoples traditionally look to, to fulfill the Crown's obligations (McIvor, 2018, p. 17).

This decision not only presents complications for Indigenous peoples, but for provinces as well. The provinces have taken on the burden of greater constitutional responsibility when it comes to upholding the constitutionally enshrined rights of Indigenous peoples. Now, provinces must justify any infringement of a Section 35 right and they have a clear responsibility to fulfill the terms of outstanding treaties with Indigenous peoples (McIvor, 2018, p. 17).

However, with no defined federal framework, many provinces have instituted their own consultation processes, policies and guidelines for projects within their jurisdictions (AADNC, 2011, p. 18). For example, in 2009 the Government of Ontario established the Algonquin's of Ontario Consultation Process Interim Measures Agreement, in addition to a new Algonquin Consultation Office. In July of 2007, the Alberta government established Consultation Protocols with the Dene Tha' First Nations, in response to consultation concerns related to the Mackenzie Gas Project, and Mackenzie Valley Pipeline (AADNC, 2011, p. 22).

Arguably, other actors outside of the federal or provincial Crown have become powerful actors within the DTC. Perhaps most notably are industry representatives who are most frequently the third-party proponents in consultation. Newman asserts that the DTC "now engages in a more complex context than before" (2009, p. 11). While he does not clarify the "before" to which he is referring, he does explain that governments try to take new policy directions with the DTC, while Indigenous communities try to use it in

direct relation to protect and assert their rights, and now industry is stepping in trying to work practically within the law to reshape the DTC to their benefit.

Industry not only holds a place at the table, but has developed to become a main actor in the traditionally bilateral relationship between the Crown and Indigenous communities. Under the assertion that industry proponents know far more about the nature, scope and detailed information about the projects they undertake, the Crown may now delegate the procedural aspects of consultation to industry (Cameron & Levitan, 2013; Newman, 2013, p. 72; Province of Nova Scotia, 2015). As a result, in many cases industry proponents have become the main facilitators of consultation efforts and procedures. What does this procedural shift mean for the traditional understanding of the DTC? Is this shift accounted for in consultation policy? Are the roles, responsibilities of, and consequences for, all members clear? Are the concerns of all parties accounted for?

Some would argue, that this shift will, or already has had a negative impact on the DTC, and that the delegation of procedural aspects of consultation to industry is simply allowing the government to privatize their fiduciary responsibility to act in the best interest of Indigenous peoples (Cameron & Levitan, 2013, p. 260). Others assert that government purposefully maintains dominance over Indigenous peoples, and their lands so that they can pursue courses of action in its own best interest (Henderson & Wakeham, 2009; Kinonnda-niimi Collective, 2014; Kirchoff, Gardner & Tusiji, 2013; Wallace, 2013; Switlo, 2002). In contrast, others assert, that reducing government's role in consultation could be beneficial to the success of Indigenous peoples. One such emerging approach to consultation has been the development of Impact Benefit Agreements (IBAs).

IBAs are agreements executed between a project proponent and one or more First Nation, Inuit, or Métis communities (Gilmour & Mellet, 2013 p. 3). IBAs can take on a few different forms, with varying levels of government involvement. Initially, they were developed by the mining industry, to address land claim settlements in northern regions of Canada. Whereas earlier IBAs in the mining industry were negotiated between resource companies and government, emerging IBAs in the energy sector are more typically being negotiated directly between the project proponent and the potentially affected First Nations, with the intention to both provide opportunities for training and employment for members of Indigenous communities, and also address the adverse effects of development, such as impacts on the environment and local culture. (Gilmour & Mellet, 2013, p. 387).

However, for many scholars working within a neo-colonial lens, increased industry involvement in consultation and IBAs are seen as potential threats to Indigenous communities. In their study of IBAs in northern Canada, Emilie Cameron and Tyler Levitan (2013) argue that IBAs are neo-liberal tools for the privatization of the federal duty to consult. In addition, they contend that IBAs naturalize market-based solutions to social suffering, and limit First Nations' access to important political and legal channels.

David Rossiter, and Patricia Wood share in the critique of neo-liberal policy directives regarding consultation. In their examination of consultation processes surrounding the Northern Gateway pipeline proposal (2016), they argue that neo-liberal policies, such as IBAs are “shape-shifting” policies. They appear to take on a form that is productive for Aboriginal sovereignty, but they are strategically used to exploit Aboriginal peoples for the benefit of industry interests. They argue that neo-liberal policies ultimately aim to fix the landscape for the investment of capital, while obliterating Aboriginal

sovereignty.

Some scholars are hesitant to completely right off the potential benefits of neoliberal approaches to modern arrangements of consultation. Fiona Macdonald argues (2011, p. 257-258) that while neoliberal approaches can provide new opportunities or improved initiatives and opportunities for self-government, that these types of arrangements can foster a State-Indigenous dynamic that is actually regressive. Neoliberal state responses to Indigenous resource ownership are sometimes, part of a broader government strategy for neoliberalism, this is part of a strategy which she refers to as *neoliberal Aboriginal governance*.

Often times these strategies are not solely about “meeting the demands of Indigenous peoples but also about meeting the requirements of the contemporary governmental shift towards ‘privatization’ within liberal democratic states” (p. 257). Many scholars warn against these types of approaches (Alfred, 2005; MacDonald, 2011; Monture-Angus, 1998) and assert that all too often, the “neoliberal models of autonomy crafted by the state hand off large areas of responsibility to Indigenous peoples without passing on the actual decision-making power necessary to truly transform these policy areas” (p. 257). While many of these neoliberal strategies are branded by government or industry as measures which improve Indigenous autonomy, it is not the “self-defined”³ (Green, 2001; MacDonald, 2011 p. 258) or “external self-determination”⁴ (Tully, 2000,

³ The right to self-determination is collectively owned by *Peoples* as distinct from *people*. It is a right which implies the capacity for statehood however, it does not require state form and can be expressed through sovereignty within existing states. Green asserts that in Canada, this “almost certainly” requires the establishment of a third order of Aboriginal Government. Green, Joyce. 2001. “Canaries in the Mines of Citizenship”: Canadian Journal of Political Science 34: 715-38

⁴ According to Tully, *external self-determination* will exist when Indigenous peoples can free themselves of the dominant society and develop their own nation state. In “The Struggles of Indigenous Peoples for and

MacDonald, 2011, p. 258) that is needed to establish true Indigenous autonomy.

All that being said, MacDonald (2011, p. 259) argues that there can be positive impacts to Indigenous autonomy by such neoliberal approaches, if pursued with a significant degree of skepticism. For example, the Membertou First Nation in Cape Breton, Nova Scotia has experienced a great amount of success with neoliberal policies focused on entering into the marketplace:

During the past decade Membertou has gone from massive operating debt and welfare to labour shortages, budget surpluses, capital reserves and annual dividend payments to band members (with those of minor children banked in a healthy trust fund for future education and other expenditures) Dramatic changes in the institutions and processes of governance have occurred on the reserve, and they are paying off through a number of new business enterprises and partnerships (Scott, 2006, p. 243)

Similarly, in his 2012 analysis of Indigenous-owned renewable energy projects, Joel Kurpa found that Indigenous nations can find success with strategies influenced by neoliberalism, but largely based on their own interests. Kurpa's study (2012) found that the Pic River First Nation, pursued a new path forward in which they did not "fully embrace a ruthlessly neoliberal agenda of 'economic development at all costs' nor an anti-globalization 'back-to-the-earth' ideology" (p. 111). Instead, the Pic River Nation took on their own path to development where they pursued an industry with which they could align with their own interests, and ensure that their own standards of community consultation and inclusivity were met.

Energy was not always the focal point in Pic River's economic development strategy. They began pursuing sustainable development with the creation of a forestry

of Freedom" In *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton and Will Sanders. Cambridge, UK: Cambridge University Press.

company through the Pic River Development Corporation. Their switch to renewable energy sparked after they were approached by a third-party renewable energy developer in the late 1980s. Pic River decided to pursue the project (Wawatay) as a proponent themselves. In the years to follow, Pic River owned a substantial equity stake in the Wawatay hydroelectric operation (Kurpa, 2012, p. 114-115).

Based upon their previous success with Wawatay, the Pic River Nation joined another in another partnership, a new hydroelectric site called Twin Falls. Pic River initially joined as minority equity partner, however the band sought to expand their role. Several years after the completion of the Two Falls hydroelectric facility, Pic River assumed full ownership. Their ownership marked the first time in Ontario history that an operational plant was wholly owned and operated by a First Nation (Kurpa, 2012, p. 115).

While the impacts of IBAs specifically on Indigenous communities are still under debate, there are studies which suggest that more direct Indigenous involvement and more clearly defined property rights can directly improve the local income of Indigenous communities (Aragon, 2013; Besley & Ghatak, 2009; Gilmour & Mellet, 2013; Laurin & Jamieson, 2015; North, 1990). In Aragon's 2015 study of modern treaty arrangements with Indigenous peoples he finds that modern treaties have the potential to clarify property rights over lands and resources. Furthermore, he finds that there is evidence which show that the negotiation of such arrangements directly increases the income of Indigenous communities. However, Aragon's study pertains only to modern treaties implemented by Indigenous communities, not so much on negotiations pursued by industry with Indigenous communities.

Aragon finds (2013) that modern treaties act to clarify property rights over Indigenous lands in several ways. First, “they delimit the boundaries of the territory subject to [Indigenous] rights of a given community” (p. 45). Second, “they recognize and specify the property rights to the land and natural resources of the involved parties, and describe in detail how these rights will be exercised” (p. 45). Third, “they define the scope of [Indigenous] rights to harvest wildlife and use land for traditional purposes” (p. 45)

Aragon asserts (2015, p. 45) that this clarification of property rights has the potential to reduce costs for associated with the development of extractive industries surrounding Indigenous communities. Due to the fact that most transaction costs arise as a result of the need to consult with Indigenous community members before commencing any project. Aragon suggests that “the consultation process is likely to be more cumbersome without clarity of who owns the rights over land and resources, and the scope of these rights” (p. 45) and finds evidence which suggests that contracts between mining companies and Indigenous communities are positively affected by the negotiation of modern treaties.

Aragon’s approach however, does entirely clarify the process of denoting ownership in such negotiation processes. Within the negotiation of modern treaties that pertain only to instances of industry development, there is still a lot of room for government and industry to work together to exploit Indigenous lands for their own economic benefit. It is for this reason, that some scholars suggest that the only method to improve consultation and Indigenous autonomy, is through the requirement of free, prior and informed consent (FPIC) from Indigenous communities.

FPIC “refers to engagement and decision making in which the free and informed consent of an indigenous people is obtained in advance for a course of action” (Szablowski,

2010, p. 111). It pertains to decisions that may affect Indigenous lands, livelihoods, culture and resources. FPIC has been a key proponent in the Indigenous rights movement that continues to develop globally, and was a main influence within many aspects of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁵ (Szablowski, 2010, p. 112). FPIC however, has been a contentious concept “because of its implications for state sovereignty and control over natural resources development” (Szablowski, 2010, p. 114). Many governments perceive FPIC as a form of veto power that Indigenous groups would be able to exercise against the state and its interests. This was certainly the case in Canada, when Tom Flanagan, an advisor for former Prime Minister Harper, stated that “the new Liberal federal government’s intention to implement the United Nations Declaration of Indigenous Peoples has ‘great potential for mischief...’” (McIvor, 2018, p. 146).

Flanagan asserted that recognizing the principle of FPIC would be a “recipe for economic ruin” in Canada, because Indigenous land rights in Canada are too poorly defined, and that some Indigenous peoples “might consider consent to be a veto and because without the threat of expropriation Canadian governments will have a hard time building long-distance corridor projects” (McIvor, 2018, p. 146), such as pipelines, railways, etc. According to McIvor (2018), Flanagan’s message was very clear, “implementing UNDRIP is dangerous because it is contrary to Canada’s and the provinces’ long established policy of denying [Indigenous] title, rights and Treaty rights” (p. 146).

As it currently stands, the Crown’s duty to consult in Canada does not constitute the principle elements of FPIC, though it enshrines a constitutional obligation to consult

⁵ The UNDRIP was adopted by the General Assembly in September, 2007. It recognizes the basic human rights of Indigenous peoples as well as their rights to self-determination, culture, languages and land. Canada became a signatory member in 2016 under the Trudeau Government.

(and accommodate where appropriate) it does not clearly or solidly require consent from Indigenous peoples being consulted. Consultation consists of an exchange of information, not a one-way diffusion of information, it must be a process capable of influencing decision making in relation to the proposed development or action, however the nature of consultation is such that the degree of this influence is outside the control of the consulted party. As it is Indigenous Nations who are the “consulted parties” the DTC does not guarantee them control over their lands. Arguably then, any measures to “improve” or “strengthen” consultation with Indigenous peoples, or to foster a “nation-to-nation” relationship, ought to include measures which transfer direct control and decision-making power to Indigenous peoples. Perhaps, any attempts to improve consultation and ultimately reconciliation with Indigenous peoples, ought to include a veto.

2.2 CONSULTATION IN NOVA SCOTIA

With a high concentration of natural resource industries in Western and Northern Canada, provinces such as Alberta, British Columbia, as well as the North West Territories are commonly examined as case studies in consultation research. British Columbia is often the focus in consultation research, as many court cases seminal to consultation have developed there. For example, *Haida Nation v. British Columbia* (2004), *Taku River Tlingit First Nation v. British Columbia* (2004) (Fidler, 2010), the contestation of B.C Hydro’s Site C dam project on the Peace River (Kurjata, 2016), or the uprising against the National Energy Board’s green light for seismic testing in Nunavut (Tasker, 2017), just to name a few.

In Alberta, developments in the oil industry are frequently studied in consultation scholarship. The Northern Gateway Pipeline proposal in 2010, sparked numerous accounts of poor consultation and the override of Indigenous rights (Kino-nda-niimi Collective, 2014; Kirchoff, Gardner & Tusiji, 2013; Rossiter & Wood, 2016). In addition, there is an extensive body of literature concerning the Alberta oil sands, from a lack of consultation, to the health risks posed to those First Nations communities who are exposed to the release of toxic contaminants (Gilmour, B & Mellett, 2013; Irvine & Kimpe, 2014; Kirchoff, Gardner & Tusiji, 2013; Laurin & Jamieson, 2015).

While these pertinent case studies in the western and northern regions of the country are critical, consultation in the Maritime regions of Canada has been largely overlooked in consultation scholarship. While the Maritime provinces do not have the highest population of Indigenous peoples, they are home to 34 First Nations communities out of 617 across Canada (AANDC, 2014), and throughout their histories, these Nations have felt the direct impact of instances of poor consultation, and environmental racism⁶ in Nova Scotia. One of Nova Scotia's most pertinent examples may be, there is the case of Boat Harbour in Pictou. Northern Pulp's 2014 spill was its second effluent spill into Boat Harbour. The spill exposed the Pictou Landing First Nation community to 90 million litres of pulp mill waste daily (Withers, 2015). Chief Andrea Paul claimed that the Pictou Landing First Nations

⁶ Studies on environmental health equity have revealed differential impacts of pollution and environmental degradation based on race and income. Such studies have also shown that racialized communities are often clustered around areas with greater toxicity, which results in greater health risks to these communities. Currently in Nova Scotia Indigenous and other vulnerable communities are experiencing disproportionate effects of climate change, water contamination and exposure to toxins by nearby facilities (e.g. pulp mills, oil and gas extraction, and hazardous waste sites). See Waldron, I. R. G. (2015). Findings from the series of workshops "In whose backyard?—Exploring toxic legacies in Mi'kmaw and African Nova Scotian communities." *Environmental Justice*, 8(2), 33-37.

Community was notified of the spill by media, not government, and that the community's demands to cease the factory's production until clean-up have been largely ignored (Patterson, 2014).

This research aims to extend the analysis of consultation processes and policies to the Maritimes, and to bring to light the current struggles and experiences of Indigenous peoples in Nova Scotia, to contribute to a much larger conversation on improving consultation and reconciliation with Indigenous communities across Canada.

The Umbrella Agreement of 2001 formalized the commitment made by Canada, Nova Scotia, and the Mi'kmaq residing in Nova Scotia, to work together in good faith. One crucial element of this commitment, was that the provincial government ensure that First Nations communities were consulted on all matters that could infringe upon their constitutionally enshrined rights (Office of Aboriginal Affairs, 2015). In 2015, the Premier and Minister of Indigenous affairs introduced Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia. This was the government's attempt to outline current consultation best practices, and to shape a consistent consultation process that respects the established rights of the Mi'kmaq of Nova Scotia. The policy boasts a high level of inclusiveness and cooperation with key consultation practitioners, such as various Mi'kmaq organizations, industry, and different levels of government (Province of Nova Scotia, 2015). Despite the revised consultation policy, and the statements of cooperation from provincial government, there are newly arising, and ongoing claims of poor or failed consultation within Nova Scotia.

One pertinent and recent example of such a claim, is the controversy surrounding the Alton Natural Gas Storage Project. The Alton Natural Gas Storage project seeks to

develop underground storage caverns for natural gas in the Shubenacadie River. The Sipekne'katik Nation, with treaty rights to the river, has identified numerous grounds to appeal industry approval, including potential environmental damages. The primary argument, however, is that the province has failed to comply with the duty to consult. The Sipekne'katik Nation contends that the government did not consult early enough in the process, and they have accused the Minister of Environment of withholding information necessary for proper consultation (Sipekne'katik v. Nova Scotia, 2016).

Arguably then, the newly developed “Nova Scotia made” policy has not led to adequate consultation in Nova Scotia, which prompts a particular set of questions: Why aren't these policies leading to more successful consultation? Are the discourses of reconciliation and nation-to-nation evoked by our federal and provincial governments truly reflected in actual policy, and in their actions? Are these policies truly carving out a new path towards an equal relationship between Indigenous peoples and government?

2.3 THEORY

Institutional power has often been argued to play a central role in the analysis of politics and policy (Carstensen & Schmidt, 2016, p. 4). Traditional institutional theory stresses the role that institutions play in shaping political and social life. To distinguish them from other forms of human organizations, institutions have typically been defined by their level of formalization (Peters, 2012, p. 19; Zurnic, 2014, p. 218). In the mid-nineteenth and mid-twentieth centuries, traditional institutionalists prioritized the analysis of the legal and administrative structures, as they dominated behaviour in society (Lowndes & Roberts, 2013, p. 22-28; Peters, 2012, p. 6; Zurnic, 2014, p. 218). This view began to

shift slightly in the 1950s with the arrival of theoretical approaches based on behaviouralism and rational choice theory. The focus on individual behaviour brought on in these new approaches highlighted the limitations of traditional institutionalism which was accused of placing too much importance on formal political structures, and being more descriptive approach than it was analytical (Peters, 2012, p. 3; Zurnic, 2014, p. 218).

In the 1960s however, institutionalism made a significant comeback with methodologies that had been redesigned. New institutionalism (or neo-institutionalism) (NI) viewed institutions as desegregated concepts rather than holistic ones; it focused the analysis on their many components. Institutions were understood to have particular norms and values internally which facilitated power relations within them where some solutions or actors were privileged over others. NI scholars did not work under the assumption that institutions existed in a vacuum outside of time and space, but that they were embedded in particular contexts, and historical backgrounds (Zurnic, 2014, p. 220). Under NI, the definition of an institution became broader, by incorporating the concepts of rules and behaviour. Rather than recognizing only formal organizations, stable recurring patterns of behaviour were thought of as institutions (Goodmin and Klingemann, 1996, p. 2222; Zurnic, 2014, p. 220). In addition to the shift in definition, New institutionalism shifted its focus from the “one-way” influence from institutions on individuals, to better encompass the interaction between institutions and individuals (Zurnic, 2014, p. 220). Multiple approaches to new-institutionalism have developed over time. Most neo-institutionalists would agree that institutions most often serve as constraints, and have a major impact on political processes, however various theoretical approaches to institutionalism differ on the exact nature of that impact (Schmidt, 2010, p. 2; Zurnic, 2014).

Taylor and Hall suggest (1996, p. 939-941) that the diverse approaches within NI can be grouped into two positions in their relation to positivism and constructivism. The positivist grouping consists of calculus-oriented approaches, such as rational institutionalism (RI). RI emphasizes rational actors within institutions who follow a “logic of calculation” to pursue actions that best suit their interests (Schmidt, 2010, p. 2). Whereas the constructivist side consists of culture-based approaches, which emphasize the roles of values, norms, and beliefs, such as Sociological institutionalism (SI) which emphasizes the procedures of organizational life stemming from institutions as the producers of norms, cognitive frames, and meaning systems, which ultimately guide human action according to a “logic of appropriateness” (Schmidt, 2010, p. 13). According to Taylor and Hall (1996, p. 939) those who adapt a calculus approach assume a more instrumental, and strategic aspect of human behaviour and institutions. The calculus approach assumes that individuals are self-maximizers and institutions are designed strategically to achieve a set of goals. The cultural approach “stresses that behaviour is not strategic, but bounded by and individual’s worldview” (1996, p. 939). This is not to say that human behaviour can’t be rational or calculating, but that individuals often turn to established routines or patterns of behaviour to attain their purposes.

Historical institutionalism (HI), however, is a little bit harder to place on this calculus- cultural spectrum, as HI literature and studies have been rooted in both rational-choice theory and the culturalist tradition (Zurnic, 2014, p. 221). HI scholars emphasize the historical development and operation of political institutions as well as the path dependencies⁷ and consequences that result from their development (Schmidt, 2010, p. 10).

⁷ A concept which emphasizes the importance of the past. The history of a given institution, or the past decisions made by the rational actors within them, work as constraints or limits which will keep the

For HI scholars, history matters, institutional change is not dependent solely upon the interests of the rational actors within them, nor are they dependent upon current events, but also on the series of past events that formed them (Frans-Bauke Van Der Meer & Kickert, 2011, p. 476).

Another important development in NI approaches has been the turn to ideas, and ideational power (Carstensen & Schmidt, 2016, 319; Schmidt, 2010, Zurnic, 2014, p. 223). With power as the central element of political science, ideational scholars endeavour to prove that ideas are directly related to practices of power. To further clarify the general ideational scholar's claim - ideas matter - Carstensen and Schmidt emphasize that ideational power is more specifically about why, or how, some ideas matter more than others, and are promoted at the expense of others (2016, p. 319). In efforts to develop analytical tools to analyze ideational power, it has been suggested that ideational power could be studied as an analytical category on its own, similar to other types of power. This notion, Carstensen and Schmidt suggest, is not new, citing the works of scholars such as Foucault, Gramsci, and Lukes, who have emphasized the power of discursive formations and hegemony (Carstensen & Schmidt, 2016, p. 320; Zurnic, 2014). Carstensen and Schmidt highlight the rise of yet another NI approach:

[T]hose who have come to take ideas and discourse seriously have broken with some of the fundamental presuppositions of their own institutionalist tradition at the same time that they have come to share enough in common to be identifiable as part of a fourth new institutionalism (2016, p. 2).

institution on a given path, and thus institutions typically experience slow, gradual change as opposed to quick, radical change. See Kickert, W. J. M., & Van, D. M. (2011). Small, slow, and gradual reform: What can historical institutionalism teach us? *International Journal of Public Administration*, 34(8), 475-485.10.1080/01900692.2011.583768

The fourth NI to which they are referring is Discursive institutionalism (DI). It is suggested that DI broadened the spectrum of institutional analysis yet again and broke through the limitations of previous NI approaches to demonstrate how ideas and discourse can explain institutional change and continuity (Carstensen & Schmidt, 2016, p. 2; Zurnic, 2014).

Why is discursive analysis important? What power can words really wield? Many critical discourse analyses have addressed these questions exactly. Critical Discourse (CDA) Scholars are interested in the interrelationships between discourse and wider social structures.

Discourse is an incredibly powerful tool. Beyond giving language, discourses are systems of signification that work to construct our social reality. Discourses are productive, in that they have the ability to enable or disable, legitimize or marginalize particular knowledge-power relations (Doty, 1993; Eckersley, 2013, 383; Milliken, 1999; Wesley, 2014).

Numerous studies have revealed just how powerful discourse can be as a tool to produce a particular common sense within society, in order to limit possible resistance to government policies (Milliken, 1999, p. 231; Simpson, Jaccard & Rivers 2007; Smith; 2010; Young & Couthino, 2013). For example, Heather Smith's rhetorical analysis of the Harper Government's speeches and policy statements on the arctic (2010) revealed what she referred to as an "Arctic warrior rhetoric." She defined the rhetoric as a contradictory mixture of "romantic invocations of the North coupled with aggressive claims of ownership" (932). She notes then Prime Minister Harper's announcement of the Ice-Breaker Project in 2008, in which he described the initiative as "a major arctic sovereignty

project,” then continued to describe the Arctic as intrinsic to Canadian identity. “True north is our destiny, for our explorers, entrepreneurs and for our artists, and not to embrace its promise now at the dawn of ascendency would be to turn our backs on what it is to be Canadian” (p. 932). Smith concluded that the Arctic warrior rhetoric was a well- worded and controlled attempt to link Canadian identity with the Arctic, and to define what the Arctic will contribute to Canada. This rhetoric was used to inspire the notion of ownership and sovereignty that must be defended against “future others” (932), in support of the Conservative governments Arctic policy (Luddington, 2016, p. 11).

Young and Coutinho’s (2013) analysis of government discourses in Canada and Australia revealed how each government employed a range of “ignorance building” discourses to mitigate demands for climate change policies. Through discourses which suppressed and manipulated scientific knowledge, each government was able to strategically construct green energy initiatives as detrimental to economic success, and climate change as one of the earth’s natural processes (p. 91).

In addition to CDA studies examining the ways in which discourses are employed to strengthen or squash certain political initiatives, there have also been many studies done which demonstrate the ways in which discourses frame the ways in which we think of each other, and address how social and political inequalities are manifested through the use of discourse (Cairns, 2000; Wallace, 2013; Wodak, 2001; Woofit, 2005; Sacks 1979, 1984; Van Dijk, 1993). In some of Harvey Sacks earlier works on critical discourse analysis (CDA) he revealed that the labels we place on people, and the categories to which we prescribe them are anything but neutral, but instead they are inference rich.

[W]e all have a stock of culturally available, tacit knowledge about categories and their members. When we come to see a

person as a member of a particular category, the normative expectations associated with that category become available as inferential resource by which we can interpret and anticipate the actions of this particular person (Woofit, 2005, p. 100).

Sacks further also argues that not only do these labels or categories enable us to anticipate the actions of that person or group, but they also work to dictate the ways in which their conduct and claims will be interpreted.

In his works on CDA van Dijk argues that we must pay special attention to the role of social cognitions and representations in our understandings of the world we live in. This is necessary to understand how wider inequalities inform particular discursive, or interpretative acts. According to van Dijk “[c]ognition is the theoretical interface between discourse and dominance” (Woofit, 2005, p. 138).

If we accept the theoretical assertions that both cognition, and history are integral to the development of our institutions as we know them today, then it is highly likely that certain ideological constructs from Canada’s colonial history are influencing the ways in which Indigenous peoples, and Canada’s reconciliation with them, is theorized and addressed by policy makers today.

2.4 METHODOLOGY, OBJECTIVES AND HYPOTHESES

This research proposes that a mixed institutional analysis of our colonial history, and pivotal Crown policies mandating Indigenous peoples, will reveal the dominant ways in which Indigenous peoples have been framed in Nova Scotia’s past and present. The analysis of archival documents, various accounts outlining first contact, as well as the policies and statements that followed with the development of colonial governments, will

provide a clear image as to how Indigenous peoples were framed in relation to their colonial counterparts. This analysis will reveal the dominant discursive categories that have framed Indigenous peoples, and how these discourses have limited the ways in which old-colonial, or colonial-Canadian, institutions have approached them and their affairs. The goal of this comprehensive analysis is to identify some of the root cause(s) of ineffective consultation, in order to gain possible insight on what needs to change within policy to truly improve consultation, and most importantly, to champion reconciliation with Indigenous peoples in Canada.

The first component of the research conducts a mixed-institutional analysis of the institutions addressing Indigenous peoples in Nova Scotia. A mixed-institutional analysis, as opposed to using one approach alone, is more beneficial for the nature of this research. Incorporating the power of ideas and discourse into our analyses can take us beyond the limits of other NI approaches, and offer a more comprehensive explanation on the dynamics of institutional change or continuity (Schmidt, 2010, p. 3). The interweaving of HI and DI for institutional analyses is not uncommon (Berman, 1998; Schmidt, 2010, p. 12; Zurnic, 2014, p. 221). Such an approach enables the consideration of how institutions evolved, while at the same time “giving primacy to the ways in which evolving ideas affect changes” in those institutions (Schmidt, 2010, p. 12).

HI and DI scholarship have a mutually beneficial relationship in the sense that they can each bring in elements that strengthen the other. For example, DI can offer insight to HI analyses by tracing legitimization and ideational power over time. Meanwhile, HI can add insight to DI analyses by describing the formal institutional contexts that shaped different interactive patterns of discourse. In other words, the HI provides structure, and

the DI provides agency (Schmidt, 2010, p. 11; Lieberman 2005). The results of an HI analysis, which considers the context of history and critical junctures, could provide integral background information for a DI analysis. The DI analysis, drawing on this background, could then show how actors within institutions “infuse HI rules with contextualized meanings, construct understandings and responses to critical moments [...]” (Schmidt, 2010, p. 12).

For the purposes of this study an institution can be understood in both a formal context (e.g. legislation, structures of government) and in a more informal context (e.g. ideas influencing governing structures and policies, and organization norms of government). The mixed HI-DI analysis will provide an account of how the relationship between Indigenous peoples and the state developed over time, revealing how the conceptualization of consultation transformed overtime. Ultimately, this chapter will identify the most dominant discourses that have shaped Indigenous peoples and consultation historically, and in the present day.

This portion of the research will draw predominantly on secondary sources. Such sources will include a mix of Indigenous and non-Indigenous works that have traced and examined the history of settler-Indigenous relations and the changing nature of consultation in Canada. From these sources my research will identify predominant discursive themes that construct the contemporary hegemonic conceptualization of consultation. In support of the secondary sources, the research will also reflect on primary resources such as archived documents detailing first- hand accounts of the state of affairs between Indigenous peoples and their colonial counterparts.

The research will then shift its focus to the recently implemented policy guidelines for consultation with the Mi'kmaq in Nova Scotia: Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia. This component of the research will consist of a thorough analysis of the policy itself, the supporting documents that support it (Terms of Reference, Proponents Guide), and government statements surrounding the legislation, to identify whether the policy is truly reflective of the present empowering Indigenous discourses, or the more authoritative and degrading discourses that have long held hegemony in Canada's history.

The purpose of this analysis is to identify how the provincial government and Indigenous peoples are constructed in relation to one another in this policy document, and to uncover whose conceptualization of consultation is reflected in the document. The analysis may answer questions such as: Who exercises authority (defines consultation, defines accommodation, determines when it is necessary)? Who is in charge of assessing whether or not consultation is needed? Perhaps most importantly, who determines whether the Indigenous community in question has been adequately consulted?

This is why Schmidt suggests (2010, p. 23) that the goal for a DI scholar, should not just be limited to convincing political scientists that ideas and discourse matter – because by now, most neo-institutionalists have accepted this to some degree; instead, the goal should be to show empirically how, when, where, and why ideas and discourse matter for institutional change, and when they do not. It is for this reason, that my research will make use of a case study to provide empirical evidence that the shift in government discourses has not translated to policy, or to consultation processes in practice.

To better establish the trustworthiness of this research, two measures for triangulation have been incorporated into the methodology (Morse et al., 2002; Wesley, 2014). In addition to the connection of my research to the works of others in the literature review, the research will provide a case study of the consultation process in Nova Scotia.

The case study will consist of an analysis of Government-Indigenous relations during the Alton Natural Gas Storage project on the Shubenacadie River in Nova Scotia. The case study will reveal exactly how the discourses identified earlier in the research, are operationalized in practice. This portion of the research will draw on the examination of primary documents, such as legal and political documents pertaining to the case study (e.g. court documents, official statements, government and proponent reports etc.). The research will draw on some secondary sources here, such as existing interviews of the communities and actors in question. These resources will provide a summation of how consultation was carried out in practice, to further evaluate whether or not the implementation of the “Made-in-Nova Scotia” process has actually resulted in meaningful consultation.

The case study methodology has been critiqued for its inability to make broader generalizations (Flyvberg, 2006; King, Keohane & Verba, 1994); however, I contest that generalizations are necessary given the nature of my research. My research takes on the very specific task of identifying the dominant discourses reflected in Nova Scotia’s consultation policy guidelines, to gain better insight into how consultation is carried out within the province.

In addition, from both an understanding- oriented and an action-oriented perspective, it is often more important to clarify the deeper causes behind a given problem and its consequences than to describe the symptoms of the problem and how frequently they occur. Random samples emphasizing representativeness will seldom be able to

produce this kind of insight; it is more appropriate to select some few cases chosen for their validity (Flyvbjerg, 2006, p. 229).

Flyvbjerg notes (2006, p. 225) that it is in fact incorrect to conclude that important generalizations cannot be drawn from a single case study. He insists that “carefully chosen” (2006, p. 226) experiments and cases can, and have generated critical generalizations in both the study of natural sciences, and the study of human affairs (Flyvbjerg, 2006). While the research question focuses specifically on consultation policy in Nova Scotia, this is a policy issue all across Canada. This study may produce more meaningful discoveries than what could be derived from a study generalizing statistical findings across large groups (Flyvbjerg, 2006, p. 236). It is also entirely possible that discoveries made in the Nova Scotian context could provide insight for consultation policy in other provinces, or on a national level.

The case study methodology has been criticized and questioned for its validity as a scientific research method. Flyvbjerg refers to these major criticisms as “misunderstandings,” or “oversimplifications,” of case study research (2006, 221). Overall, this methodology has been critiqued for its narrow focus on context dependent knowledge, its inability to produce generalizations that contribute to scientific knowledge, and that it contains a bias towards confirmation. This is where the added media analysis may prove useful, as it will reflect the nature of government-industry-Indigenous relations during the Alton Gas Natural Storage project in a way that is not subject to the researcher’s own interpretation of the situation.

Formal institutions, or the discourses and ideas from those formal institutions are not the sole influencers of policy. The policy context that frames any issue, and formulates

the response to the issue, can be subject to local, national or global influences (Howlett, Perl, Ramesh, 2009, p. 87). There are many actors, and distinct sets of ideas that influence the making of public policy. For instance, existing policy paradigms carry with them preexisting cognitive assumptions that constrain action, while symbolic frames, societal norms, and public sentiment work to affect the legitimacy of certain courses of action (Howlett, et al., 2009, 51). Thus, to better understand the nature of consultation during the Alton Gas conflict, we must also examine the actors outside of formal institutions of government; here we must turn to media.

While the study of institutions can provide ample insight into the more formal knowledge-power relations between the Mi'kmaq, government, and industry, it provides little insight to how Indigenous peoples and issues are framed to the greater public. Arguably, the average citizen may not be actively engaged in the ongoing scientific and intricate legal complexities of the Alton Gas case, and formal policy documents are not where most citizens turn for their information. It is the media that has a great deal of influence when it comes to investigating, narrating and communicating information to the public (Corrigall-Brown, Myers, & Wilkes, 2010; Harding 2006; Olive, 2015).

It can be argued that media plays a large role in shaping public opinion, especially in areas of reporting related to scientific or legal information. This is largely because the public is commonly unaware of these issues and/or does not understand the specifics at the root of the issue (Olive, 2015, p. 34). Media in Canada has often been the subject of critique for the colonial, racist, or disproportionate coverage of Indigenous issues. Some common themes discovered in analyses of Indigenous issues in the media include a focus on singular

“newsworthy” events, a disparity in coverage (Corrigall-Brown et al., 2010) and a higher level of reporting on issues that also pertain to non-Aboriginal peoples (Harding, 2006).

Indigenous issues or not, certain types of stories are sought by media outlets. Journalists are looking to report, "drama ...winners and losers, and an emotional element ... but most of all ...conflict" (Morton, 1992, p. 645; Taras, 1989, p. 325). Various studies of media coverage and social movements suggests that the media coverage received by collective action is not completely random. (Boyle 2005; Myers & Canilinga, 2004; Corrigall-Brown et al., 2010). Typically, events that fit best “with the organizational and structural demands of creating the news” (Corrigall-Brown et al., 2010) are the events that receive the most coverage. Quite frequently, it is land conflicts which spur Indigenous opposition in the form of collective action. Such standoffs provide the drama that is so attractive to media outlets. Media coverage of such events tends to frame them as stand-alone issues, with no link to longstanding political conflicts, or colonial legacies (Corrigall-Brown et al., 2010; Harding, 2006). For example, an analysis of 208 stories in fifteen separate Canadian newspapers during the first week of the Oka crisis⁸ in 1990, revealed that 60 percent of stories framed Oka as an issue of law-and-order, as opposed to a political struggle which extends over Canada’s history (Corrigall-Brown et al., 2010).

Critical studies and theories of Indigenous peoples in media reveal disparities in coverage in a wide range of reporting. Arguably, media tends to focus on non-Indigenous

⁸ The Oka crisis refers to a land dispute involving the Mohawk peoples which took place in Quebec, Canada in 1990. There was a plan to convert a disputed piece of land within the community of Kenesatake into a golf course. Protests took a violent turn, and the Canadian Army had to step in to maintain control. The Oka crisis resulted in a 78-day stand-off between Mohawk Warriors, the police, the Canadian army and non-Indigenous protestors. See Swain, H. (2010). In Canadian Electronic Library (Firm) (Ed.), *Oka a political crisis and its legacy*. Vancouver B.C.]; Vancouver: Vancouver B.C.: Douglas & McIntyre.

issues faced by non-Indigenous peoples, even wide-reaching issues such as crime. For example, there has been research done revealing the disproportionate news coverage of missing and murdered Indigenous women and children, compared to that of missing Caucasian women and children (Lavell- Harvard & Brant, 2016; Moll, 2016; Razack, 2016; Stillman, 2007). Critical theories also reveal that there is a tendency to frame Indigenous peoples as a threat to certain things, or interests. For example, research has shown disparities in reporting on Indigenous child welfare, where most media attention and blame being assigned to Indigenous childcare authorities, with little focus on the inadequacies of government based childcare agencies (Harding, 2006).

Finally, critical theories and research has also identified that there is a higher frequency of coverage on Indigenous issues that have a direct connection, or impact on non-Indigenous peoples. For example, missing Indigenous women and children are featured less than disputes over land and resources, which could have significant implications for power relations between Indigenous and non-Indigenous peoples, or significant economic implications for all Canadians (Corrigall-Brown, et al., 2010; Harding, 2006, p. 206).

The media analysis will do two things. First, it will reflect the nature of consultation during the Alton Gas conflict. Rather than depending solely on the researcher's interpretation of events during the Alton Gas conflict, the media analysis will further illustrate the case study as it played out, and the sentiments of the parties involved (e.g. Sipekne'katik First Nation, provincial government, industry proponent). Second, the media analysis will not only contribute to the illustration of events throughout the case study, but it will also provide better insight into the policy environment that exists for consultation

and Indigenous self-government in Nova Scotia. As previously parsed out in theory discussions above, informal institutions play a part in creating a policy environment. Informal institutions (such as media) play a large role in the creation of public opinion, and are also a tool used by formal powers in assessing the public opinion or mood⁹ of a given issue. Thus, the ways in which mainstream media packaged and presents an issue to the issue to the general public can reveal a lot about the general mood regarding the issue at hand. The media analysis will examine how the media reported the Alton Gas conflict and whether they acted to legitimize government and industry agendas, or to put Indigenous voices and their rights on a platform.

The media analysis does not include Indigenous media sources, as the research aims to reveal how dominant media outlets frame the issue to the public. The media sources examined include CBC Nova Scotia (Halifax), the Chronicle Herald (Halifax), the Daily News (Truro), The New Glasgow News (Pictou County), the Cape Breton Post (Cape Breton), and the Weekly Press (Enfield).

All publications from each paper referencing the Alton Gas conflict from January of 2014 to March of 2017 were collected using the Eureka media research database. All relevant articles were identified using keywords and phrases such as: “Alton Gas”, “AltaGas,” “Alton Gas natural storage project.” The search yielded a total of 204 articles, which were later cross referenced with a search on each paper’s respective website.

⁹ Ideas can have a very significant impact on policy making because it is through ideas about a given issue that individuals formulate their demands for government action. There are different types of ideas (e.g. principled beliefs, or worldviews) that will have varying effects on policy making. Such ideas act as road maps for action, they influence how problems are deigned and limit the ways in which policy options are proposed. The *policy mood* can be understood as the public sentiment around a certain issue in a given area, influenced by norms, values or public opinion (Howlett, Ramesh & Perl, 2009, p. 97).

A preliminary scan of all articles enabled the identification of recurring themes. Recurring themes were then categorized into various frames in which the Alton Gas conflict was presented. The three dominant frames are as follows:

- 1) Economic development, in which the Alton Gas process is framed as an economic opportunity for the province, creating jobs and providing energy security.
- 2) Indigenous right, in which the issue is framed as an issue of established Indigenous rights, including the duty to consult, and treaty rights.
- 3) Environmental issue, in which the issue was framed as an environmental issue which transcends identity, and impacts all Nova Scotians.

This research employs the axial coding method, in which coding software (Nvivo) is used to identify and tag and passages belonging to one or more of the frames identified (Boyatzis, 1998, p. 31; Wesley 2014, p. 149). While more general word searches were part of the coding process, each result was examined to ensure the context was in fact a correct fit for the frame.

The findings of the media analysis will be broken down using the terms frame, theme, references and mentions. The term frame can be understood as described above, they are the three dominant frames used to construct the Alton Gas conflict to the public. The term theme refers to a recurring theme within the frame. For example, dominant themes within the Indigenous right frame were the duty to consult, and fishing rights. The terms references and mentions may be used interchangeably, and refer only to references/mentions of words particular to certain themes (see Figure 2.0 on next page).

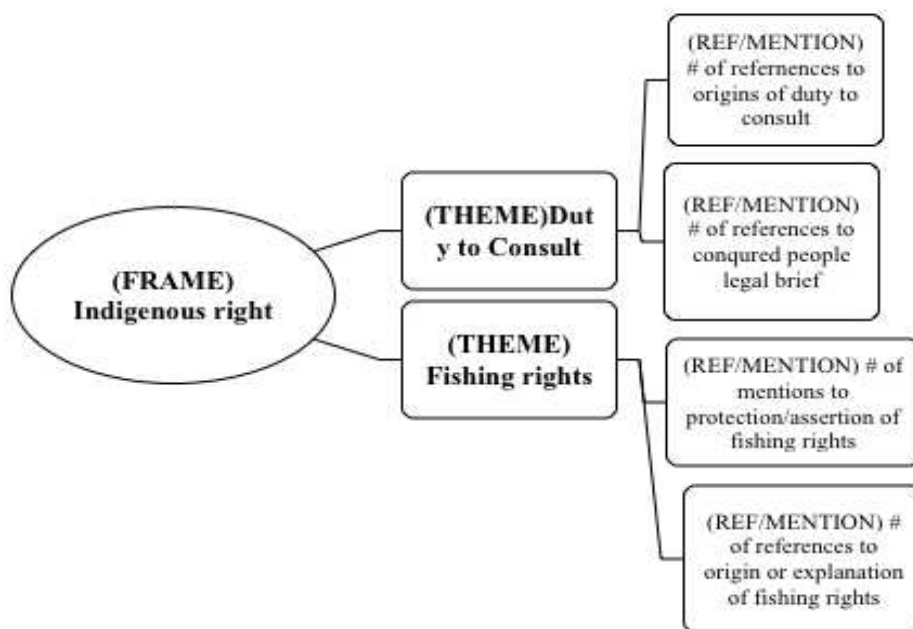


Figure 2.0 – Explanation of frames, themes and references/mentions

Though government discourse is shifting, and policies boasting improved partnerships with Indigenous peoples are being introduced, there is a strong possibility that these policies and the processes by which they are created and implemented, are no closer to achieving a nation-to-nation relationship than the policies of the past. Drawing on the Nova Scotian Alton Gas Storage project as a case study for illustration, this research will examine whether or not the disparaging ideas from the past are reflected in the policies, and actions of the Provincial Government today.

An analysis of Nova Scotia's most recent consultation policy documents and the recent Alton Gas court case, accompanied with a historical analysis of the DTC, will show

that the government has not actually made changes necessary to pursue the reconciliation of a true nation-to-nation relationship with Indigenous peoples, but instead have held on to power to continue securing their best interest. The long-standing discourses of the past have limited the ways in which policy makers feel they should have to consult with, or partner with Indigenous peoples.

CHAPTER 3

DISCOURSES AND DISEMPOWERMENT: ESTABLISHING COLONIAL DISCOURSE

A well-rounded legal sense of the DTC is inarguably essential knowledge to have when trying to understand the nature, or scope of the duty itself. There is however, an argument to be made that there is much more relevant information outside its legal description. To truly understand the weight of the DTC scholars and policy makers need to have a historical understanding of how it came to be. To understand the nature of this duty, it is necessary to have an understanding of the part of Canada's history in which it was a new world to the Europeans who brought their boats to shore and began settling their people. The new world was not empty and awaiting colonization, but was already long inhabited by diverse groups of Indigenous peoples who had their own cultures, customs, systems of governance, languages, and spiritual beliefs.

Before this chapter goes further it is necessary to highlight some of its characteristics and bring to light a few of its limitations. First, the chapter itself will focus primarily on Nova Scotia's history; however, as the federal government and its policies have played a principal role in the lives of Indigenous peoples there are times where it is necessary to discuss the history of Canada. Second, this chapter recognizes the need for, and importance of, a Mi'kmaq historical perspective. This chapter focuses predominantly on an Indigenous account of Nova Scotia's history but will draw on a number of Indigenous and non-Indigenous voices to give an overview of Nova Scotia's past.

This chapter has a number of limitations. First, it is important to recognize that a single chapter could not begin to give a full and in-depth account of the history between

Indigenous peoples and settlers across Canada. There were many distinctive groupings of Indigenous peoples, and they all interacted with settlers in different ways. For instance, this chapter will touch on historical accounts which describe how French and English settlers in Nova Scotia were vastly different in their dealings with Indigenous peoples. While this chapter will draw on these accounts it is important to highlight that the chapter does not assume that the relationship between the French settlers and Indigenous peoples was without maltreatments. While some archival documents examined in this chapter discuss the bonds that formed between the Mi'kmaq peoples and the Acadians, this is not to suggest that this type of relationship was the case for all Indigenous groups encountering French settlers across the Americas.

Second, there will be many moments in history, or interpretations of history that are not included in this chapter. As previously stated, it would be impossible to do justice to all sides involved in this history in one chapter. This is why a mix of literature and documents is being incorporated into this chapter (e.g. Indigenous and non-Indigenous, archival documents, legal and political works, and works on colonialism and development). There is a specific purpose that guides the historic analysis of this chapter, which is to explore the ways in which crucial moments of this complex history have given rise to certain power relationships, and the many ways in which Indigenous peoples have been constructed by discourses of those dominant powers.

Third, there will be many personal accounts and official statements made by colonial officials and the Canadian government, quoted and explored throughout this chapter. Some of the statements are descriptive accounts of Indigenous peoples, pertaining to their generosity, kindness, intelligence, or character. These statements are in no way a

demeaning attempt to “prove” the intelligence, nature or character of Indigenous peoples, they are simply referenced to gain further insight on how Indigenous peoples were framed by non-Indigenous peoples in a given time period. For example, some of the archival accounts referenced later refer to Indigenous peoples petitioning colonial officials to address settler encroachment on their lands, as “sober and industrious people” (Wentworth, 1802). This passage was not referenced for the purpose of proving that the Indigenous peoples making the complaint were “sober and industrious” and thus worthy of trust. It was referenced to show the mindset of the colonial official writing the official complaint, that such officials assumed the right to assess the worthiness of an Indigenous person’s (or group’s) claim against settlers, based upon their assumed superiority.

Why is it necessary to explore the discursive history between the settling French and British Crowns and the Indigenous peoples? As explained in the previous chapter, discourses have been shown to shape the meaning of the world we live in. “[D]iscourse is a system of meaning production that fixes meaning” (Dunn & Neumann, 2016, p. 17). Those who hold power can dictate that meaning, and in turn they can then dictate how to make sense of that meaning and act within it. Studying discourse then, is not merely the study of words, but the examination of how discourses function as part of the social world where meaning is constructed, it is the recognition that “language does not reflect reality so much as it creates reality” (Dunn and Neumann, 2016, p. 19).

The ways in which those in power have constructed Indigenous peoples have influenced, and justified the acts of the British Crown, and then the policies of Federal Governments of Canada. Certain discourses, whether it be those of backward savages, wards of the Canadian state, or victims have been accepted as truths enabling colonial

governments to pursue acts of genocide, assimilation, and many other egregious acts against Indigenous peoples in Canada.

This chapter will explore some of critical historical events in Indigenous-Settler and Indigenous–Crown relations, while identifying and categorizing the main discourses that evolved to inform or justify certain policies and institutions directed towards Indigenous peoples. The chapter will show how discursive categories, and thus policies, transformed with the priorities of those holding power and constrained the abilities of Indigenous peoples to engage in effective actions to promote their interests and well-being. The chapter will explore earlier discourses of Indigenous peoples as strong, independent peoples, the colonial discourses of genocide and eradication, the later discourses of assimilation, and finally Canada’s recent revival of the nation-to-nation discourse.

3.1 FIRST CONTACT AND TREATY MAKING

[...] They all have naturally sound minds, and common sense beyond which is supposed in France. They conduct their affairs cleverly, and take wise and necessary steps to make them turn out favourably. They are very eloquent and persuasive among those of their own nation [...]"
(Paul, 2008, 35).

Above is a passage about the character of the Mi’kmaq people, written by Christien Le Clerq, one of many French Roman Catholic priests who lived among the Mi’kmaq for years. There are many personal historical accounts similar to Le Clerq’s, which describe the honourable, intelligent, courageous, and kind character of the Mi’kmaq peoples. In fact, there are many accounts of the ways in which Indigenous peoples cooperated and contributed to the health and survival of European settlers (Episkew, 2009, p. 21; Franks, 2002, p. 552; Jaenen, 1984, p. 60; Kerr, 2005; Lescarbot, 1605; Paul, 2008).

Though there is evidence of contact before John Cabot, the first official settlement in Nova Scotia was the settlement of Port Royal in 1604, a result of the French expedition of Pierre Dugua Sieur de Mons and Samuel de Champlain (Kerr, 2005; Paul, 2008). The Mi'kmaq people helped the French settlers by providing them the knowledge they would need to survive in the new world, and their acts of compassion have been documented in personal historical accounts of the French (Lescarbot, 1605). Despite the help of the Mi'kmaq peoples, the first attempt of the settlement of Port Royal only lasted until 1607 when relief ships were sent from France and the settlement was abandoned. Some settlers stayed behind as they had married Mi'kmaq women. Under the stewardship of Jean de Poutrincourt in the settlement of Port Royal was re-established in 1610. Again, the Mi'kmaq are documented to have helped the French to adapt to their new environment, and to aid them in treating diseases such as scurvy. This time the Port Royal Settlement persevered (Hoffman, 1955, p. 604; Paul, 2008, p. 53).

Paul discusses at many points in his book that the relationship between the Mi'kmaq and the French was different from that with the British. There is not one specific event, reason, or specific date to mark such a partnership and so the development of this relationship is attributed to many different reasons. Paul states (2008, p. 73) that the alliance between the French and Mi'kmaq could be a result of the more enlightened practices of the French.

Although, France did make claim to parts of Nova Scotia without informing the Mi'kmaq, the French Crown never presumed the authority to exclude the Mi'kmaq people from enjoying the bounties and freedoms of their land. Perhaps most important to note, no attempt was ever made under the French Crown in Nova Scotia to commit any kind of

genocide against the Mi'kmaq, in fact, it was quite the opposite.

The French did not demonstrate the same demeaning or racist attitudes towards the Mi'kmaq (Franks, 2002, p. 558-660; Paul, 2008; Lescarbot, 1605; Rees, 2008, p. 341). Beyond the formal politics of the day, this positive attitude towards the Mi'kmaq peoples carried over into social policies as well. Friendships and even intermarriages were very common among the French and the Mi'kmaq, and over many years living side by side, the two populations began to mix (Palmater, 2011, p. 38; Paul 2008; RCAP, p. 99). Paul describes (2008), the children resulting from these marriages were welcomed by either society. Some French settlers preferred to live their lives within Mi'kmaq communities, while others remained in the French community. Largely abandoned by the French Crown, the Acadians relied on the partnership of the Mi'kmaq for their survival.

Of course, the French were not the only Europeans attempting to settle in Nova Scotia nor were they the only ones with their eyes on Acadia specifically. During the period of 1621 to 1630, there were many attempts by the British Crown to take Acadia. Until the Treaty of Saint-Germain-en-Laye (1632) between France and England returned Port-Royal and Quebec to France. Unfortunately, even with the treaty between France and England, the fighting did not cease. The French-British war over the right to claim Acadia sparked up again in the 1690's. Facing English aggression, the Acadians and the Mi'kmaq allied against British forces and began taking on great risks to protect one another (Paul, 2008, 73).

Peace, or the closest thing to it, arrived on July 13th, 1713 with France and Great Britain's signature of the Treaty of Utrecht. Any claims of land from the French Crown were transferred entirely to the British Crown. All peoples and lands in Nova Scotian under

this treaty were declared subject to the Dominion of Great Britain. Quite confusingly though, the wording of the treaty framed the Mikmaq, referred to as Amerindians, as “independent nations” who had the right to engage with French and English colonies unhindered to carry out trade. (Paul, 2008, p. 75; Reid, 1995, p. 33).

All this language is confusing, but one crucial bit of information to note is that the Mi’kmaq were not included in the negotiation of the Treaty of Utrecht, nor did they know that there were treaty negotiations taking place between the French and British Crowns. It was not until 1715 that Mikmaq Chiefs were informed by British officers that France had transferred them and ownership of their land to Great Britain (Paul, 2008, p. 76). This resumed the conflict between the English and the Mi’kmaq. The Mi’kmaq contended, and still contend to this day, that they have never given ownership of their lands to the French Crown, and as an independent peoples, had never given their consent to transfer their peoples and lands to the British Crown. Paul notes that this betrayal is probably one of the darkest moments in French-Indigenous history (Paul, 2008, p. 77).

Once the British Crown established that they were the rightful owners of all lands, they began cutting down trees, fishing, and claiming wildlife without restraint (Episkew, 2002; Paul, 2008). The Mi’kmaq strongly opposed the policies of the British, and responded with military action against the British on many occasions. This violence resulted in a paranoia among the British colonizers and they feared that the French and Mi’kmaq would take up arms against them. This paranoia is documented perfectly through the British proclamation passed in 1725, which made it illegal for Acadians to associate with, or entertain a Mi’kmaq of any manner (Paul, 2008, 82; Original Minutes, p. 100-101).

Faced with entirely overwhelming odds, the Mi'kmaq opted to enter treaties with the English, in hopes to preserve their civilization and bring an end to centuries of ongoing violence (Augustine, 2016; Battiste 2016; Paul, 2008). The Treaty of 1725, also referred to as Treaty No. 239 was one of the first versions of what have come to be known as Peace and Friendship Treaties between the Mi'kmaq and the British Crown. Though the Mi'kmaq were entering into signed treaties with the British Crown, they never at any time agreed to become subject to the British Crown, nor did they surrender their lands, nor did they surrender their right to self-determination (Augustine, 2016, p. 16; Henderson, 1994; Palmater, 2016, p. 24; Paul, 2008). During delegation at the Webanki Treaty Conference for Treaty No. 239, Mi'kmaq delegates communicated their understanding of the treaty and stated that they would “pay all the respect and Duty to the King of Great Britain as we did ye King of France, but we reckon ourselves free people and are not bound” (Henderson, 1994, p. 255). The treaties of peace, friendship and protection did authorize the application of English laws to their existing settlements on shared lands, however, no treaty established that English laws would apply to Indigenous peoples within Indigenous lands (Henderson, 1994, p. 258).

On a matter of honour, the Mi'kmaq people required a strict observance of treaties between all members. Indigenous peoples to this day “attach enormous significance to the moral, legal, and political authorities of the treaties they signed with the Crown” (Poelzer & Coates, p. 46). It has been suggested however, that such treaties with Indigenous peoples did not carry the same weight or validity for representatives of the British Crown in the colonies (Battiste & Marshall, 2016, p. 150; Henderson, 1994, p. 295; Paul, 2008, p. 84; Poelzer & Coates, 2008, p. 46). The differing opinions of officials of the Crown in England

and those representatives in the colonies have been historically documented. Letters from England to officials in the colonies often reveal requests to undertake “a just and faithful observance of those treaties and compacts” (Paul, 2008, p. 84), and issued a number of proclamations for settlers who had “willfully or inadvertently” settled themselves on “Lands reserved or claimed by Indians” to remove themselves from said land (Reid, 1995, 34). The colonial governments however, did not act in good faith, and when the Mi’kmaq violently responded to the continued overstep and abuse of such colonial governments, the lack of respect for such treaties by colonial governments were revealed.

In 1749 the first genocidal policy of its kind was issued in Nova Scotia, the Scalping Proclamation put forth by Governor Edward Cornwallis (Patterson, 1985, p. 13; Paul, 2008). Cornwallis did not agree with his English counterparts overseas that any form of long-lasting peace could be established with the Mi’kmaq, and that it would be best to eradicate them from the peninsula forever. Whereas the Mi’kmaq were prepared to co-exist with settlers and honour treaties, a letter from Edward Cornwallis to the Lords of Trade in 1749 revealed his true thoughts on such treaties; “treaties with Indians are nothing, only force will prevail” (Paul, 2008, 119).

The signature of confusing treaties continued into the 1750s and 60s. Peace and Friendship treaties of the 1750s ensured Mi’kmaq peoples could continue on with their way of life and protected their rights for fishing and hunting. The actions of colonial governments however, was in stark difference with what the treaties proposed. Colonial governments continued to acquire more and more Mi’kmaq territory, frequently putting Mi’kmaq populations in positions where they were almost incapable of survival. The 1750s also brought on further devastation to the Mi’kmaq peoples in the expulsion of their allies,

the Acadians. After the seizure of Acadia by the British in 1730, the Acadians refused to wholly submit to the British Crown, nor did they swear allegiance to the French Crown; instead they opted to remain neutral. Similarly, to the Mi'kmaq, the existence of the Acadians became a point of contention among British colonial officials in their attempts to either assimilate or eliminate them. In 1755 the Nova Scotia Governor, Justice Jonathan Belcher, ordered the seizure of all Acadian firearms, and gave the Acadian population one more chance to swear an oath of allegiance to the British Crown. When the Acadians refused, Belcher initiated the permanent deportation of the Acadians from Nova Scotia (Brasseaux, 1991, 1995; Faragher, 2005; Rees, 2008, p. 341). The Mi'kmaq had to accept that the departure of their allies was permanent. With this, they also had to accept that their war with the British Crown was hopeless and once again, they sought to treat with the British to create peace (Paul, 2008).

In June of 1761 the “Burying of the Hatchet Ceremony” was held in Halifax, during which additional Peace and Friendship Treaties were signed by Governor Belcher, and Chiefs of various Mi'kmaq Nations. Along with treaties came the Royal Instructions of 1761. The instructions, from the King to colonial governors, made it clear to colonial governors that all treaties between the Crown and Indigenous peoples be honoured and enforced without exception. One important thing to note about these instructions was that the language used indicated that the Crown did not view the Indigenous peoples as their subjects, but as members of other nations who had to be consulted in honour of such treaties (Abele & Prince, 2006, 569; Henderson, 1994, 256; Paul, 2008). It is this passage that Paul quotes in his justification:

[I]t is Our further Will and Pleasure, that you do forthwith
cause this our instructions to be made Public, not only

within all parts of your said Province, inhabited by Our Subjects, but also amongst several Tribes of Indians living within the same (2008, 170).

Following two years after the Royal Instructions of 1761, was the Royal Proclamation of 1763. This is perhaps one of the most referenced historic documents when arguing the independence of Indigenous peoples from the English Crown. The Royal Proclamation of 1763 was intended to give further strength to the Royal Instructions of 1761. The Royal Proclamation of 1763 distinguished an Aboriginal frontier “beyond which colonization would not be permitted,” and reserved the right of the Crown to make treaties with the Aboriginal nations (Abele & Prince, 2006; Henderson, 1994; Ladner, 2005). The proclamation actually went as far to assert that many colonists were guilty of land theft from the Indigenous peoples, and for this reason the proclamation ensured that treaties in Canada would be negotiated by a single authority, the Crown, as a matter of constitutional provision (Abele & Prince, 2006, 569; Henderson, 1994, 256; Paul, 2008, 176). The proclamation acknowledged that the treaties entered into with Indigenous nations should be honoured, it was from this Proclamation that the notion of co-existence, between separate and distinct nations was born.

These two rows will symbolize two paths or two vessels, traveling down The same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boats. Neither will try to steer the other's vessel (Abele & Prince, 2006, p. 581).

The two-row wampum analogy fueled the notion that as separate nations jointly occupying a territory, in which, “each being is autonomous from the other” should the

actions of one affect the other, they must “treat” about it, by coming to a settlement or understanding (Abele & Prince, 2006, p. 581; Hugelín, 1999, p. 37). The relationship between the two is based on treaties and agreements, where each side is respected, and neither one dominates the other. Self-determination was the basis of the proclamation, Aboriginal autonomy was not considered to exist merely from a Crown grant, but as an inherent right. Aboriginal nations began their relationship with the Crown as independent powers, not as subjects but as a distinct people. They had the right to exercise authority over their territories and people, assured by treaty commissioners that the government had no intentions of interfering with their way of life (Abele & Prince, 2006; Battiste, 2016, p. 3; Henderson, 1994, p. 251). The Royal Proclamation however, was not the end of the Mi’kmaq struggle. Why after the Crown instructed governors to respect treaties made with Indigenous peoples would colonial governments continue to purposefully pursue actions and policies to subjugate and degrade Indigenous populations?

Many assert that it is evident that the white supremacy or eurocentrism of colonial governments was a huge detriment to the history of Crown-Indigenous relations, and a huge influence to the genocidal actions and policies pursued by such governments (Benjamin, 2014; Episkew, 2002; King, 1986, p. 18; Palmater, 2011, p. 30; Paul, 2008). There was an astonishing arrogance and ego among colonizers of the British Crown. It was this ego that fueled their greed and violence. It was this ego that was used by the British as a justification for the appropriation of land, as if their colonization of Indigenous lands was some sort of gift.

Their inflated perception of themselves, which in their opinion destined them to dictate the correct mode of civilization to the world, instilled in the English colonial leaders, and their London counterparts, superiority

complexes that can only be described as awesome. Their giant egos and White supremacist views prevented them from ever considering that the sovereign non-Caucasian civilizations they were forcing into the British empire had cultures worth preserving (Paul, 2008, p. 83).

There are many Indigenous and non-Indigenous accounts of such bigoted and supremacist attitudes among colonial governments. In fact, there are entire theories of development based upon such an understanding of European progress. Chris Benjamin's book entitled *Indian School Road: Legacies of the Shubenacadie Residential School* (2014), is a pertinent example the long-lasting impacts of Eurocentric ideas of development forced upon native populations in white settler societies. Drawing on historical accounts of first contact between Indigenous peoples and European settlers, Benjamin describes how unequal power relations were developed and justified by the settlers. In his chapter "Superiority Complex" Benjamin outlines how European settlers considered the Native people to be savages, in need of European progress. It became the duty of the settler to better the Indian, and condition the Indian to the modern ways of speaking, living, and learning. This notion of European superiority is common in many theories of development. In theories of growth and modernization, traditional societies are viewed as backward societies. Traditional people, such as the savages found in the new world, are not innovative, creative or capable of progress (Payne & Phillips, 2010, p. 68).

The settlers brought with them their understanding of ownership, linked with domination. European/Western conceptions of nations and provinces rest on particular assumptions of territoriality. Western knowledge produces somewhat of a fetish of ownership, which stems from the foundation of settler traditions of place. Thus, in order to maintain control over the new world, they needed to limit who could own land, what could

be owned, and how things could be owned (Elkins, 1995; Episkew, 2002; King, 1986, p. 18; Seawright, 2014). The communal or shared understanding of Indigenous lands were not translatable to Eurocentric concepts of ownership. Accounts of the French often highlighted the absence of a sense of exclusive ownership of goods or lands among the Indigenous peoples. They were also described by French accounts as having a lack of social contract regarding the concept of debt “not out of natural dishonesty, but from their having no notion of property or of owing a debt” (Paul, 2008, p. 40). From the perspective of many British colonizers then, they were not stealing already occupied land because the land was not owned. These Indigenous populations were “isolated parochial enclaves,” that had been cut off from the forces of progress (Payne & Phillips, 2010, p. 70). They existed alone, left behind, awaiting innovation that only Europeans culture could bring (Benjamin, 2014, p. 4). This concept is referred to as Terra nullius, the belief that prospective land for colonizing/settling is in fact empty, based upon an understanding that only civilized societies can own land (Elkins, 1995, p. 13; Seawright, 2014, p. 559).

3.2 LAND APPROPRIATION AND EXTINCTION BY POVERTY

The more apparent and violently genocidal policies, such as scalping proclamations, became harder for colonial governments to publicly pursue after the issuance of the Royal Instructions of 1761 and the Royal Proclamation of 1763. This did not stop colonial governments from creating policies to inflict less obvious means of genocide upon Indigenous populations. In the 1780's the British colonial government implemented a series of land policies which entirely ignored all individual and land rights of the Mi'kmaq (Palmer, 2011, p. 38; Paul, 2008; Reid, 2005, p. 35). Paul notes (2008,

p. 186), that this tactic is incredibly similar to what British colonial governments did elsewhere to Indigenous populations such as the Aborigines in Australia.

In Nova Scotia, the British issued temporary grants of occupancy to Mi'kmaq peoples. The land designated to the Mi'kmaq populations were often of poor quality, and were not conducive to the Mi'kmaq way of life, or even suitable to provide adequate means of survival (Paul, 2008; Reid, 2005, p. 35). The total acreage of land granted to the Mi'kmaq people in 1783 was around 18,105 acres; Paul notes that this works out to be around one-eight-hundredth of the provincial total of 13.5 million acres (2008, p. 186). The British colonial government thought themselves incredibly generous, but were not recognizing the irony of their actions; they were issuing temporary grants to the rightful owners of lands that they had violently seized (Paul, 2008).

Policies reducing Mi'kmaq lands continued to segregate Indigenous populations and force them into small land bases, generally relinquished by colonials because of its lack of resources (Palmer, 2011, p. 39; Paul, 2008; Reid, 1995, p. 34). By 1821 the total acreage of land set aside for Mikmaq peoples had shrunken to a measly 20,765 acres, and much of this land was not land arable enough to produce food (Paul, 2008, p. 193; Reid, 1995, p. 35). “[R]obbed of their lands, freedom and dignity” (Paul, 2008, p. 193), and with little to no access to human or civil rights the Mi'kmaq were on their way to extinction.

Encroachment was rampant. From the mid 1700's and onward, many Caucasian settlers, Members of the Nova Scotia Legislature, and various other colonial government officials wrote petitions to the government regarding white encroachment on Indigenous lands. Letters and petitions sent from various colonial government officials to governors and Commissioners of Indian Affairs detail encroachment on Mi'kmaq lands, inhibiting

their ability to hunt, to fish, and to live their day-to-day lives.

In a petition to the Commissioners of Indian Affairs dated 1802, Sir John Wentworth explained that several Indigenous families living in Cape Sable, who were by their own account “sober and industrious people,” (Wentworth, 1802) were being blocked from fishing for sustenance by numerous white people who laid claim to the land (Frost, n.d; Wentworth 1802). In a letter to Sir John Wentworth dated 1801, William Nixon requested relief for a group of Indians who were forced to flee from their lands in Pictou to Guysborough due to the arrival of Scottish settlers infected with smallpox disease (Nixon, 1801).

The letters also detail the impoverished state of Indigenous peoples on said low quality lands. In a letter dated March 6 1801, Jonathan Crane of Horton wrote that he was not able to achieve the provision of necessities to Indians in the county, especially those of an advanced age (Crane, 1801, p. 1). A Copy of a letter sent from the Committee of His Majesty’s Council and House of Assembly details the great need to provide relief for the Native Indians of Nova Scotia. The Committee wrote that the elderly “Native Indians” of the province were suffering from sickness, and that others were not able to “procure their own subsistence” and that “during the enduring winter [they will] be in danger of starving from want of the necessities of life” (Committee of His Majesty’s Council, 1800, p. 1). Similar to those letters quoted above, hundreds of letters, still accessible today in the Nova Scotia Archives, make requests to colonial government officials requesting support for Mi’kmaq peoples by way of the provision of blankets, food, medical supplies and some means of shelter to address the abhorrent conditions in which they were living.

These conditions evidently persisted for many years, as the same conditions

depicted in the early 1800s continued to be described in the mid to late 1800s. During his visit to Nova Scotia, Bishop Plessis of Quebec wrote a letter depicting the shocking living conditions of the Mi'kmaq. He wrote that during his visit to the Nova Scotia capital his "eyes were hit and his heart afflicted by the large number of savages of the nation who were left wandering, poor, and abandoned" (1815, p. 1).

In 1841, Grand Chief Pemmeenauweet wrote to Queen Victoria on behalf of his peoples. In the letter he depicted how all their rights to their land had been stripped by colonial governments. He explained that the Mi'kmaq peoples no longer had the means to feed themselves, clothe themselves, or warm themselves and how everything necessary to their survival become the dominion of the White Man:

My people are poor. No Hunting Grounds, No Beaver, No Otter No nothing. Indians are poor, poor forever, No Store, No Chest, No Clothes. All these woods once ours. Our Fathers possessed them all. Now we cannot cut a Tree to warm our Wigwam in Winter unless the White Man please (Paul, 2008, 202).

It took three and a half years to get the news of the dire situation of the Mi'kmaq peoples to the Queen, upon hearing this news she urged her colonial governments to act. On March 19th, 1842 at the behest of the government and Act was passed by the General Assembly of Nova Scotia entitled, An Act to Provide for the Instruction and Permanent Settlement of the Indians.

The Act necessitated the appointment of a Commissioner for Indian Affairs who would inform the Queen's executive council whether or not colonial governments were acting faithfully in all their duties and commitments to the Indigenous peoples. The Commissioner would take over the supervision and management of all lands that had been or would be designated as Indian Reserves. The Commissioner was to insure that the

Indians themselves define their boundaries, and the Commissioner was to oversee all intrusions, sales or uses of said land to prevent further encroachment and alienation (Patterson 1985; Paul, 2008).

One report in particular worth highlighting, was Joseph Howe's first report as Commissioner for Indian Affairs in January of 1843. The report, while diplomatic, was condemning of the colonial government, and compellingly suggested that the government had allowed, and even caused the poverty among the Mi'kmaq peoples. Howe notes (Howe, 1843, p. 6-7) that the encroachment of white people on Indian lands had not stopped, and that many Mi'kmaq in the province "had been deprived of the property, to which they were often entitled by grant or by uninterrupted possession." Howe also wrote that the quality of the land reserved for Indians was incredibly poor:

It is to be regretted that so little judgement has been exercised in the selection of them — the same quantity, if reserved in spots where the soil was good, on navigable streams, or in places where fish was abundant, and game within reach, would now be a valuable resource. All the land reserved in this Country is sterile and comparatively valueless. In Yarmouth, Hants, Colchester, Pictou and Guysborough, there are no reserves, and in some other places, as at Pomket, and in parts of Cape Breton, it is to be feared that the quantity has been somewhat diminished by the encroachments of the whites (Howe, 1843, p. 6).

Howe pointed out that Indian statistics collected in 1838 compared to those he had most recently collected showed a dramatic decline in the population of Mi'kmaq peoples, and cautioned that at this rate of decline the entire population could be extinct in 40 years (Howe, 1843, p.3; Patterson, 1985, p. 15; Paul, 2008, p. 206).

One section of the Act, however, enabled the Mi'kmaq peoples to make strong, legally sound land claims. Section IV of the Act indicated that the colonial government recognize the sovereignty of Mi'kmaq communities, and required that the consent of the

Mi'kmaq Chiefs be sought and received before any government plans regarding that land could proceed. In addition to suggestions to protect the fishing and hunting rights of the Mi'kmaq, and to secure their agricultural abilities, Howe suggested a different approach to aiding the survival of Indigenous populations. Howe began to include the necessity of educating the Mi'kmaq to read and write in English, in addition to learning about how the new system of government worked (Howe, 1843, p. 7-8). According to Howe, this education would enable them to write to government concerning their own affairs, and would "show them how much they had lost from not knowing how to secure lands like the white man had done" (Howe, 1843, p. 8).

In the years leading up to Confederation there was a shift in attitude by some towards the Mi'kmaq. Many sympathized with the poor plight of the Mi'kmaq victims, starving, abandoned, and on the brink of extinction. Joseph Howe urged that the government do more to assist in the civilization of the Mi'kmaq peoples. However sincere his intentions may have been, his idea of civilizing carried its own Eurocentric biases and racial superiority (Patterson, 1985, 15; Paul, 2008, 216).

3.3 CONFEDERATION: THE BENEVOLENT STATE

In 1867 Canada was born. The British North America Act 1867 established a new country, with four provinces and two levels of government, provincial and federal. Panic ensued among the Mi'kmaq population, as rumours spread that their existing treaty rights would be abolished under the new dominion of Canada (Augustine, 2016, p. 52; Coates, 2000, p. 45). Indigenous peoples across the country now looked to Ottawa and the federal government for subsistence and allowance. This was perhaps beneficial in the sense that

the resources of Ottawa were far greater than those of individual provinces, and could perhaps end problems such as starvation on reserves. To the detriment of Indigenous populations though, were the difficulties surrounding communication with the “remote Great White Father” (Paul, 2008, 219).

Both levels of government had their responsibilities and powers defined within the Constitution, however responsibility for the welfare of Treaty Indians and the security of their lands was charged to the federal government, pursuant to Section 91(24):

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters Not coming within the Classes of Subjects by this Act assigned Exclusively to the Legislatures of the Provinces; and for great Certainty... (not withstanding anything in this Act) the exclusive Legislative Authority of Parliament of Canada extends to all Matters Hereinafter enumerated; that is to say... (24) Indians and Lands reserved for Indians.

With jurisdiction assigned to the federal government, Indigenous peoples were designated wards of the Crown, and were paternalistically dealt with as non-citizens. In his 1867 speech John A. Macdonald asserted that the aim of the new Canadian civilization is to “do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the dominion” (Cairns, 2000, p. 48). Policies regarding Indigenous peoples began to take on a new appearance. While they did not appear outwardly violent, their most basic principle rested on an old colonial mindset, bent on ultimately ridding society of the Indian; the goal was extinction by assimilation.

The *Indian Act 1876* defined the constitutional Indian and became the legal code needed to manage Canada’s constitutional obligations to Indigenous peoples. Paul notes

(2008, p. 221) that the Indian Act was a further betrayal of the government's duty to act in good faith with Indigenous peoples, as particular sections were very clearly in the government's best interest.

Input from, and consultation of Indigenous peoples was largely ignored in the drafting of the Indian Act. Rather than a means of protection, the Indian Act really functioned as a means to consolidate administrative control over Indigenous peoples (Augustine, 2016, p. 60), and as “an instrument of social control [...] defining all aspects of Indian's relationship to Canadian Society” (Patterson, 1985, p. 5). The federal government replaced the traditional government of the Mi'kmaq (Mi'kmaq Grand Council) with elected administrative systems responsible to the Department of Indian Affairs (Augustine, 2016, p. 60; Walls, 2010, p. 51). “From cradle to grave the Indian life was the responsibility of the minister of Indian Affairs” (Augustine, 2015, p. 61). The Indian Act 1876 granted federal governments the control over federal band systems and virtually everything done on reserves (Augustine, 2016, p. 61; Cumming and Mickenberg, 1972, p. 236). Though the *Indian Act 1876* was modified several times including in 1951, the undertones of the document still dictate many aspects of “Indian” life, and identity today (Patterson, 1985).

It was not until 1880 that the federal government created the Indian Affairs Department, in attempts to solve what was referred to as “the Indian Problem” (Cairns, 2000; Benjamin, 2014). The purpose of the Department was to figure out what an “Indian” was, who qualified as such, how many Indians there were, and how much they would cost. Indians were an expensive burden on the Canadian government, if they were to become “civilized” they would “disappear into the fabric of Canada like everyone else” (Benjamin,

2014, p. 22). This mindset, ultimately bent on the assimilation or extermination of Indigenous peoples, continued to transform overtime. Echoing John A. MacDonald's statements, Duncan Campbell (then Deputy Superintendent General of Indian Affairs 1913-32) delivered his speech to the House of Commons Committee in 1920, requesting to amend the Indian Act to give the Indian Department power to assimilate the Indians; "I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone" (Benjamin, 2014, p. 17).

With their authority stemming from the sections of the *Indian Act 1876* which dealt with matters of education, government policies shifted towards what is arguably considered one of the darkest, and treacherous moments of Canada's history, the residential schools. Under the guise of aiding Indigenous youth to civilize, the government saw to it that the traditional spiritual beliefs and ways of life of the Indigenous population would not be carried over to their children (Benjamin, 2014; Patterson, 1985, p. 16). In an extension of colonialism, residential schools were used to commit cultural genocide. The schools were to "take the Indian out of the child," to educate them, and enable them to lead full "productive" lives. In reality, the schools were nothing more than self-sustaining work camps with two main functions, house unwanted Indigenous children, and assimilate or "kill" the Indian child (Benjamin, 2014, p. 29), meaning Indigenous children could be forcefully assimilated into the broader Canadian society by being denied their culture, and distanced from their families.

Indian Residential Schools operated in Canada from 1892-1996. For the most part, these "schools" were government initiatives however, there were many partnerships and

funding arrangements between the Government of Canada and Christian churches (Hulan, 2012, p. 85). In 1892, the government set on finding a way to “educate” Maliseet and Mi’kmaq children and settled on the idea of building a residential school in Nova Scotia. The decision to build such a school was not official until 1927, when the first residential school opened off-reserve in Shubenacadie, Nova Scotia. Teachers were recruited for these schools according to the section of the Indian Act which dictated that the teachers be of the same religion of the students they were teaching (Paul, 2008, 283). As most of the Maliseet and Mi’kmaq children had been converted to Roman Catholicism, the teachers were predominantly Roman Catholic nuns and priests. Their curriculum was the same of that prescribed by the Nova Scotia Department of Education, except of course those courses designed specifically to shame Indigenous children. Religious courses preached the importance of Christianity, and the children were taught of the superiority of Caucasian life (Benjamin, 2014; Paul, 2000, p. 283).

Similar to other Indigenous peoples across Canada, Indigenous students of the Shubenacdie Residential School were subject to extreme and disturbing abuse. In some cases, cut completely off from their families, students suffered neglect, and lived in appalling unsanitary and unsafe conditions. It was not uncommon for children to go without food, resulting in severe cases of malnutrition. It was not uncommon for children to go without proper medical care for illnesses. In fact, it was not at all uncommon for children to die. Not only were children in Residential Schools subject to unacceptable conditions, but were also victims of cruel and disturbing punishments. Children were severely beaten, and in many cases repeatedly and brutally sexually abused (Benjamin, 2014; Hulan, 2012, p. 55; Paul, 2008, p. 293).

Unfortunately, Residential Schools were not the only instance in which the government targeted Indigenous children through policies of assimilation. While many Indigenous children were being abused in Residential Schools across Canada, others were being removed from their homes and communities. What is widely referred to as the “Sixties Scoop,” were policies which insinuated that Indigenous families and social workers were not capable of providing a proper upbringing of the child. Children were taken from their homes, cut off from their communities, and put up for adoption in non-Indigenous homes. For these children, in addition to a loss of their families, this resulted in the great loss of their culture, their languages, and their spirituality. Over 20,000 Indigenous children and their families experienced this trauma (Guse, 2015).

Policies of assimilation attacked not only the character or culture of Indigenous peoples and children but were also directly linked to policies which dealt with the ability of Indigenous peoples to oversee their own lands and affairs. This idea of Indigenous people as underdeveloped, uneducated victims of past colonial times, unable to manage their own affairs, enabled politicians to justify more paternalistic policies. One example of this is the 1936 report of the Ewing Royal Commission in Alberta, which labeled the Metis as a “forgotten people” or “half-breeds” (Cairns, 2000, p. 21). These labels worked to justify the commission’s recommendation to government that they “empower” the Metis people by establishing farm colonies to turn the “impoverished” Metis people into farmers.

Similarly, in Northern Canada, the Department of Northern Affairs and National Resources’ release of Canada and our Eskimos in 1953. This was the first “take-charge” policy to “allow the Inuit to share fully in the national life of Canada” (Cairns, 2000, p. 20). The Eskimo Affairs Committee, comprised of government representatives, as well as

representatives from Hudson's Bay Company and the church, was established to ensure more inclusion and representation of Inuit peoples. The Committee exercised a paternalistic power over the affairs of the Inuit, maintaining that few, if any, had reached the stage where they could take a responsible part in decision-making. This paternalism resulted in the relocation of Inuit populations to the High Arctic in the 1950s. Later, a Royal Commission on Aboriginal Peoples (RCAP) report of the relocation efforts stated that the needs and aspirations of the Inuit people were minimized by the committee's belief that it was best equipped to make decisions on behalf of the Inuit people, who were regarded and treated like children (Cairns, 2000, 20).

Other policies of assimilation were cloaked behind claims of "integration" or "equality" (Cairns, 2000, p. 18), perhaps one of the best examples of such a policy was Pierre Trudeau's 1969 White Paper. The Trudeau government took a completely different approach attempting to improve the state's relationship and improving the status of Aboriginal peoples; an approach which has been referred to as "shock treatment" (Cairns, 2000, p. 18). The White Paper aimed to break from past policies of distinctness, or separation, and move towards the full, free, and non-discriminatory participation of Aboriginal peoples in Canadian society (438). It pushed for full integration of Aboriginal peoples into Canadian society in order to combat the poverty and development issues that had plagued Aboriginal nations. It aimed to rid the country of any use for a Department of Indian Affairs, and sought to provide services to Aboriginal peoples through the same channels as non-Aboriginal Canadians. The White Paper also recommended that the *Indian Act 1876* be scrapped in its entirety. Pierre Trudeau's federal government insisted that by treating Indigenous peoples the same as all other Canadian citizens, they would better

integrate into the majority of society, where they would have claim to the same rights and services as all other Canadian citizens.

Jean Chretien, Minister of Indian Affairs in Pierre Trudeau's cabinet, explained that the intent of the White Paper was to "lead to the full, free, and non-discriminatory participation of the Indian people in Canadian society" (Chretien, 1969). According to the Trudeau government, policies which differentiate the legal status of Indigenous peoples from non-Indigenous Canadians, only work to separate and set back Indigenous peoples from fully participating fully in Canadian society;

The Government does not wish to perpetuate policies which carry with them the seeds of disharmony and disunity, policies which prevent Canadians from fulfilling themselves, and contributing to their society. It seeks a partnership to achieve a better goal (Chretien, 1969).

Of course, there was great opposition to the White Paper from those who saw it as an attempt at assimilation and to strip Indigenous peoples of their rights, lands, and distinct status, to make them disappear into larger Canadian society (Papillion, 2014, p. 116). The response to the White Paper from Indigenous peoples across Canada was not a positive one. The formal response, known as the Red Paper¹⁰, asserted that the Federal Government's White Paper was nothing more than a program disguised for the extermination of Indigenous peoples through assimilation (Cardinal, 1969, p. 442). The White Paper would create a world where the only way for an Indigenous individual to

¹⁰ The *Red Paper*, was a response to the Federal Government's *White Paper 1969*. Authored principally by Indigenous Activist, Harold Cardinal, the Red Paper – which Cardinal referred to as Citizens Plus – argued that the first step in resolving the "Indian problem" was not by legislating them out of existence, but by honouring existing obligations, recognizing self-determination and outstanding promises and treaty commitments owed to Indigenous peoples across Canada. See Steel, K. (2003). Three days in June: How the provinces played a key role in scuttling Chretien's 1969 white paper on Indians. *Citizens Centre Report*, 30(3), 44.

survive would be to in effect become a white man. While the suggestion of ridding the world of something as racist as the *Indian Act 1876* may have appeared to be something incredibly progressive, it was wholly advantageous to the government rather than Indigenous peoples. While there is much to dread of the *Indian Act 1876*, it did create sources of authority for Indigenous peoples stand on in their dealings with the Federal Government. Getting rid of the *Indian Act*, and eventually the Indian, would have ultimately relieved the Federal Government of the many responsibilities, duties, and costs associated with Indigenous peoples. The Red Paper asserted that the White Paper was nothing more than an escape for the Government of Canada. Rather than acknowledging the legal and moral responsibilities that the Government owes to Indigenous peoples, rather than honouring treaties signed in good faith, the Government sought to wash its hands entirely of Indigenous peoples, and “pass the buck” to provincial governments (Cardinal, 1969, p. 443).

3.4 NEOCOLONIALISM: RECONCILIATION FOR SHOW

Discourses of Canada’s colonial legacies are often challenged by Indigenous activism and the rise of rights-based constitutional visions (Abele & Prince, 2006; Rocher & Smith, 2003, 38). Through Indigenous activism, Indigenous voices have been gaining platforms to push the for recognition of the atrocity of Canada’s colonial legacy, and to revive the nation-to-nation relationship that once acted as the base of early treaties. In 1991 the Royal Commission on Aboriginal Peoples (RCAP) was established, with the mandate to investigate and propose solutions to reconcile and improve the relationship between Indigenous peoples and the Canadian Government. The final report issued by RCAP

suggested that Canada, as we know it today, was built on a foundation of false premises (p. 247). Canada was not unoccupied land, awaiting discovery, it was occupied by Indigenous peoples. These peoples had their own customs, systems of law and governance, languages, and cultures. RCAP suggested that in order to move towards reconciliation, there existed a gruesome dark history to which the Government of Canada had to own up.

RCAP also identified essential themes and recommendations to incorporate Indigenous autonomy and self-government into the Canadian federal system. RCAP concluded that in order for Indigenous peoples to exercise their right to self-government, federal and provincial governments would have to make room in Canada's federal system for a third order of government, which would constitute a separate Aboriginal government (Abele & Prince, 2006, p. 578). RCAP highlighted that both federal and provincial governments share a fiduciary responsibility to Aboriginal peoples, and thus they should both be expected to participate in intergovernmental relations with a distinct order of Aboriginal government. RCAP suggested that this distinct third order of government necessitated the creation of a new "Aboriginal House" in the legislative branch of Parliament (Abele & Prince, 2007, p. 176)

RCAP's recommendations were similar to those proposed in the Penner Report in 1983. The Penner Report argued that the Canadian government completely restructure their relationship with Aboriginal peoples. The report proposed that a third distinct order of Aboriginal government hold an extensive set of powers (Abele & Prince, 2006; Belanger & Newhouse, 2011, p. 363; Gibbins & Pointing, 1984). Penner argued that the third order of government be constitutionally entrenched, and enable them to legislate over jurisdictions such as education, child welfare, health care, membership, social/cultural

development, land and resource use, economic development, as well as justice and law enforcement (Belanger & Newhouse, 2011, p. 363).

These reports, coupled with the increasing volume of Indigenous voices, began to push the government in what seemed to be a new direction. The federal government responded to RCAP's report with the creation of a new action plan entitled, *Gathering Strength – Canada's Aboriginal Action Plan*. The intention of the plan was to formally recognize the historical struggle of Indigenous populations in Canada, and carve a path forward toward the reconciliation of the nation-to-nation relationship that once existed between the Indigenous peoples and Canada's earliest settlers.

Government agendas, even party platforms, began to outline matters of reconciliation with Indigenous peoples as priority, and with each new government came a new apology for the past. These apologies however, have been marked by many as a continuation of denial (Benjamin, 2014; Henderson & Wakeham, 2009; Hulan, 2012; Switlo, 2002; Wallace, 2013). What exactly was the Canadian state denying? Federal and Provincial Governments tend to associate these apologies with a colonial past, isolating parts of this dark history from the broader systems colonialism. Echoed in these apologies is the notion that these are horrible events which stem from a very specific time in the past of a country with an otherwise progressive history (Henderson & Wakeham, 2009, p. 2; Hulan, 2012, p. 56). In other words, federal and provincial governments have no issue apologizing for governments disassociated from Canada today, but they refuse to acknowledge the neo-colonialism that is very much so a part of Canada's present.

The Statement of Reconciliation (1998) boasted not only a new policy direction for Indigenous affairs in Canada, but also, the beginning of a new relationship between the

Government and Indigenous peoples of Canada. “The time has come to state formally that the days of paternalism and disrespect are behind us and that we are committed to changing the nature of the relationship between Indigenous and non-Indigenous people in Canada” (Stewart, 1998).

The Statement of Reconciliation (1998) clearly exhibited the government’s recognition of the fact that First Nations people in Canada had long been living under policies, laws, and events that had created an overarching system of oppression:

As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory [...] (Stewart, 1998).

Despite this recognition of oppression, the speech makes it a point to distinguish between the Canadian state and earlier colonial power, “[t]he main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong” (Stewart, 1998). While this statement does accept that past policies enforced by the Canadian state have been “wrong,” it carefully avoids the notion that the Government of Canada is itself an extension of colonial power (Henderson & Wakeham, 2009).

Unfortunately, The Statement of Reconciliation (1998) is only one of countless occasions where the government of Canada has denied the existence and impacts of neo-colonialism. In June of 2008, then Prime Minister Stephen Harper delivered a Statement of Apology to the former students of Indian Residential Schools, which are a prime example of neo-colonial policies pursued by the Canadian Government (Henderson & Wakeham, 2009). Prime Minister Harper highlighted the two main objectives of residential

schools in his statement, in a joint venture with Christian Churches, the residential school system was to “remove and isolate children from the influence of their homes, families, traditions and cultures, to assimilate them into the dominant culture [...]” (Harper, 2011). The statement of apology (2008) revealed an unsettling truth, but perhaps what is most unsettling, is that despite this recognition, a year later at a press conference for the G20 Summit, PM Harper was quoted as describing Canada as a unique country, for its stable regime “without any social breakdown, political upheaval, invasion,” and most importantly, “with no history of colonialism” (Henderson & Wakeham, 2009, p. 1).

What is “neo-colonialism,” and why is it important to recognize it if the discourses used to address Indigenous peoples are changing? Neo-colonialism can be understood as modern day colonialism. Put very simply, it refers to the strategic pursuit of unequal economic, cultural, and power relations between the colonizers and the “colonized”, in this case, between the Canadian state and Indigenous peoples (Switlo, 2002, p. 100). By not acknowledging Canada’s neo-colonial present, all matters of reconciliation rest on a completely spurious notion of Canada’s past. Most often, apologies are associated specific parts of Canada’s history, such as residential schools, which insinuates that Indigenous peoples and settlers lived harmoniously side by side until things like residential schools drove a wedge between them.

The job assigned to the Truth and Reconciliation Commission then, is that of a marital counsellor “to mend the rift, heal the split, and make the two conjoin again as one” (Henderson & Wakeham, 2009, p. 14). While it is undeniable that these very specific parts of Canada’s history with Indigenous peoples are important to confront, focusing solely on these aspects of history works to avoid the truth that the extermination of Indigenous

peoples through the appropriation of their unsundered and pre- existing title to land and resources is critical to the political economy of Canada, and will continue to be (Henderson & Wakeham, 2009; Wallace, 2013). More simply put, the recognition of, and emphasis on particular moments in Canada's colonial past, negate the fact that there are existing neo-colonial policies which continue to enable the "usurpation, subordination and absorption of the Indigenous peoples' sovereignty" (Wallace, 2013, p. 13). Discourses of reconciliation that emphasize sincere apologies for the colonialism of the past, scared children in Residential Schools, and families torn apart, enable governments to appear to be taking responsibility of the past, without making any formal policy changes that recognize the sovereignty of Indigenous peoples.

Wallace argues (2013) that this focus on the past is inherently strategic, so that the government can continue to place its own economic interests above Indigenous rights and title. He illustrates this argument with an examination of the Harper Government in 2012. Under Mr. Harper, the federal government introduced two omnibus bills that changed over 900 pieces of legislation; Bill C-38 - *The Jobs, Growth and Long-Term Prosperity Act (2012)* and Bill C-45 - *The Jobs and Growth Act (2012)* Both omnibus bills ushered in sweeping changes to the *Indian Act 1876* and existing environmental legislation.

Changes were made to Canadian Environmental Assessment Legislation and the Canadian Environmental Assessment Agency (CEAA). The CEAA provided a variety of critical services including making suggestion to reduce environmental impact for proposed projects, improving project design and planning, reducing project costs. It required that planning agencies integrate environmental considerations and assessments early in the decision making process and most importantly, the CEAA facilitated public knowledge,

debate and greater transparency. Both Bills made changes to the Fisheries Act, Bill C-45 made substantial changes to the *Species at Risk Act*, the *National Energy Board Act*, and most importantly the *Navigable Waters Protection Act*. These changes ultimately eliminated “federally protected waterways and facilitates the surrender of reserve lands without consultation” (Kino-nda-niimi Collective, p. 218; Kirchoff, Gardner & Tusiji, 2013, p. 8-10; Luddington, 2016 p. 31). One critical element of Bill C-45 were the amendments made to the Indian Act. Bill C-45 actually reduced the level of community voting necessary to allow Indigenous communities to sell their land to pipeline consortiums (Wallace, 2013, p. 7). Even without changes made to the *Indian Act 1876*, the changes made to the CEAA had significant implications in terms of how effectively Indigenous peoples could participate in the environmental assessment and review process (Kirchoff, Gardner & Tusiji, 2013, p. 5; Luddington, 2016, p. 31).

Canada’s current Prime Minister, Justin Trudeau, has been vocal about prioritizing reconciliation with Indigenous peoples. Nonetheless, the Liberal Party of Canada’s web page devoted to “a New nation-to-nation process” is exceptionally vague. The page asserts that “[i]t is time for Canada to have a renewed, nation-to-nation relationship with Indigenous peoples based on recognition, respect, co-operation and partnership,” as it is both “the right thing to do and a sure path to economic growth.” The party states that they will “immediately re-engage in a renewed nation-to-nation process” in order to “make progress on the issues most important to First Nations, the Metis Nation, and Inuit communities.” There is however, no further explanation as to what that “process” may be. The web page states that the party will “do more to make sure the voices of Indigenous Peoples are heard in Ottawa,” but does not state exactly what they intend to do to ensure

that.

With claims of carrying through with his 2015 political platform to improve Crown-Indigenous relations, Prime Minister Trudeau issued a statement in August of 2017 which reassured that the Government of Canada is “committed to a renewed relationship with Indigenous peoples, based on the recognition of rights, respect, co-operation, and partnership” (Trudeau, 2017). In his statement the Prime Minister boasts the investment of over \$8.4 billion over five years in improving the lives of Indigenous peoples, the elimination of 29 long-term drinking water advisories, and over 135 projects currently underway to refurbish schools and homes. Perhaps the most dramatic change, came from his mandate to the Minister of Indigenous and Northern Affairs (INAC) to dissolve and redesign the department, following a recommendation from RCAP, however, none of RCAPs recommendations involving all levels of Canadian governments making room in Canada’s federal system for a third order of government, thus constituting a separate order of Indigenous government, have been mentioned by the Trudeau Government.

The changes, Trudeau suggests, are necessary because the department itself was built upon carrying out the paternalistic and colonial Indian Act. Also, in its original design, the department was not meant to support or partner with Inuit and Métis peoples. The department was broken down into two new departments, the Department of Crown-Indigenous Relations and Northern Affairs, and the Department of Indigenous Services. This move according to Prime Minister Trudeau, not only improves deliverable services to Indigenous peoples in Canada, but ultimately contributes to the creation of a “true nation-to-nation, Inuit-Crown, and government-to- government” (Trudeau, 2017) relationship with Indigenous peoples in Canada.

While Prime Minister Trudeau speaks highly of rebuilding a “nation-to-nation relationship” he has not been spared criticisms in his dealings with Indigenous peoples. The Prime Minister has been accused of completely bulldozing Indigenous rights regarding the Site C Dam in British Columbia. The proposed hydraulic dam on the Peace River will flood around 83 kilometers of land in the Peace River Valley, rendering the land useless for local Indigenous population that depends on it. (Kurjata, 2016).

Prime Minister’s Trudeau’s rhetoric surrounding reconciliation has been accused of being more symbolically important than policy driven;

It gazes accordingly at Indigenous children singing, yet betrays those same children by failing to comply with human rights rulings vital to their welfare. [...] It champions the idea of rights, while simultaneously opposing the Indigenous right to veto impositions on land and water, profiting from territorial exploitation (Ansloos, 2017).

Perhaps the most important critique about Justin Trudeau’s notion of a return to a “nation- to-nation” relationship, is that it is incredibly difficult to decipher what exactly he means by this. While the reconfiguration of INAC can be thought of as a bold move, we cannot be entirely sure how this change will benefit Indigenous peoples across Canada, or if the change really included proper consultation with, or recommendation from Indigenous peoples across Canada. Is this change designed to put power back into the hands of Indigenous peoples to manage their own affairs? Is this change designed to push federal and provincial governments to honour the original meaning and intent of treaties, which in cases such as the Peace and Friendship Treaties signed with the Mi’kmaw in Nova Scotia, never truly surrendered lands or the right to self- determination? Is Trudeau’s vision of this nation-to-nation relationship the relationship that according to treaties and Indigenous

histories, was supposed to exist? An arrangement where Indigenous peoples and the Canadian governments co-exist but one cannot rule over the other? With no mention of how this relationship was supposed to be in the past, or how it is supposed to exist in the present, how are we supposed to understand Justin Trudeau's nation-to-nation ideal?

During the 2015 election campaign in an Aboriginal People's Television Network (APTN) Town Hall, PM Trudeau promised that if Indigenous peoples elected him, they would receive a veto over resource development (Palmater, 2017; Jago, 2017). This would be an incredible step for Indigenous-Crown relations in Canada, as currently, most consultation policies outline the fact that while governments have a duty to consult Indigenous peoples over matters such as resource development projects, there is no duty to agree, and Indigenous peoples certainly do not have a veto over such projects. Since making this promise however, PM Trudeau has approved multiple plans for pipeline construction amidst Indigenous protest (Barrera, 2018; Palmater 2017; Jago 2017). When questioned about his approval of the Trans Mountain oil pipeline from Edmonton to Burnaby, PM Trudeau said he "respects the right of opponents to vigorously protest the project" however he does not recognize any right enabling Indigenous peoples to block projects; "no, they don't have a veto" (Financial Post, 2016). Turning back on such a monumental promise has led some to question whether or not PM Trudeau takes his promises with Indigenous peoples seriously, or if they were simply part of his striking discourses of "real change" and "nation-to-nation" which helped him to get elected:

Trudeau has not followed through on his promises to First Nations people — and where he has, it has been done poorly or on a far longer timeline than First Nations people are willing to accept. It's become clear that his engagement with us was more about virtue signaling to white liberal voters, than about genuine concern over our well-being (Jago, 2017).

It would appear, that while multiple Canadian federal governments have publicly denounced the racist attitudes of superiority which so greatly influenced the assimilatory laws and policies pursued in Canada's past, the majority of these laws and policies remain unchanged (Palmater, 2011, p. 114). How is it that Canada on one hand, can continue to pursue policies which exert power over Indigenous peoples, while at the same time claiming support self-government, reconciliation, and the nation-to-nation relationship? There is a great deal of underlying conflict in these two policy objectives which greatly impede any type of real progress (Palmater, 2011, 114).

3.5 CURRENT PROVINCIAL DISCOURSES IN NOVA SCOTIA

The goals of reconciliation held by the Provincial Liberal government in Nova Scotia seem to echo those of their federal counterparts. In 2015, the Liberal government made it a point to introduce legislation that would outline current consultation best practices, and shape a consistent consultation process that respects the recognized rights of the Mi'kmaq of Nova Scotia: The Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia 2015. The policy boasts a high level of inclusiveness and cooperation with key consultation practitioners, such as various Mi'kmaq organizations across the province, industry representatives, and different levels of government (Province of Nova Scotia, 2015).

In addition to the policy, the Provincial government announced on October 1, 2015, that in honour of Treaty Day the province would be partnering with the Mi'kmaq community of Nova Scotia to launch a long-term Treaty Education initiative. The

education initiative will eventually be incorporated into the provincial education system, and will also take the form of training and education for civil servants in the province. Premier McNeil said that this initiative “is an opportunity to not only advance our relationship with the Mi’kmaq” but that this was also an opportunity “to engage Nova Scotians in a conversation about our shared treaty relationship and how we can work together for the future prosperity of our province” (McNeil as quoted by Province of Nova Scotia, 2015).

In addition to legislation strengthening consultation, the provincial Liberal government has taken action and issued statements acknowledging past wrongs, and pathing the path for a brighter future with Indigenous peoples. In the 2017 Speech from the Throne, the Premier boasted his government’s intentions and actions to work towards reconciliation with Indigenous peoples in Nova Scotia;

My government’s continued leadership and commitment on Aboriginal consultation was evident when Nova Scotia became the first province to sign a Memorandum of Understanding with the federal government that formalizes and strengthens the cooperative working relationship between Nova Scotia and Canada regarding consultation with the Mi’kmaq. (Speech from the Throne, 2013).

Also in 2017, the government of Nova Scotia issued a posthumous pardon for the late Gran Chief Gabriel Sylliboy, who was wrongly accused of hunting illegally on lands over which he held treaty rights. In his statement, Premier McNeil addressed the need to recognize past wrongs in efforts to move towards reconciliation with the Mi’kmaq of Nova Scotia;

We recognize that the treatment of the grand chief was unjust. The province apologizes to the family of Grand Chief Sylliboy and the Mi’kmaw community for this injustice. An important step

on our path toward reconciliation is recognizing the mistakes of the past so we can build a better future for all Nova Scotians (McNeil, as quoted by Province of Nova Scotia in 2017).

However, Nova Scotian initiatives are arguably following along the same footsteps as many federal initiatives that have been dubbed all talk and no action. In Nova Scotia, claims of poor consultation continue to arise. Most recently, controversy has sparked between the government and the Sipekne'katik Nation concerning the Alton Gas storage project in the Shubenacadie River. The disagreement lies in claims made by the Mi'kmaq community that the government has not adequately fulfilled its duty to consult (Sipekne'katik v. Nova Scotia, 2016; Tattrie, 2016). The provincial government, however, disagrees and contends that they have carried out their duty to consult in the case of Alton Gas (Tattrie, 2016).

While the province acknowledges that we have a duty to consult, the implementation of that consultation in practice raises important questions. Are the powerful discourses of decolonization, partnership and Indigenous sovereignty truly reflected in the formal policies, decisions, and actions of government? Are these discourses truly putting an end to the colonial legacy in Nova Scotia, or do they only appear to be doing so?

CHAPTER 4

MOVING BEYOND COLONIALISM? AN ANALYSIS OF CONSULTATION POLICY IN NOVA SCOTIA

In the previous chapter a historical-discursive analysis showed that discourses framing Indigenous peoples, and the policies addressing them, transformed over time along with the different agendas of those in power. In the beginning, the desire for a nation-to-nation relationship among Indigenous peoples and French settlers was expressed, however, as conflict over control of the land grew the colonial governments sought ownership of the land, treaty terms were not honoured and the Mi'kmaq peoples found themselves the target of policies designed to assimilate them, or eradicate them all together.

This chapter will examine Nova Scotia's present consultation policy and all supporting documents that accompany the policy, to uncover the discourses that form consultation policy in the province. The chapter will examine The Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia (2015), the Terms of Reference for a Mi'kmaq - Nova Scotia - Canada Consultation Process, and the Proponents Guide to consultation: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia. The chapter will provide a brief description, or outline of each document, and will continue with a more in-depth analysis to uncover the following components:

- i) The definition or framing of concepts such as “consultation” or “reconciliation”.
- ii) The mechanisms or processes in which each document outlines and suggests to ensure that adequate consultation takes place.
- iii) Who exercises authority over these mechanisms?

To more adequately assess whether the policy has been successful in its objective to improve consultation processes, and promote reconciliation in the province, the chapter will examine a pertinent case study of consultation in Nova Scotia, the Alton Gas Natural Storage Project.

4.1 DEFINING CONSULTATION IN NOVA SCOTIA

In 2015 the Liberal Government of Nova Scotia introduced *The Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia*, to solidify a meaningful consultation process with Indigenous communities across the province. Accompanying the guidelines was a Memorandum of Understanding (MOU) on Cooperation Regarding the Duty to Consult, the Terms of Reference for a Mi'kmaq - Nova Scotia - Canada Consultation Process (TOR), and the Proponents Guide to consultation: *The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia*. Each document offers some form of definition for consultation.

The MOU outlines the wish of Her Majesty the Queen in Right of Canada (as represented by the Minister of Aboriginal Affairs and Northern Development) and Her Majesty the Queen in Right of Nova Scotia (as represented by the Minister of the Nova Scotia Office for Aboriginal Affairs) to build on existing relationships and to “strengthen effective and coordinated approaches to Aboriginal consultation.” The MOU is intended to promote co-operation, the sharing of knowledge of consultation processes, and to increase training and knowledge related to Consultation.

The Terms of Reference (TOR) were introduced to outline the preferred method of consultation for the Parties (consisting of Her Majesty the Queen in Right of Canada, and

Nova Scotia). In addition, the document outlines the structure of various committees and councils involved in consultation processes in the province, Mi'kmaq of Nova Scotia Consultation Committees, the inclusion of a Consultation Advisory Group. The Terms of Reference also outline expectations for confidentiality, funding to the Assembly of Nova Scotia Chiefs, and a three-year review and evaluation of the terms themselves.

The proponents guide was released in 2012, before the election of the current Liberal Provincial Government arrived in power in 2013, however, the document does not appear to have been updated. The guide outlines the consultative roles of proponents who fall under Section 9(1A) (xiii to xv) of the *Environment Act*, which require an Environmental Assessment before a project may continue.

As part of an undertaking, proponent must identify:
All steps taken to identify, list and address concerns of the public and aboriginal people about the adverse effects or the environmental effects of the proposed undertaking (2012, p.1).

The guide further outlines the legal duty the government has to consult, and the goals for consultation with Indigenous peoples in the province. The document states that proponents have no legal duty to consult, but that in many cases the province will delegate the procedural aspects of consultation to them, and so they should consider the government's suggested principles of engagement including mutual respect, early engagement, openness and transparency, and adequate time to review/respond.

The consultation guidelines are intended to apply to all provincial government departments, offices, Crown corporations, boards and commissions that are undertaking any action that could adversely impact established or asserted Mi'kmaq rights. The purpose of the guidelines as outlined within the document, are to "provide clear direction and

practical, consistent guidance to ministers of the Crown and to provincial government staff,” (p. 4) when interacting with, or consulting with Mi’kmaq peoples. The guidelines outline the various reasons why the Crown enters into consultation with Indigenous peoples, the principles that guide consultation, the roles and responsibilities of participants, and the preferred procedures for consultation. The guidelines are based on the Terms of Reference for a Mi’kmaq-Nova Scotia- Canada Consultation Process and replace the previous Province of Nova Scotia Consultation with the Mi’kmaq: Interim Consultation Policy from June 2007.

4.2 THE TERMS OF REFERENCE

The Terms of Reference (referred to as TOR) establish the protocols of, and structure for consultation for both levels of government, and for the Mi’kmaq in Nova Scotia. As a document which intends to outline the terms in which consultation takes place in Nova Scotia, consultation as a concept should be defined, however, consultation as a concept on its own is never specifically defined. Instead, consultation is discussed in a variety of procedural contexts throughout the document, such as what types of activity may trigger the need for consultation, who participates in consultation, and what established principals should guide consultation.

Consultation within the TOR is never described as a legal duty of the Crown, nor is there any explanation of the historic circumstances that in turn create the necessity of the duty itself. In addition, the TOR references treaty rights twice (p. 1, 3) but only in passing. The document does not provide any definition of treaties, treaty rights, how they are regarded by law, or how they are treated presently in Nova Scotia.

The TOR establishes a “made-in-Nova Scotia” process for consultation within the province. The Mi’kmaq of Nova Scotia who sign on and agree to the TOR will participate in the consultation process through committees that are appointed by, and report to the Assembly of Nova Scotia Chiefs. The composition of these committees is not defined in the TOR, as the composition of such committees needs to be flexible from consultation-to-consultation (p. 2). The Assembly of Mi’kmaq Chiefs, which assumes the lead role on the Mi’kmaq side of consultation, receives all of its funding from the governments of Canada and Nova Scotia (Article 18). While it is expected and is completely logical that the government should have responsibility to ensure that the Assembly has the means to participate in consultation processes, one criticism to be made is that the TOR does not adequately define the conditions of such funding. The TOR does not list whether or not there is an assured annual amount, or percentage of the provincial budget provided to the Assembly, it simply states that funding will be taken into consideration by each level of government annually. The TOR also does not establish whether or not the government has a responsibility to provide resources to ensure that communities who proceed with consultation apart from the Assembly, or who are not signatory members of the TOR, are able to participate in the consultation process.

The assembly and the committees appointed by the assembly have the authority to enter into consultations, and to make agreements with the parties involved in consultation on behalf of the Mi’kmaq of Nova Scotia and the Chief and Council of all thirteen Mi’kmaq Bands that subscribe to the TOR. As per article 13 and 13(b) of the terms of reference, the consultation process outlined in the TOR are completely optional. Should a specific Band/Community wish to abstain from participation in the assembly, and represent

themselves, they must provide notice in writing to the assembly, who will then provide written notice to the provincial, or federal government. The TOR however, does not make it entirely clear what happens to communities or bands who decide to opt out of the TOR.

As per article 12(a) of the TOR, whenever the Crown finds that they have a duty to consult the Mi'kmaq of Nova Scotia, they must notify the Assembly in writing and send a copy of this letter to the potentially impacted community, and the Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO). The community then decides whether or not they want to a) take control over the file on behalf of the Assembly, b) proceed with consultation completely on their own, or c) run consultations through the KMKNO. Since 2004, Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO —also known as the Mi'kmaq Rights Initiative— has been actively engaged in the consultation process, on behalf of the Assembly of Nova Scotia Mi'kmaq Chiefs. Currently, the KMKNO is coordinating consultation on over 300 diverse projects in the province (KMKNO, 2018). Advisory groups are appointed by the KMKNO to assist with consultation on different projects. While these advisory groups may be made up of Mi'kmaq elders and community members, non-Indigenous peoples are also given a place on advisory boards. Typically, the non-Indigenous positions on the advisory boards are filled by experts or researchers in the given field, conservationists, or members of a community outside of the Mi'kmaq community who face potentially adverse impacts from the proposed action or project (for example, if fishermen were being impacted by a proposal also impacting Indigenous peoples with rights to conduct certain traditional activities on the river).

4.3 CONSULTATION POLICY GUIDELINES

The consultation policy guidelines do not offer a specific definition of what constitutes consultation, however some recurring themes influencing the framing of consultation were identified in analysis. One such theme is, the framing of consultation as a legal concept. In this theme, consultation is defined as a legal obligation of government, that is not fixed or defined, but continuously changing. Another theme was to frame consultation in a historic context, associated only with historic traditions and practices of Mi'kmaq peoples. The other frequent theme among documents was to associate consultation with partnership and shared responsibility, while all actual policy instruments associated with power or final decision-making within the consultative process were associated with government.

Within the document, consultation is most frequently framed as a legal concept, or obligation, linked to Canada's constitution and the Honour of the Crown. The document establishes (2015, 7) that the policy is bound by, and based on legal the framework established by the Supreme Court of Canada regarding the DTC. Specifically, the guidelines reference six Supreme Court cases (Haida Nation v. BC (Minister of Forests) 2004, Taku River Tingit First Nation v. BC (Project Assessment Director) 2004, Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005, Rio Tinto Alcan Inc. v. Carrier Sekai Tribal Council 2010, and Beckman v. Little Salmon/Carmacks First Nation 2010) as the sources responsible for defining any sort of consistent framework for consultation to date (2015, 7).

The guidelines further list (2015, p. 7-8) some of the more significant observations taken from the SCC established framework on consultation that makeup the basis of Nova

Scotia's policy guidelines. Principally, the document recognizes that;

- a) All consultation with Indigenous peoples in Nova Scotia is rooted with the Honour of the Crown.
- b) That government has a DTC whenever government decisions or actions have the potential to impact Indigenous rights, and exists to protect the collective rights of Indigenous peoples.
- c) That past decisions/breaches of the duty to consult do not trigger consultation obligations, as the DTC is forward looking.
- d) That consultation must engage with Indigenous Nations directly, and may not simply be a component of public consultation.
- e) That it is inherently the government's duty to consult Indigenous peoples, but the procedural aspects of consultation may be delegated to third party proponents.
- f) That the goal of consultation is to reach consensus or agreement, but there is no duty to reach an agreement.
- g) That Indigenous groups have a reciprocal duty to express their interests and concerns, however they must not frustrate the government's attempts to consult or take unreasonable positions.

The policy document outlines five principles that will guide all consultation with Mi'kmaq peoples in the province in efforts to maintain the Honour of the Crown. The first of which is "good faith," which is vaguely defined as ensuring that consultation is undertaken "in the spirit of trust, collaboration, and mutual respect among all parties" (2015, p. 9).

The second principle, is "reconciliation," which necessitates that all consultation is "carried out with the goal of reconciliation of government and Mi'kma[q] interests" and of "reconciliation of Mi'kmaw interests with broader society" (2009, p. 9). Interesting to note, is that the concept of "reconciliation" within this policy does not seem to refer to the broader sense of reconciliation as a whole. The vague reference to reconciliation in this

policy document seems to equate reconciliation with inclusion, which is certainly a component of reconciliation but only scratches the surface. Reconciliation, in this policy document, is about finding ways to incorporate Indigenous interests with broader society, not about reconciling the past with the present. There is no mention of how the policy intends to reconcile the terms set out by historical treaties signed with colonial governments (pre- and post-confederation). This is an essential component lacking from the concept of reconciliation in this document, as the main component of reconciliation is reconciling the past, reconciling treaties and neglect of those treaties, and reconciling the relationship between Indigenous peoples and Canada. Reconciliation is about true recognition of Indigenous rights to self-determination and self-government, the recognition of a nation-to-nation relationship, and the right of Indigenous peoples to the benefit and use of their lands (Coulthard, 2014; Youdelis, 2016, p. 1375).

The third principal is transparency, which is defined as the sharing of all information related to the subject of consultation with the Mi'kmaq of Nova Scotia, which is ultimately linked to the fifth principal, timeliness. This is the idea that consultation should take place within reasonable time periods, and information should be shared in a timely manner, so that the Indigenous community in question has enough time to consider the information and respond accordingly. It is worth noting that transparency of the consultation process is never mentioned again within the guidelines after it is listed in the guiding principles, and while "timeliness" is referred to quite frequently, it is never defined.

While it is difficult, and illogical to ascribe a fixed time allotment applicable to all consultations, it is never specified when consultation is supposed to begin. For example, when government, or a third party proponent, is contemplating action that may trigger

consultation it is not clear which stage of this contemplation requires consultation. In Nunavut following land claim settlements in 1998, the Canadian government transferred all responsibility for oil and gas development in the Yukon Territory to the territorial government. As part of the agreement with the territorial government and the various Inuit populations that reside there. Inuit beneficiaries became the holders of private mineral and surface rights over defined sections of land within their regions, enabling them to manage their own petroleum rights on said lands. Thus, for proponents to receive regulatory approval even to obtain an exploratory permit, the duty to consult with potentially impacted communities is triggered, and project components must begin consultation (Nuttall, 2008, p. 622-623). Such specific timeline requirements are not established in Nova Scotia's current policy. It is not clearly stated whether or not third party proponents need to notify, and engage with potentially impacted communities in the early stages of design before the issuance of exploratory permits.

The fourth guiding principle is that of accountability. The definition of accountability in this policy however, is completely obscure;

All parties share the responsibility to ensure the consultation process is carried out in a manner consistent with agreements and the principles of consultation. The Government of Nova Scotia will provide information related to the decision or action under consideration; participate in a meaningful process of dialogue that considers all interests and concerns of the Mi'kmaq of Nova Scotia; and provide a response, once decisions are made, that outlines how the government is responding to those interests and concerns, including any accommodation measures, where appropriate (2015, p. 9).

All parties (those parties being federal and provincial representatives of the Crown, and the Mi'kmaq of Nova Scotia) share a responsibility to ensure that consultation is

carried out in accordance with the above mentioned, ill-defined principals. The above statement of accountability really establishes no accountability at all. It more or less outlines a very vague idea of which parties have a role in consultation, but nothing about how any party is held accountable. In addition, none of the terms of these guiding principles are specifically defined, and so there is a high possibility that there will be competing interpretations of what constitutes compliance with these principles. In such an event, whose interpretation reigns supreme? According to the roles and responsibilities, and the six-step consultation process outlined in this policy document, it is literally only government that can initiate the consultative process, or to make the final call.

The policy outlines a six-step consultation process that it will follow in every instance of consultation, however, it is specified that it is the government that initiates this process; “The Government of Nova Scotia will consult with the Mi’kmaq of Nova Scotia, and accommodate their interests and concerns, where appropriate” (2015, 17). The steps are as follows; 1) Consultation Screening, 2) Initiate Consultation, 3) Identification of Mi’kmaq Concerns, 4) Accommodation, 5) Decision, 6) Monitoring.

In step one, consultation screening, the Government of Nova Scotia has either been notified by a third-party proponent of a project, or is planning an action on their own, and they contemplate whether or not these proposed actions require consultation. Depending upon the findings of their analysis, there are three potential outcomes: no duty to consult, notification, or consultation.

Any proposed activity that is the potential to infringe upon Indigenous rights, or treaty rights to the land in question triggers the DTC. The policy outlines these instances as decisions that may affect Crown lands, plans related to managing or using natural

resources, proposed developments in close proximity to Mi'kmaq communities, or lands used by the Mi'kmaq, or other actions that may negatively impact asserted Mi'kmaq rights. The policy focuses particularly on only triggers related to possible interference with historical or traditional land uses, e.g. hunting, fishing, gathering, trapping, or other traditional uses. While the traditional uses of land are a sacred to Indigenous peoples, and many of these traditional practices remain important in the present day lives of Indigenous peoples, the policy seems only to focus on Indigenous peoples in a historic sense.

There is a danger in framing Indigenous peoples solely in reference to narratives from colonial history. It closes off the potential that Indigenous peoples may want to engage in, or even attract the economic benefits of certain types of developments on their lands. It also limits the ways the government may seek to interact with them by keeping them frozen within a particular idea of Indigenous peoples influenced largely by “oppressive colonial myths and symbols” (Alfred & Corntassel, 2005, 447).

Furthermore, this traditional-only view of Indigenous peoples works to support the notion of a more restrictive understanding of Indigenous rights as solely based on the exercise of their traditional culture (MacDonald, 2011, p. 261). It is important to understand Indigenous rights in a modern sense as well, one that speaks to their ability not only to carry out traditional activities but to exercise real decision making authority over their lands and affairs. Indigenous rights and autonomy are not simply one among many multicultural policies, they are inherent rights derived from the history of their existence on these lands prior to the European colonization of Canada.

By sticking to the idea of Indigenous peoples only has hunters and fishers, the policy negates all instances in which Indigenous peoples may want to enter into agreements

with proponents in which they are able to share revenue, or create employment for their peoples. This enables the government to maintain control over what types of project proposals or developments will be considered in a given area. It also enables the government to dictate the priorities or interests of a given community prior to their knowledge of a proponent proposal, as it is the government first that is notified by a third party proponent, and it is the Office of Aboriginal Affairs (OAA) that provides assistance to proponents or provincial departments to help them decide whether or not they need to consult (2015, 18).

In assessing the potential for adverse impacts, or the type of consultation required, the OAA's consultation screening takes into account factors such as:

- a) existing information on Mi'kmaq land use.
- b) proximity of Mi'kmaq reserve lands and lands of interest.
- c) the size, nature, duration and location of the proposed interest, and the level of ground disturbance.
- d) the activities proposed during all phases of the project.
- e) land ownership, land description, and potential Mi'kmaq interests in the land.
- f) potential environmental, social, and cultural impacts.
- g) potential impacts on Mi'kmaq cultural sites.
- h) potential impacts on asserted Mi'kmaq rights (hunting, fishing, gathering, cultural).
- i) existing statutory regulations for decision making.

The Government of Nova Scotia operates under the spectrum analysis used most frequently within courts. The depth of consultation on the part of the government will vary

depending upon the strength of the asserted rights, and the potential level of impact on those rights. In order for full consultation to be required, the magnitude of impact on asserted Mi'kmaq rights must be identified, and the claim must be credible.

The policy does not outline or emphasize any point within their initial screening in which the OAA needs to notify, or work in partnership with the potentially impacted Indigenous community, meaning the OAA has the ability to assess all components listed above without the input of the potentially impacted community, meaning, it is the government which decides whether notification, or more involved consultation is required. If the consultation screening establishes that no consultation is required, the government may continue without taking any action, though they may share information with Indigenous peoples in the area if they so desire. If it is determined that notification without the offer to consult is required, the lead department involved with the proposed plan sends a notification letter to the Mi'kmaq community(ies) in the closest geographic proximity to the site of the proposed action. The purpose of the letter is to provide only general information that may be of interest to the identified communities, however the policy makes it clear (p. 22) that this is not an offer to consult. Should the consultation screening result in the need for consultation, steps two through six of the consultation process are initiated.

Step two is to initiate consultation with the identified communities. Though there may be multiple departments or jurisdictions involved in making decisions about the government action, or proposed project requiring consultation, the government takes a "whole-of-project" approach; one project equals one consultation (p. 20). The OAA provides support to all provincial departments, and helps to coordinate with the federal

government. The OAA also provides a supportive role to any third party proponent involved in consultation. The policy states that proponents do not have a duty to consult, however they may be delegated to perform the procedural aspects of consultation, where appropriate. The government may wish to defer the procedural aspects of consultation to proponents, as they tend to have a better technical understanding of the project, and its possible impacts. The policy references the section on roles and responsibilities, as well as the Proponents Guide for further information for proponents engaging in consultation.

This is perhaps one of the biggest issues that goes unaddressed in not only Nova Scotia's consultation policy, but at a federal level as well. The Supreme Court of Canada found that proponents do not have a DTC, nor do they have any measures by way of regulations or penalties specifically outlined for proponents regarding consultation with Indigenous peoples, however the bulk of the consultative process may be transferred to proponents who do not actually have a duty to consult with Indigenous peoples. Not only can the government delegate the procedural aspects of consultation to proponents, but they can also delegate aspects of accommodation to proponents, which will be discussed in detail in step four of the consultation process.

The Proponents' Guide notes (p. 1) that depending upon the nature of the proposed project, the proponent may have to complete an Environmental Assessment (EA) prior to advancing the projects. As part of the undertaking to conduct an EA, the proponent must identify all steps taken to identify, list, and address all concerns of the public and Indigenous peoples about both the potential adverse and/or environmental effects of the proposed project. The guide, however, does not go into detail about how engaging with Indigenous peoples as part of consultations with the general public are not permissible in

terms of the DTC. In addition, the proponent's guide seems to conflate carrying out EAs as an integral part of the consultation process.

While EAs may play a principal role in engagement/consultation with Indigenous peoples by providing information needed for deliberations, simply conducting EAs does not qualify as meaningful engagement or consultation with Indigenous peoples. In fact, this conflation has been identified as a source of continuing frustration for Indigenous peoples, and the Supreme Court of Canada has issued rulings on this matter. For example, in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, the SCC condemned the National Energy Board for narrowly focusing its inquiry on whether or not the project would cause significant environmental effects. The SCC confirmed that what Indigenous peoples have been arguing for years holds true: when the duty to consult is triggered a consideration of environmental effects alone will not suffice, the Crown must assess potential impacts on Indigenous and treaty rights (McIvor, 2018).

The guide offers advice to proponents in order to fulfill their obligations under the Environment Act to identify the concerns of Indigenous peoples by suggesting four Principals of Engagement (Mutual Respect, Early Engagement, Openness and Transparency, Adequate Time to Review/Respond) as well as identifying six steps for proponents to follow when engaging with the Mi'kmaq of Nova Scotia (2012, p. 3-4);

- 1) Notify the Mi'kmaq early in the development process (which could ultimately mean engaging first with the OAA, not necessarily with the Mi'kmaq).
- 2) Provide as much information as possible on the proposed action.
- 3) Meet with Mi'kmaq Community.

- 4) Complete a Mi'kmaq Ecological Knowledge Study (MEKS)
- 5) Address potential project-specific impacts.
- 6) Document the engagement process.

The province maintains accountability for consultation even though the proponent may be heavily involved, and though the guide lists principals of engagement and suggested methods, the guide is not intended to provide legal advice and does not establish any measures by which industry is held accountable, or penalized for not following through on any of these suggestions; the guide provides practical advice for things that should be done, not things that must be done. Similar to the guiding principles listed within the consultation guidelines, the four guiding principles listed in the proponent's guide are vague. Though references are made to transparency, adequate or reasonable time frames, and early engagement there are no regulatory measures with defined terms, leaving these principals open to interpretation.

Turning attention back to step two of the consultation process as defined in the consultation policy guidelines, after it is decided that consultation is required, the lead department(s) or proponents work in partnership with the OAA to gather all relevant information that will assist the Mi'kmaq in their deliberations over the potential impacts of the proposed project. When relevant information is gathered, under the TOR the lead department needs to prepare a consultation letter to be sent to all Mi'kmaq chiefs and councils that have formally adopted the TOR. In addition, they must provide copies of the letter to the OAA, and the Kwilmu'kw Maw-klusuaqn Office (KMKNO). If the letter is being extended to a Mi'kmaq community that is not a signatory member of the TOR, the lead department sends a separate letter to the chief and council of said community, as well

as a copy to any identified responsible provincial or federal government departments. Interestingly enough, this is the only time in which a specific timeframe is identified and it is being imposed by government onto the identified Mi'kmaq community. In addition to a description of the proposed action, a list of all permits and authorizations, the Mi'kmaq community is given 30 days to review the information and respond with whether or not they are interested in participating in consultation, and if so, how they would like to proceed (2015, p. 21). If no response is received, the government may (but is not required) to send a letter offering additional time. If no response is received within the government's desired period, they may proceed with decision-making.

The response from the Mi'kmaq community or the KMKNO may request consultation. The request for consultation must be accompanied by an explanation of any potential impacts on asserted Mi'kmaq rights, meaning it is up to the community to prove how their rights and treaty rights could/will be impacted by the proposed action. In order for the Government of Nova Scotia to give full consideration to potential impacts and contemplate appropriate accommodation, claims must be specific in nature and show a distinct causal relationship between the proposed action and the adverse impacts of the potential action; citing past wrongs, or breaches of the duty to consult do not suffice (2015, 22).

Step three in the consultation process, is the identification of Mi'kmaq concerns. Here, the objective is somewhat different than the objectives laid out in the policy objectives, or the objectives of the TOR. The objective is only to understand Mi'kmaq concerns, interests, and asserted rights that may be negatively impacted, and "where appropriate" accommodate those concerns or interests. The use of "where appropriate" is

quite rampant throughout the consultation policy documents. As is the case for consultation, accommodation is not nearly defined, as the accommodation sought and pursued in different cases varies. It is however, pertinent to note that upon analysis, “where appropriate” is only ever connected to government duties/obligations owed to the Indigenous communities with which they may be consulting, e.g. the Crown has a duty to consult and accommodate where appropriate, the Crown or government will accommodate interests and concerns of the Mi’kmaq where appropriate, additional assessments/information sessions will be planned where appropriate.

The question then becomes, whose job is it to ultimately decide when consultation/accommodation, or accommodation is and what type of consultation/accommodation is “appropriate.” Really, this power belongs to the government during the consultation process, and can only be challenged by the Indigenous community in question if they decide to take the matter to court and challenge the government.

During the third step of the consultation process, the Mi’kmaq of Nova Scotia may request additional studies, such as more specific environmental assessments, Mi’kmaq Traditional Ecological Studies (MEKS), or archaeological studies in order to support the claims they are making to the land. The policy outlines, however, that it is the lead department that ultimately considers these requests on a case-by-case basis in collaboration with the OAA (2015, 22).

Additionally, all of the Indigenous bodies that this policy, or the TOR have created for the purpose of achieving the “Made-in-Nova Scotia Process” exist only (in this process) as advisory bodies. The consultation roundtables established in the mining, energy, fisheries, transportation and industry sectors may be asked to gather information and

provide feedback from an Indigenous standpoint on policies or projects, and the KMKNO may assist in the coordination, execution, and documentation of consultation, however neither the policy guidelines or the TOR establish any ability for these bodies to decisively impose changes upon, or stop proposed actions, or project. In fact, throughout all the documents examined in this chapter, the one thing about consultation that is very clearly defined and established is that Indigenous groups do not have a veto over government actions or decisions.

Step four of the consultation processes is accommodation. The policy asserts that “consultation that excludes from the outset any form of accommodation is meaningless (2025, 24). The policy outlines that the DTC “carries with it a concurrent obligation to consider the accommodation of Mi’kmaw interests” (2015, 24).

Similar to the spectrum analysis of consultation, the policy document lays out a spectrum of accommodation. Accommodation may take many forms, such as placing terms and conditions on permits, licenses or authorizations for proposed projects. It may also take on the form of measures to promote the avoidance or minimizing of potential impacts. Cases in which, for some reason or another, avoidance or mitigation is not possible, compensation (financial and/or non-financial) may also be considered as a form of accommodation.

As briefly mentioned above, the government not only has the opportunity to delegate the procedural aspects of consultation to third party proponents, but may also delegate or share aspects of consultation with them as well.

The fifth and sixth steps of consultation are decision making, and follow-up/monitoring. Very simply, the decision making process is defined within the policy

guidelines in a few sentences. Once a course of action has been decided by the lead government department, they will report back in writing to the Indigenous community which with they were consulting with details outlining the decision they have made, how any information/advice from consultation with the community has impacted government decision-making, and any accommodation measures that the government has decided to pursue (2015, 27). The lead department responsible for consultation should then work in partnership with the OAA to establish preferred methods of ongoing communication with the community that was consulted, to keep them informed with all project developments.

4.4 RECAP OF RECURRING PROBLEMS AND IDENTIFICATION OF DISCOURSES

The problems identified in current Nova Scotia consultation policies are connected to, and consistent with some of the discursive categories uncovered in the historical-discursive institutional analysis. While Nova Scotia's current policy could never be likened to the violent, or outwardly genocidal policies uncovered by pre-confederation colonial governments, the policy is reflective of the paternalistic policies pursued over Canada's history, as control over the definition and terms of the consultation process is still ultimately exercised by government. Similarly, to the current Liberal Federal Government, and Provincial Liberal Government of Nova Scotia, the return to the "nation-to-nation" discourse seems to invoke more of a feeling, or "reconciliation for show," rather than an actual transfer of power, or the inclusive establishment of any real plan forward.

The remaining portion of this chapter will assess the made-in Nova Scotia process outlined by the policies outlined above. The main criticisms are as follows;

- 1) The policy is lacking in instruments to hold actors accountable.
- 2) Many components of the process itself are not transparent and much of the terminology used to outline specific components of the policy is vague.
- 3) The policy does not address the existence, meaning, or implementation of treaties.
- 4) The policy does not adequately define the province's plan for reconciliation, nor does it reflect the true meaning of reconciliation.
- 5) There is no ability for an Indigenous community to refuse projects/developments.

4.5.1 VAGUE TERMINOLOGY

Much of the terminology used throughout the policy is not well-defined, this applies to general concepts such as the meaning of “consultation” or “accommodation,” but also applies to the definition of specific processes that are supposed to be followed by government, and third-party proponents.

The vague definition of consultation and accommodation is not completely the fault of the provincial government in Nova Scotia. Quite logically, it relies on the general standards of consultation set by various case outcomes in the Supreme Court of Canada. It is difficult to suggest that there be one overarching, universally applicable definition of consultation, because this could do more harm than good. “Meaningful consultation,” is a legal concept, and a legal requirement, a good consultation does not necessarily have to be limited to strict or set elements prescribed by any legal doctrine. This is where the spectrum analysis of consultation is beneficial in the sense that different cases require governments to consult in a manner that is consistent with the Honour of the Crown. Ultimately, this allows for more flexibility, and a diverse ray of acceptable outcomes for the many

Indigenous communities involved in consultation across Nova Scotia, or Canada, who have different priorities and different desired outcomes (Newman, 2014, 88-89).

This however, does not mean that there is no way, or reason to established more well-defined terms processes within consultation policies, that are more inclusive and empowering to Indigenous peoples. Yes, there is no set definition of consultation, but that does not mean there cannot be processes and measures for accountability within consultation policies, nor does it mean that in every instance the body that decides whether or not this vague concept of consultation has been reached, must be the government. In Nova Scotia, it is the government who is first notified of the potential project or action, it is the government who conducts the initial consultation screening, it is the government who initiates contact and consultation with potentially impacted Indigenous peoples, it is the government who awaits proof of Indigenous claims, it is the government who ultimately decides whether those claims hold and should influence the design of the proposed project, and it is the government that issues approval an necessary permits to the proponent. This entire government-lead process itself is not transparent. The extent to which Mi'kmaq peoples in Nova Scotia were involved in the drafting of this policy, and the execution of consultation in practice is not entirely clear, meaning that there is still great opportunity for government to prioritize their own interests over the rights of Indigenous peoples. The policy, under the guise of needing to appear flexible, never defines any set protocols or standards of which are mandatory for themselves, or proponents meet.

One pertinent example of this is the government's employment of "reasonable timelines." Understandably, a specific, universally applied timeline for each consultation is difficult to establish, as some projects may require more time for any of the parties to

understand, maybe they will require additional independent reports, etc. There is however, no mention of how this “reasonable timeline” will be established on a case-to-case basis. Who is it that decides what amount of time is reasonable? The way this policy seems to lay it out, is that it is the government that decides. The only specified timeline in the entire policy is the 30-day period in which the Indigenous community must reply to the government after being notified of their plans to consult. During the rest of the process, when it comes to the sharing of information, the responses of government to the community in question, the sharing of information or actual meetings with the proponents, they are all based on the suggestion of reasonable, or appropriate timelines. This is where it could be beneficial to insert mechanisms within the policy that specify Indigenous involvement in the making of these timelines, and appropriate measures of accountability to ensure they are followed, because as of right now, this policy does nothing to change the fact that the only places Indigenous peoples have to go when they are wronged in the consultative process is court.

Taking a consultation complaint to court can be a long and very expensive process for communities who may or may not have the resources. This enables government and third-party proponents to take a “minimalist approach” to their DTC, on the assumption that an Indigenous community is unlikely to challenge them in court. Even if a community does take them to court, the outcome is not certain, and even if a court does find against them, it does not necessarily mean the project will be quashed; they may get a second chance to make it right (McIvor, 2018).

4.5.2 INSTRUMENTS, TRANSPARENCY AND ACCOUNTABILITY

During policy formation process, policy-makers must identify the technical and political constraints on possible state action and uncover all feasible mechanisms to address the identified problem. In some instances, the “problem” being addressed is not necessarily a problem, but a plan, or a goal. In the case of Nova Scotia’s consultation policy guidelines, the province is working towards the goal of improved consultation with the Mi’kmaq of the Province, as part of the larger goal of reconciliation. With these guidelines, the Province of Nova Scotia sought to create a policy that enable the streamlining of consultation with Mi’kmaq peoples, as part of their constitutional obligation to consult.

With a policy such as this, one would expect to see some instruments for accountability, to afford more transparency to the consultation process. In addition, one would expect to see measures of accountability such as penalization for those parties involved who may not live up to their responsibilities within the consultative process. In addition, one would expect to see within such a policy that all parties involved are equally addressed, with clear responsibilities throughout the document. The policy’s understanding of consultation, however, is based on several rulings from the Supreme Court, not based on an understanding or process as defined in partnership with Mi’kmaq peoples. As the exact definition of meaningful consultation remains rife with complexities, there is no known, or universally applicable solution. The amount of ambiguity means there is a lot of flexibility with how policy-makers can formulate the specifics of consultation policy. This flexibility enables policy-makers to tinker with policy options that barely scratch the surface of the problem, or issue at hand.

The options that will be weighted and measured for potential adoption into policy

depend a great deal on the people who are considering them, their ideas about the world and the issue at hand, and the nature of the structures they are working within (DeLeon, 1992; Howelett, Ramesh, and Perl, 2009, p. 113). In the case of Nova Scotia's consultation guidelines, it appears that it is the Government of Nova Scotia itself designing the bulk of the policy. Whereas this policy deals specifically with consultation over the use and development of land that has the potential to be of great economic benefit to the province, there exists a risk that the government may have designed a policy in which they have minimal constraints to attracting and pursuing such developments, while appearing to fulfill their constitutional obligation to consult. In other words, the policy must be minimally politically acceptable, but more so, administratively feasible.

This research argues that that is exactly what the province did within these consultation guidelines. While the policy boasts a high level of inclusiveness (2015, p. 1) it is not made entirely clear just how involved all parties were in the drafting of these guidelines. The policy itself is ultimately lacking in any policy instruments that would provide true accountability for all parties involved. Many of the procedures outlined within the policy are suggestions which act more so for the purposes of information and data collection should the particular case ever go to court. In addition, the only penalization or risk presented within the policy for the province, or the third-party proponent, is that a particular case may or may not go to court and may or may not be stopped.

The policy is lacking in authority-based policy instruments, especially regarding the involvement of third party project proponents. As figure 4.4 revealed, the province may delegate many procedural aspects of consultation, and even accommodation, to third party proponents, such as the industries seeking to develop on the lands in question. While it is

entirely logical that third party proponents would play a role in consultation, their role as outlined by both the consultation guidelines, and the proponents guide, is entirely recommended vs. mandatory. Both the consultation guidelines and the proponent guide indicate clearly that proponents legally have no duty to consult (Province of Nova Scotia, 2015; Province of Nova Scotia, 2012, p. 2) but that they may find themselves playing an important role, and thus suggest principles of engagement to follow during the consultative process. No actual new regulatory measures are imposed on industry proponents within this policy to ensure that certain procedures are followed, with the result of penalization in the case that they do not. The only regulation mentioned within the proponents' guide is Section 9(1A) (xiii to xv) in the *Environment Act*. Although this section of the Act does deal with addressing the concerns of both the public, and Indigenous peoples about adverse environmental effects of the proposed project, it does not deal specifically with consultation, or with potential infringements on Indigenous rights. In the end, it is the province who assumes full responsibility for consultation, whether the procedural aspects of consultation were carried out largely by the proponent or not. Should a particular case go to court, it is the Indigenous group vs. the Province of Nova Scotia, not the specific proponent.

Arguably, proponents would want to mitigate the risks associated with poor consultation and take all steps necessary to pursue active engagement with any Mi'kmaq communities in question. Failure to do so could end up in delays, or cancellations of their projects all together, however, it is not even an entirely sure thing that their projects will be delayed or rejected entirely in the event that the province is taken to court.

The regulatory issue of permit acquisition is not addressed in this policy. Though

any proponent seeking to embark on some time of project or development in the Province of Nova Scotia is expected to go through the correct channels to obtain permits and approvals, the policy does not necessitate the commencement of consultation with Mi'kmaq peoples prior to permits or approvals. Meaning, as long as the proponent is keeping record of all the instances, and ways in which they met with, sent information to, or attempted to contact the Mi'kmaq community in question, they are holding up their end of the consultative process. The policy does not even dictate at what stage the government must notify Mi'kmaq nations at risk, is it when they have been notified of a project proposal, when there is a project they are actively exploring that is pending approval, or when they have issued approval. This means, that there is no guarantee that a project proponent could face any sort of consequence for engaging Mi'kmaq peoples too late in the project development process, and this is unacceptable for their amount of involvement in consultation.

It is quite reasonable to believe that the government has avoided regulation and penalization in this policy in efforts to mitigate the disadvantages of regulation that are so often associated with the private sector. The provincial Liberal government highlighted in their 2017-2018 Provincial Budget, that a goal of their government was to “create conditions to stimulate employment, business, and export development” (2017, p. 2). Regulations most often, are made out to be unattractive to investors or developers seeking to set up shop in a given area. In capitalist societies, regulations are often regarded as inhibitors of innovation or technical progress (Howlett, Perl and Ramesh, 2009, p. 120). For the industries that are involved in resource extraction, like many of the projects that so often trigger the DTC in Canada, regulations are generally seen as deterrents (Nondo &

Schaeffer, 2012; Magat, 1979; Thomas, 2009, p. 329). It is quite clear that regulations do not seem like the perfect fit with the government's plan. As part of their "One Nova Scotia" goals to stimulate economic growth, the government stated in their budget that the "primary responsibility of government in the economy is to create conditions that support growth. Government will continue to reduce regulatory hurdles that impede business growth" (Province of Nova Scotia, 2017, p. 6).

The other instrument that was recommended was the establishment of advisory committees. The Terms of Reference established the need for the creation of a Consultation Advisory Group, with one or more persons representing each party (those parties being the federal and provincial governments, and the Mi'kmaq of Nova Scotia). Advisory committees certainly have positive aspects. They can provide space for the organized presentation of interests or concerns from various stakeholders included, however, most advisory boards implemented by government are designed in such a way that they can be dealt with by governments (Howlett et al., 2009, 122). It is very typical to see advisory committees situated closer to societal actors, rather than closely to the formal government they report to. The focus of such groups are usually quite specific, and the goal is to build consensus on a range of stakeholder positions (Howlett et. al, 2009, 122), of course, it is important to note, that most of the time these advisory committees are designed by, with representatives selected by government.

The actual consultation policy guidelines themselves do not refer specifically to the establishment of a Consultation Advisory Group, however, they do take into account the roles of the Assembly of Mi'kmaq Chiefs and the (KMKNO) in the consultative process. The Assembly consists of the 13 elected Nova Scotia Mi'kmaq chiefs and two

prior members, as well as additional staff and advisors. The Assembly plays a significant role in collective decision making for the Mi'kmaq of Nova Scotia, particularly on issues pertaining to Mi'kmaq rights and governance. The policy guidelines outline that under the Terms of Reference, the Assembly leads negotiations and consultations with the provincial and federal governments on behalf of the Mi'kmaq of Nova Scotia (2015, 11).

The KMKNO coordinates and supports the work of negotiation and consultation on behalf of the Assembly of Mi'kmaq Chiefs. In partnership with the chiefs and councils, the KMKNO is the main consultative body for Mi'kmaq communities in Nova Scotia (2015, 12), however, as previously mentioned, the KMKNO is not made up only of Indigenous peoples, and certainly not Indigenous peoples from the potentially impacted land. Filling the seats at any given consultation at the KMKNO are Mi'kmaq representatives, government representatives, subject matter experts/scientists, members of the public, etc.

While a diverse array of viewpoints is often valuable, the inclusion of non-Indigenous peoples, especially those with expertise based in Western scientific knowledge, raises many concerns. The proceedings of these advisory groups are not publicly accessible, in some cases not even by the Indigenous community facing potential adverse impacts. Without seeing what weight non-Indigenous viewpoints and knowledge, whether they be from members of advisory groups, or representatives of the crown, it is difficult to evaluate just how the voices and priorities of the Indigenous community at risk of adverse impact are heard within negotiations, and who exercises power in terms of agenda-setting. Though this process may seem like a whole-hearted attempt at co-management, and cooperation between Indigenous peoples and the Crown during consultation, there is plenty

evidence to suggest that these types of arrangements do not always necessarily prioritize Indigenous traditional knowledge, rights or concerns.

It has been argued that existing traces of neo-colonialism in Canada inhibits the capacity for true partnership between the Crown, non-indigenous representatives, and Indigenous peoples in consultation, and co-management processes (Wallace, 2013; Spak, 2005; Youdelis et al., 2016).

The core assumptions of policy analysis, the risk assessments completed for different projects or government undertakings and the analysis of environmental risks in Western public policy demand, at minimum, expertise, reliance on Western science, deductive logic, a form of measurement and replicable steps or stages (Pal, 2013). Arguably, the dominance of Western science, expertise and knowledge in Canadian policymaking has resulted in the invalidation of Indigenous knowledge.

Indigenous knowledge, also referred to, as traditional knowledge, can be understood as knowledge gained by experience. It is the knowledge obtained by the observation of natural events that are transmitted through members of a community (Spak, 2005). During processes of consultation and partnership between the Government and Indigenous peoples, there is an unfortunate tendency to regard traditional ecological knowledge as a disqualified knowledge (Spak, 2005; Wallace, 2013; Youdelis, 2016), as it is viewed as “religious beliefs that should be kept separate from physically observable knowledge (Spak, 2005). This has been exemplified through many co-management organizations in which the Government claims to work in partnership with Aboriginal populations on a given issue.

One such example is the Stella Spak’s examination of the Beverly and Qamanirjuaq

Caribou Management Board (BQCMB). The BQCMB, still in existence today, was established in 1982 between the provincial Governments of Manitoba and Saskatchewan, the North West Territories, members of the Inuit community, and numerous federal Scientists, in response to a decline in Caribou populations in Northern Canada. While the board made room for Indigenous Elders of Northern Inuit Communities, the seats of the board were shared with government representatives (provincial, territorial, federal) as well as government appointed scientist.

Spak's study found that the meetings were bureaucratic in nature, that government representatives maintained the authority for agenda setting, and that government representatives had the floor for around 80% of the time during meetings. Spak's interviews with community Elders who participated in the BQCMB revealed that they felt that their experiences and knowledge were not really of interest to the board, but that they had to be there for the board to be able to tick off the box of Indigenous inclusion to claim that they were a diverse, and representational board (Spak, 2005, 238). While co-management boards such as the BQCMB meet in Indigenous communities to involve the "resource" users in the management of the resources, many Elders felt that they were invited to comment on plans that had already been developed to achieve goals set by state-mandated experts (Spak, 2005, 239);

The people, the White people, whatever they write down on a piece of paper, they just follow their rules and they don't care what the people that live off the land have to say, and so that is why it gets really complicated when they have meetings like this you know. They have to have the rules of the White people and the rules of the Dene people, it has to be communicated and a decision has to be made right there instead of, you know, only White people making decisions compared to the Dene people (Spak, 2005, 239).

The same issues have been identified in terms of co-management arrangements regarding the use and conservation of national and provincially protected parks that overlap with traditional lands of Indigenous peoples. As part of Canada's colonial legacy, many Indigenous peoples were forcefully evicted from some of Canada's earlier iconic parks - such as Banff and Jasper. The "wilderness" model of park management sought to "conserve" nature, and make space available for enterprises such as sport hunting, hiking, and other forms of tourism. In their attempts to include and consult with Indigenous peoples in Jasper National Park, Jasper Park management's actual consultation "further entrenched] unequal colonial-capitalist power dynamics" the processes of co-management, largely designed and controlled without Indigenous voice, only exist to give the appearance of inclusion of Indigenous voice (Youdelis et al., 2016).

In addition to the lack of transparency in the scope and processes of the KMKNO, the policy does not make it clear on what happens to Indigenous nations who do not sign on to the TOR. While there are government funding responsibilities mentioned (albeit vaguely mentioned) owed to communities signed on to the TOR, the policy does not outline any processes or responsibilities for any party when consulting with communities that are not signed on to the TOR. In the event that a community does not sign on to the TOR, which components of the policy apply to this communities? Do the established processes still apply? It is not made entirely clear how the government is to ensure that the community is fully able to participate in the processes of consultation, or whether or not said communities should work through the Assembly of Mi'kmaq Chiefs, or the KMKNO.

4.5.3 TREATY IMPLEMENTATION AND RECONCILIATION: THE INABILITY TO REFUSE

The consultation policy guidelines only speak to instances of informed consent, e.g. situations in which Indigenous peoples were consulted with, and the proposed project continues. The policy gives no power to Indigenous peoples, or procedures to deal with instances in which Indigenous peoples refuse. How is it, that we can expect government to consult in good faith with Indigenous communities throughout the province, if they are not necessarily ever going to be faced with the possibility that they could be refused? How is it that we can expect proponents to carry out proper engagement and accommodation of Indigenous concerns, if they may never face any large-scale, detrimental opposition, if they have no duty owed under law, and if they don't necessarily face any type of penalty for doing the bare minimum? Though the DTC an essential component to the protection of Indigenous rights, with no ability to refuse, it is not enough as it currently stands in Nova Scotia's provincial policy.

The DTC as reflected in current Nova Scotian policies does not facilitate meaningful consultation, or the reconciliation of a nation-to-nation relationship with Indigenous peoples. The policy takes Indigenous peoples no further than they were before in terms of proper consultation, or reconciliation. Rather than putting any actual mechanisms of power over themselves and their territories, it leaves them exactly where they were before in instances when they are wronged by the government, that is fighting in court for the rights that have been granted by settler states. This is a notion that some refer to as an extension of colonialism, not a remedy to it, as such rights are still predominantly set and controlled by the settler state.

[G]iven Canada's shameful history, defining Aboriginal rights

in terms of, for example, a right to fish for food and traditional purposes is better than nothing. But to what extent does that state-regulated ‘right’ to food-fish represent justice for people who have been fishing on their rivers and seas since time began? (Alfred, 1999 as cited in Short, 2005, p. 277)

For policy claiming to improve Indigenous-Crown relations, consultation, and reconciliation, why is it that Indigenous peoples and their lands are still entirely subject to the will of the settler state? If they are wronged, it is entirely up to them to prove exactly how the state has infringed upon their rights - of which the state technically never had to grant in the first place because they are inherently theirs.

Similar to the notion of false reconciliation, or “reconciliation for show” discussed in Chapter three, the policy itself does not define what reconciliation, and “nation-to-nation” looks like. Provincial policy in Nova Scotia seems to associate reconciliation only with apologizing, or acknowledging with a passing nod, what happened in the past while refusing to acknowledge the existing components of Nova Scotia’s colonial legacy today. The policy acknowledges the presence of the Mi’kmaq peoples long before the arrival of European settlers; however, the present day meaning of the treaties is largely unaddressed. If reconciliation is the main goal, how will the past be reconciled with the future? How will a nation-to-nation relationship be formed between Indigenous peoples and the Government of Nova Scotia?

In Nova Scotia’s current policy, treaties were documents signed between European colonizers and Indigenous peoples in Nova Scotia, and they do not seem to move past that historical definition. Indigenous peoples did not cede their own lands, systems of governance, or way of life, or subject themselves to the powers of foreign authorities. Treaties were negotiated between representatives of Indigenous nations and settler

societies to protect and maintain their own constitutional orders through treaty relationships, just like they had done in the past in all their dealings with other Indigenous nations (Ladner, 2006). Treaties were negotiated on a nation-to-nation basis, and formalized a commitment to a nation-to-nation relationship. These nation-to-nation agreements enabled settler populations and Indigenous peoples to peacefully co-exist as separate and autonomous nations within the same territory. The purpose of treaties was to recognize and affirm the right to self-government and sovereignty for Indigenous, and non-Indigenous nations (Ladner, 2006). Therefore, it is not possible to achieve the reconciliation of a nation-to-nation relationship without acknowledging first that the terms of such historic treaties have been broken by colonial (now Canadian) governments and second, that the terms of such treaties, and the concepts which they enshrined (Indigenous autonomy, sovereignty, or self-government) must be addressed in any plan or policy to truly “return to” a nation-to-nation relationship.

To recognize the true intent of treaties and the Indigenous rights that stem from them, would be to sacrifice a degree of provincial autonomy and authority over resources. Arguably, the Nova Scotian government has adapted a rational approach to their constitutional duty to consult, in which they overcome any constraints posed by institutions to pursue their idea of the province’s best interest (Schmidt, 2010, p. 2). They have incorporated the bare minimum concerning the main elements of consultation passed down by the supreme courts. Within their policy, they make reference to early consultation and to the inclusion of Indigenous concerns within project design, however they are reluctant to define any of these terms. They have designed a method of consultation which really only makes suggestions rather than concrete processes, and enables them to consult with a

body that's is not even necessarily represent the Indigenous community requiring consultation (the KMKNO). Unless the province is ultimately taken to court by a given community, current consultation policy allows them to technically claim that they have fulfilled their duty to consult.

They have incorporated their constitutional obligation to consult within a process that is subject to their design and authority, of which the terms are flexible to meet the needs of the province, which in the case of Alton Gas, were based upon economics and industry sector development.

CHAPTER 5

FROM POLICY TO PRACTICE: ALTON GAS CASE STUDY

In August of 2006, the Province met with Alton Gas (a subsidiary of Calgary based company AltaGas) regarding a proposal put forward for the development of an underground hydrocarbon storage facility along the Shubenacadie Estuary (commonly referred to as the Shubenacadie River (Alton Appeal Document, 2016)). Building the facility would also require the construction of pipelines near Alton, Nova Scotia. The project, as boasted by Alton Gas, would help to meet the ever-growing demand for energy diversification, and to help to provide residents in Nova Scotians with “secure, affordable and reliable natural gas year-round” (Alton Natural Gas L.P., 2017). According to Alton Gas, the proposed is ideal for this type of project because of the natural makeup of the area, including the naturally existing salt formation, the close proximity of a water source, and its proximity to the Maritimes & Northeast Pipeline natural gas pipeline. With project approval, the Alton Natural Gas Storage would be the only natural gas storage facility in Atlantic Canada, as well as the only storage facility that would be connected to the Maritimes and Northeast Pipeline (Alton Natural Gas L.P., 2017).

The project seeks to create underground storage caverns, for which naturally occurring salt must be removed from the ground. Through a drilled into existing salt formations, tidal water from the Shubenacadie River is cycled through the cavern and facilitates the dilution of salt in the deposit. The byproduct of this process is called brine, which is the combination of tidal water and additional salt. This brine is then cycled back up the well, leaving an available space for natural gas storage. The brine produced in this process, is pumped to a holding pond, which then allows for the controlled release of brine

back into the Shubenacadie River. More specifically, the brine is released into what is called the Alton Channel, which is a channel that is connected and adjacent to the Shubenacadie River, where it will then mix with the tidal (brackish) river water

In the area surrounding the project site, there are two established Mi'kmaq reserves, whose lands are recognized as "federal lands that have been set aside for the use and benefit of Indians under the Federal legislation of the Indian Act" (Mi'kmaq Ecological Knowledge Study [MEKS], 2006, p. 7). The Mi'kmaq communities are, the Indian Brook First Nation (about 9 km from the project site), the other community is Millbrook First Nation (about 13.7 km from project site).

In efforts to identify Mi'kmaq lands and resource activities at the proposed site, Membertou Geomatics Consultants (MGC) undertook a Mi'kmaq Ecological Knowledge Study (MEKS) on behalf of Alton Gas in December of 2006. MGC is a Membertou First Nations company, that was developed in 2002 to provide environmental assessments from an Indigenous perspective. The MEKS consisted of three major components:

- 1) Historical Review - regarding past Mi'kmaq occupation and use of the area in question.
- 2) Mi'kmaq Traditional Land and Resource Use Activities (past and present).
- 3) Mi'kmaq Significance Species Analysis – Considering the resources important to Mi'kmaq use.

The MEKS historical review found that Mi'kmaq use and occupation of the area, and much of the areas surrounding had been extremely significant, and that Mi'kmaq peoples had historically been situated by the Shubenacadie, Stewiacke, and Cobequid rivers for hundreds of years prior to the arrival of European peoples" (MEKS, 2006, ii). Shubenacadie had historically been a gathering place for Mi'kmaq peoples throughout the

Atlantic, as it was the home of the Shubenacadie Mass House in the 18th century (MEKS, 2006, ii). The review detailed that historically, both the Mi'kmaq communities would come together during the summer months to form a larger summer village, to share the abundant resources. In the lands surrounding the study area, the Mi'kmaq had established winter villages as well as two or three larger summer villages located on the key waterways of the area, the Shubenacadie, Musquodoboit, and Cobequid rivers. The villages were known as Cobequit, Mouscadobouet, and Shubenacadie (MEKS, 2006, p. 7-8).

Using interviews with the community as the key source of information, the Mi'kmaq Traditional Land and Resource Use component of the MEKS. Interviews with Mi'kmaq hunters, fishers, and plant gatherers revealed that much of the land and waters surrounding the project site were still regularly being used for traditional activities such as hunting deer and small game, and other activities involving the gathering of plants for food and medicinal purposes. The most frequent traditional activity the MEK revealed however, was the use of the Stewiacke and Shubenacadie rivers for the fishing of Bass, Salmon, eels, trout, and smelts (MEEKS, 2006, iii).

5.1 ALTON NATURAL GAS STORAGE PROJECT: COMMUNITY RESPONSE

Based upon the findings of the MEK the MGC recommended that the province and the proponent had a duty to consult, and should get in contact with the community to consult before proceeding. However, by July 6, of 2007, the Alton Natural Gas project was registered with the province as an underground hydrocarbon storage facility, and was awaiting environmental assessment, and provincial approval. By December 18 of 2007, the Minister of Environment and Labour had approved the Alton Gas Storage facility, and the

Sipekne'katik contend that this project was approved before any meaningful consultation had taken place (Sipekne'katik Form "A", 2016; Sipekne'katik vs. Nova Scotia).

The Sipekne'katik Nation outline in their official appeal document that they participated in the made-in-Nova Scotia process administered by the KMKNO, but assert that in that time there was no consultation, or information provided regarding the brining process specifically, and the location of brine discharge to the river. In July of 2012, despite growing concerns and unaddressed questions from the Sipekne'katik Nation, Alton Gas registered the second component of their project, the Alton Natural Gas Pipeline Project with the province for environmental assessment.

In March of 2013, the Sipekne'katik withdrew from the made-in-Nova Scotia process with the KMKNO (Sipekne'katik Form "A", 2016). Various letters, statements, and press releases from Sipekne'katik Chief Rufus Copage outlined numerous concerns with the made-in- Nova Scotia process and the KMKNOs consultations. Some of the major issues against the KMKNO highlighted by Chief Copage and the Sipekne'katik community, had to do with KMKNO over extending its original scope. As a body that was originally designed to help facilitate consultation and cooperation between the Nova Scotia government and Mi'kmaq peoples across the province, the KMKNO has been criticized by Chief Copage for overstepping on behalf of individual communities, creating a consultation process that is exclusionary to community members, and neglecting to address some of the most pertinent issues facing Mi'kmaq peoples in the province today.

Chief Copage expressed concern from the community in a press release which outlined "that individual community members have no voice in the current Made in Nova Scotia/ Mi'kmaq Rights Initiative consultation process" (Copage as quoted by

Sipekne'katik, 2016). Copage outlined that within the current consultation process, there is much confusion, not only about how and what KMKNO is consulting on, but what KMKNO may negotiate on a community's behalf. Copage argued that the inability of individual community members to actively participate in a transparent consultative process is not conducive to meaningful consultation, he is adamant that "a fully informed Nation" must act collectively to ratify any action or agreement that impacts their rights or title.

In a 2015 letter to the Assembly of Mi'kmaq Chiefs and the KMKNO, Chief Copage asserted that though the KMKNO had been meeting with Alton Gas since 2006, the Sipekne'katik Nation had not been informed of the project. In fact, the Band learned of the project through sources outside the province and the KMKNO, and later discovered that Alton Gas had been instructed by the KMKNO to deal directly with them rather than with the Chief and Council of the Sipekne'katik Band (Copage as quoted by Sipekne'katik, 2016).

Residents seemed to be left in the dark, and largely barred from the process, as if the sharing of information around the consultative process did not extend to the community at large, but only behind the closed doors of the KMKNO;

I found out about this project when I was driving along the highway, when they were clear cutting the right of way for the pipeline. It was just flabbergasting. I could not believe that our leaders let this happen and no one came to the people to warn them about it or tell them about it, include them or ask them about it, or anything (Bernard as quoted in Howe, 2016).

The Sipekne'katik Nation was not the only Indigenous nation to pull out of both the KMKNO and the Assembly of Nova Scotia Mi'kmaq Chiefs, nor were they the only nation to complain about the lack of community involvement in consultation processes

with the KMKNO. Following the withdrawal of the Sipekne'katik, the Millbrook First Nation officially withdrew as well. Similarly to Chief Copage, Chief Gloade expressed concerns that the community as a whole was not privy to, or included in the consultation process under the KMKNO:

The majority of our community members are not aware of what has been taking place. We have internal legal staff working with council now on how we can engage the community in more of an active role in decisions and issues (Gloade as quoted in Tetanish, 2016).

Chief Gloade stated in a Millbrook First Nation press release that the KMKNO had slowly been expanding its scope far past its original mandate of the promotion of treaty implementation in the province. He asserted that the KMKNO had become “an all-encompassing process that community members don't understand or recognize.” The notion that every member of the community is not informed and involved in this process caused great concern for Gloade, he noted even the Chief and Council process was based on working hand-in-hand with their community members to ensure they make decisions which impact the community in good faith. Gloade asserted that the consultation process and dealings with the KMKNO were greatly “shielded from the scrutiny of the majority of Mi'kmaw people who will be affected” (Gloade as quoted in Tetanish, 2016).

Rufus Copage, Chief of the Sipekne'katik Nation, asserted that during his cooperation with the KMKNO for consultation on the Alton Gas project, he was not regularly notified of Assembly meetings, and that when he did attend, specific information about the project was missing from his information package. He also voiced concern for the ways in which voting would take place when passing resolutions within the KMKNO. He noted that resolutions were most frequently presented to the committee on the same day

that voting was set to take place, which did not allow for any opportunity for the Band council or Band members to have any input (Copage, 2016).

Since leaving the KMKNO the Sipekne'katik Nation has been representing itself on all matters of consultation, and contends that in all matters concerning Alton Gas, they have remained transparent with the Province of Nova Scotia and Canada. Chief Copage did report that the community has been consistently lobbying the provincial government for funding, in order to support adequate consultation services for their community and band members. Not only has the Sipekne'katik nation remained transparent with the province, but any member can now access any consultation file upon request, which was not possible when the community was a member of the KMKNO.

On September 17, 2014 representatives from the Sipekne'katik attended a meeting at the OAA, along with representatives from the Department of Natural Resources, the Department of Environment, the Department of Communities, Culture and Heritage, and the Department of Agriculture, to discuss general concerns over the Alton Gas project. On September 23, 2014, Alton Gas met with the Sipekne'katik community, and gave a presentation about the Alton Gas Project. After the presentation, Sipekne'katik representatives met with reps from Nova Scotia Environment, the OAA, the Department of Fisheries and Oceans, and representatives of Alton Gas met to tour the site and observe all the construction that was required, and that had already been completed.

After the general meetings and visit, the Sipekne'katik wrote to Nova Scotia Environment, and to the OAA with a list of very specific questions and concerns concerning many aspects of the brining process and its impact on the ecosystem of the river, many aspects of proposed drilling plans, potential toxicity to microorganisms

essential to fish, as well as questions of accountability for monitoring such processes during and after construction (Alton Appeal Document, 2016, p. 21-26).

The Sipekne'katik stressed in a November 2014 meeting with the province that they did not have the capacity to assess the scientific and technical aspects of such a large scale project and expressed the need for funding so that they could conduct an independent study. Without the involvement of the Sipekne'katik community, in July of 2015 the government in partnership with the KMKNO hired Conestoga-Rovers & Associates, to conduct an independent analysis of the Alton Gas Project, with funding provided by Alton Gas. The Sipekne'katik nation was not provided with an opportunity to have any say regarding the terms for the independent review, or the selection of the independent reviewer. Throughout 2015, Alton Gas continued to drill, and construct the dykes needed for the extraction of water from the Shubenacadie River; two activities conducted without informing or consulting with the Sipekne'katik (Alton Appeal Document, 2016, p. 27-30).

The government, along with Alton Gas, contend that they had met their duty to consult, and had met with the Sipekne'katik on many occasions. The Province hold that in the June 2014 meeting held with Alton Gas, they provided a list of recommendations to Alton Gas. The recommendations from the province included the creation of a detailed communication plan, that Alton should contact the Assembly of Nova Scotia Mi'kmaq Chiefs and the KMKNO so they could work together with the Mi'kmaq to develop mutually beneficial solutions, and to present a summary report with all attempts to contact the Mi'kmaq. In addition to a summary of attempted contacts, the province requested that Alton provide a summary of Mi'kmaq concerns along with the identification of how Mi'kmaq concerns were considered by Alton Gas (Sipekne'katik vs. Nova Scotia).

Something important to note here, was that Alton Gas was directed by the province to approach the KMKNO and the Assembly regarding the project, however the Sipekne'katik nation had not been a member of either since 2013.

To exemplify their commitment to engaging in consultation, Alton Gas hosted a series of “open houses” within the Sipekne'katik community, stating that they were “committed to meaningful consultation and open dialogue with our neighbours, communities, First Nations and other Aboriginal communities in the vicinity of the project” (Alton Natural Gas L.P., 2015, p. 4). However, the Sipekne'katik community felt that during these meetings, Alton Gas seemed to treat “consultation” as a one-way process. More or less, it was a one-way conversation in which they gathered information and informed the Sipekne'katik of their decisions (Alton Appeal Document, 2016, p. 63).

In January of 2016, the Sipekne'katik nation sent a letter to the Nova Scotia Minister of Aboriginal Affairs. The letter stated that the Sipekne'katik membership was entitled to substantial, ongoing and satisfactory communication, and asserted that once real and meaningful consultation had been completed, the community wished to have a referendum to seek membership input on the Alton Gas Project. Once the referendum is complete, the Province of Nova Scotia will be notified of the results (APPEAL DOCUMENT, 36; Copage, 2016). That same month, without a response to Chief Copage's concerns, the province announced its approval for the operation of a brine storage pond, and the lease of Crown lands to complete the brine dispersion channel, requiring the building of another dyke on Crown land, all activities which the Sipekne'katik nation have not approved, and for which they have not been consulted.

The province and Alton Gas contended, however, that their project had undergone a series of assessments and evaluations, including those of independent reviewers, and would go ahead;

The Alton Project has been the subject of significant expert review and analysis for over eight years. This has included continuous monitoring of fish species by experts at Dalhousie University (Truro campus) two approved Environmental Assessments; and a Mi'kmaq-led independent review of science in 2015, which strengthened the environmental safeguards for the project (Church & AltaGas, 2016).

Alton invited the Sipekne'katik Nation to participate as part of the environmental monitoring team going forward, though they did not specify what exact role they would play, but offered to have some of the band members employed as part of the company's monitoring team. Essentially, the proponent and the province decided that the reviews, in which the Sipekne'katik community were not involved, would suffice for adequate consultation.

The Sipekne'katik community's interests and concerns were not only being challenged by government and industry, but by the media as well. In some instances, the Sipekne'katik community were able to use media as a platform to gain attention for their cause however, their voices were often lumped in with the general concerns of non-Indigenous environmentalist, or interest groups and were in many cases, pitted against the notion of Alton Gas as a critical opportunity for economic development and energy diversification in the province.

5.2 ALTON GAS CONFLICT IN THE MEDIA

A primary function of the media is to construct the common sense that audiences use to interpret news, and to interpret current issues. As there is still a great disconnect between Indigenous and non-Indigenous Canadians, recent content analyses of news texts indicate that much of the common sense held by non-Indigenous peoples about Indigenous peoples is constructed through the media (Harding, 311). Of course, The common sense produced in the news media is not value neutral, but part of a larger process of presenting a hegemonic understanding of the world to audiences, thus it is important to ask how Indigenous people were represented throughout the Alton Gas case in mainstream Nova Scotia news outlets? Similar to the discourse influencing current consultation policy in Nova Scotia, were Indigenous peoples presented in a way that legitimizes government action to supersede their right to self- governance? Were Indigenous peoples and their rights pertaining to the Alton Gas case reported in a manner that drew on the importance of Nova Scotia's colonial past, and the treaties that were signed and neglected by colonial governments? Were Indigenous claims validated, or pitted against Western science, and claims of economic prosperity for Nova Scotia?

5.2.1 INDIGENOUS RIGHT

Within the media analysis conducted for this chapter, the “Indigenous Right Frame” consists predominantly of references to the constitutional duty to consult, as well as to treaty rights, such as the right to hunt or fish. Consultation was a seemingly dominant theme of coverage on the Alton Gas conflict, with a total of 377 references made across all articles. However, of those 377 references only 158 were directly relevant to the Indigenous

Right Frame. Consultation in the context of the Indigenous Right Frame was linked directly to the consultation of Mi'kmaq peoples, or to the formal duty to consult, those references which did not pertain to treaty right or title were references in which consultation was discussed in the context of non- Indigenous community members, and local landowners surrounding the project site. While media coverage did include direct statements from Indigenous representatives expressing that neither the government, nor Alton Gas had adequately consulted, the majority of references to the duty consult were referenced only as trivial updates on the ongoing trial in Supreme Court of Nova Scotia.

In correspondence with theories of Indigenous in media, the duty to consult was very rarely linked to a historical explanation of Indigenous rights, or present Indigenous issues outside of the Alton Gas conflict specifically. References which connected the duty to consult to the historic treaties or court cases, which ultimately define the duty, were fundamentally lacking. For example, out of 158 references to the duty to consult, only twelve of those references made connections to the Peace and Friendship Treaties of 1752. Perhaps even more strikingly, out of 158 references to the formal duty to consult a paltry two references were made to the Royal Proclamation of 1763, both references made in a single article by CBC Nova Scotia (Sept 29, 2014).

The lack of reference to, or explanation of, historical rights suggests that the concerns of Indigenous peoples were not framed as anything more than environmental issues. The media did not relay the nature of their claims as they pertained to the inherent rights they possess to land in Nova Scotia by their inherent rights as Indigenous peoples, nor their treaty rights as they pertain to the historic treaties signed between the Mi'kmaq and the Crown.

Far more prominent than the origin or explanation of Indigenous Rights and the duty to consult were references made to a controversial legal brief put forward by government lawyer Alex Cameron on September 30, 2016. The brief referred to the Mi'kmaq people as a "conquered" people, to which the duty to consult did not apply. From September 2016 when the brief was introduced until March of 2017 the brief was referenced 145 times, while the government's apology was only referenced twenty-three times. These numbers suggest that the priority of media was to emphasize the controversial nature of the brief and to underline government oversight, rather than adequately explaining the relationship between the Crown and Indigenous peoples through treaties or constitutional obligations.

The Nova Scotia Premier and Minister of Aboriginal Affairs responded to the comments made in the brief, and voiced that he was exceedingly upset with what was said. He extended his apologies to the Mi'kmaq community and assured them that the ideas communicated in the brief were not his own, nor his government's. The Premier also asserted that he and his government agree that they have a constitutional DTC with First Nations peoples.

We have a duty to consult. The Supreme Court (of Canada) dealt with that issue a long time ago [...]. We are all treaty people [t]here's rights and obligations for everybody in those treaties, and it's important that we understand them (McNeil as quoted in Tattrie, 2016).

As current theories on Indigenous peoples in media suggest, the lack of historical connections and explanations of the DTC in media coverage can negatively affect how Indigenous peoples are constructed in relation to non-Indigenous citizenry (Carrigall-Brown et. al., 2010; Harding, 2006). This theory is very relevant in coverage of the Alton

Gas conflict, in which a lack of historical context was coupled with the framing of Indigenous peoples as protestors pitted against scientific reason, or the economic success of the province.

A plethora of articles distinguished Indigenous protestors from non-Indigenous protestors, usually with phrasing that separated non-Indigenous protestors with the act of protest. For example, with eighty-five mentions of “protester(s)” over half (sixty-three) referred to Indigenous peoples directly, employing terms such as “Mi’kmaq protestors” “Aboriginal protestors” or phrases such as “protestors from the Sipekne’katik [community].” Non-Indigenous protestors were commonly referred to as “supporters” “allies” or “non-Aboriginal opponents to the project.”

There was also an inclination to link only Indigenous protestors with delays to the Alton Gas project. Some articles were very direct with their connection; “\$100 million Alton gas project delayed over Mi’kmaq concerns” (CBC, Jan 26, 2015). “Mi’kmaq leaders protesting \$100 million Alton gas project” (CBC, Sep 29, 2014). “100-million Alton Natural Gas Storage Project halted until Calgary-based AltaGas carries out further consultation with the local Mi’kmaq First Nation” (CBC, Jan 26, 2015). Other articles directly linked the threat of lost economic opportunity with Indigenous protests. For example, one CBC article in 2015 emphasized AltaGas’ fear that the \$100 million investment in Nova Scotia may be “slipping away,” and that the government’s inability to manage Mi’kmaq consultation may tarnish the province’s future business reputation. (CBC, Oct 30, 2014).

There was also a trend identified in which media presented repetitive claims of inadequate consultation, rights infringement, and Indigenous concerns over food and water

security, in direct opposition to detailed and scientific reports from Alton Gas. Perhaps most striking was a quote by Stephanie Jones (Chamber President of Colchester Chamber of Commerce) in the Daily News insinuating that Indigenous protesters had “emotion-based” rather than scientifically based concerns, and that it would be “stupid move” to not let the project proceed (Daily News, Oct 18, 2014). Stewiacke mayor Wendy Robinson later agreed with this statement, and Truro Mayor Bill Mill voiced his support as well, emphasizing that the concerns of one group may endanger a bright future for other peoples;

Protests have their place in today's society, [...] [b]ut when science and ongoing monitoring show a project is safe, it's time to move on in the spirit of co-operation to re-building a bright future for all of our peoples (Redden, 2014).

The next most common theme in the Indigenous Right Frame was the right to fish. The media analysis revealed over seventy references to the right to fish. It is worth noting, however, that references to the right of Indigenous peoples to fish came predominantly from Indigenous sources and were often overlapped with the fishing interests and environmental concerns of non- Indigenous peoples.

Indigenous sources referenced their right to fish as essential not only because of their constitutional and treaty rights, but also because of cultural significance and critical political and legal gains. Indigenous sources noted the important aspect not only of fishing for sustenance, but for protecting resources for future generations. Many Indigenous sources noted that the risk of destroying spawning grounds and depleting fish stocks may put the ability for future generations to fish and feed themselves from the river at risk.

Fishing rights are also among some of the most prominent political and legal gains for Indigenous peoples in Canada. Unlike media coverage on the DTC, there was some

historically relevant information provided regarding the right to fish. Media coverage included twenty-one references to the Supreme Court of Canada's Marshall decision in 1999, in which the Court determined that treaty rights had not been extinguished in Maritime provinces and that Donald Marshall (a member of Membertou First Nation) was wrongly arrested and charged for fishing eels without a provincially issued license. There were also eight references within the Chronicle Herald to the posthumous pardon of Mi'kmaq Grand Chief Gabriel Silliboy in February of 2017. Silliboy was arrested for hunting out of season in 1929. Despite his claims his treaty rights were rejected by the courts, and he was convicted. It was not until the Simon decision in 1985, long after Silliboy's death in 1963, that the courts began to recognize the hunting and fishing rights of Indigenous peoples, in honour of the Peace and Friendship Treaties of 1752.

5.2.2 ENVIRONMENTAL ISSUE

The environmental issue frame is the most referenced of all three frames. With well over 400 references pertaining to water security, protecting various species of fish, climate change, and the risks associated with extractive fossil fuel projects. Arguably, as theory suggests, this could be because there is a tendency for media to report Indigenous issues in a way that is more gripping and relatable to the non-Indigenous public (Corrigall-Brown, et al., 2010).

Water was the predominant theme within the environment issue frame. Over 200 references relating to "water security," "water protection," "water quality," and "right to clean water," were emphasized by Aboriginal and non-Aboriginal peoples, as well as a main focus in Alton Gas' report findings and responses to public concern. The subject

causing the most concern with water quality was the act of “brining,” in which massive amounts of salt water would be flushed into the Shubenacadie River daily. Within the 221 references to “salt brine” or “brining” the repeated fear was that changes in the river’s salinity levels could pose dangerous and destructive consequences for the river’s ecosystem scaly inhabitants.

These scaly inhabitants constitute the second major theme within the environment issue frame, the protection of various fish species. There was a shared fear among Aboriginals, environmentalists, and commercial/local fishermen that increasing levels of salinity would destroy the spawning ground of various fish species such as the Atlantic Salmon, Smolt, and perhaps most referenced, the endangered Striped Bass. There was a large quantity of conflicting science within media coverage. While some reports and local observations claimed a rise in salinity, reports from Alton Gas and Fisheries and Oceans Canada frequently responded with reference to their salinity and fish monitoring programs, ensuring that the project was safe for all species residing in the river.

Least prevalent, but still important within the environment issue frame were references to climate change, and “not in my back yard” (NIMBY)¹¹ sentiments expressed community members. Twenty-eight references linked the brining process, as well as the

¹¹ NIMBY refers to a concept in which people demonstrate positive attitudes to something (such as wind power) until they are confronted with it themselves. For example, people may promote the development of wind turbines for energy production until they themselves are confronted with the possible consequences of such development (e.g noise pollution, the devaluation of property). See O’Hare, M., 1977. “Not on MY block you don’t”: facility siting and the strategic importance of compensation. *Public Policy* 25, 407–458. Also, see Wolsink, M. (2007). Planning of renewables schemes: Deliberative and fair decision-making on landscape issues instead of reproachful accusations of non-cooperation. *Energy Policy*, 35(5), 2692-2704. 10.1016/j.enpol.2006.12.002

extraction and use of fossil fuels to larger climate concerns, such as drought, loss of habitat, and climate change.

Some articles voiced the dissatisfaction with non-Indigenous landowners in close proximity to the project. Most commonly, residents were concerned with the potentially large environmental footprint that may be left behind after such an extractive project. Some residents were also concerned with the possible risks they may fall victim to in such close proximity to the project site, such as earthquakes and explosions. Many community members responded by trying to legislate more distance between them and the site, petitioning the government to amend the *Underground Hydrocarbons Storage Act 2001* to increase the current 200-meter buffer requirement.

5.2.3 ECONOMIC DEVELOPMENT FRAME

The Sipekne'katik Nation faced not only opposition from Alton and the province, but the public's perception of the project as well. The Alton Gas Natural Storage Project posed an opportunity for economic growth, energy diversity and security, and employment in Nova Scotia, all of which would motivate the government to pursue the approval of the project in its own best interest. This framing of the project was clearly revealed throughout the media analysis component of the case study, as part of the "Economic Opportunity Frame," in which the Alton Gas project was framed as an overwhelmingly positive opportunity for the province.

Provincial and municipal government officials endorsed the Alton Gas project as an important investment in the Nova Scotia economy. President of the Colchester Chamber of Commerce described the Alton Gas project as a "100-million-dollar investment that

central Nova Scotia needs to propel us forward” (Daily News, Oct 18, 2014). Larry Harrison, MLA for Colchester-Musquodoboit Valley stated that “new local businesses – like the Alton Gas project- are something to be excited about in the new year (McKay, 2015). The Premier was also quoted multiple times expressing that the project acquired permission after years of consultation and monitoring, suggesting that this was a positive and safe business venture for Nova Scotia.

At the local level, Stewiacke Mayor Wendy Robinson was routinely quoted as sympathetic to concerns of protestors, but overall in full support of the project. Robinson was quoted across various articles highlighting not only the economic investment and job opportunities, but the ways in which Alton Gas had contributed to community development initiatives, such as their controversial donation to improve a local playground, and their purchase of a rescue boat for Stewiacke Fire (Weekly Press, Nov 2, 2016). Colchester Mayor Bob Taylor consistently reiterated his support for the project suggesting that the opportunity for job creation for Nova Scotians was more important than protecting a river (Daily News, Dec 6, 2014).

Industry representatives, such as company president David Birkett, framed the Alton Gas project not only as an opportunity to employ Nova Scotians, but to establish energy security as well, stating that the project has the potential to save natural gas customers \$17 million each year.

This project will create jobs through the construction and operation of the facility, bring natural gas closer to many communities in Colchester County, stabilize natural gas prices for Nova Scotians, help more customers convert to cleaner natural gas from fuel oil and contribute to the overall economic growth of the community (Campbell, 2014; Sullivan, 2014)

5.3 CONCLUSIONS OF CASE STUDY

In accordance with the concerns highlighted in the chapter four policy analysis, the lack of defined processes and terms, and clear evidence of Indigenous empowerment resulted in the government being able to dictate the processes of consultation, until of course, the Sipekne'katik Nation managed to take them to court.

The terms with which consultation took place, regarding correspondent and sharing information in a timely manner, seemed to be dictated entirely by government. As was revealed in court, the Alton Gas project was proposed to the government in 2006, and the Sipekne'katik were not involved in consultation until July 31, 2014. Is this a “reasonable” or “appropriate” timeline? Judging by the policy, it very well could be, and obviously was reasonable enough for the government, as they did try to argue in court that they had fulfilled their DTC. The province, during this time, undertook third party reviews, without input or involvement from the Sipekne'katik Nation, and continued to consult with the Assembly and the KMKNO with full knowledge that the Sipekne'katik Nation was no longer a member of either.

This point leads to another concern that was highlighted within the chapter four policy analysis, which was the unclear processes in which Government, Indigenous communities, and third-party proponents were supposed to follow when the community being consulted was not a member of the TOR. The Sipekne'katik Nation reported consistently both in court appeal documents and in press releases, that they had chosen to leave the “made-in- Nova Scotia” consultation process, and had sent letters to the province requesting direct community consultation, shared information, and additional funding to carryout adequate independent reviews. The Province however, continued to inform Alton

Gas to communicate and consult with the Assembly of Mi'kmaq Chiefs and the KMKNO, of which they knew the Sipekne'katik Nation were no longer members.

Another issue that arose within this case study that was flagged in the chapter four policy analysis, was how the government and proponent seemed to have employed their understanding of consultation only has informing, throughout the process. While Alton Gas did share information with, and arrange a few on site presentations/meetings with the Sipekne'katik Nation specifically, the interaction in those presentations was more about what they had done, and what they planned to go ahead with. Arriving on site to consult when your decisions are already made, and approved by government is not really consultation. Especially, if like the government says, they are working towards reconciling a nation-to-nation relationship with the Mi'kmaq of Nova Scotia. With no duty to agree, and no ability for the Indigenous community in question to refuse the proposed action, it cannot be for certain that the province and future proponents can truly be trusted to consult in good faith.

As mentioned as a point of concern within the Chapter four policy analysis, Chief Copage asserted that during the “made-in-Nova Scotia” consultation process, there was and still is no way for an Indigenous community to oppose a project. The power to decide what projects require consultation, and when appropriate consultation/accommodation has been completed, still ultimately lies within the hands of the Provincial government. The Liberal Government's policy did not work to “improve” consultation with the Mi'kmaq of Nova Scotia, it established a process that was, to their benefit, incredibly vague, allowing them to continue to pursue the projects they wished to spur economic growth in the province with no real option for Indigenous opposition. The Sipekne'katik Nation, a

signatory member of the 1752 Peace and Friendship Treaties, assert that they have never “surrendered, ceded or sold their title to any lands or resources in the province, and therefore have interest in all the lands, waters, and air in the Province” (Sipekne’katik, Form A, 2016, no. 40-41). The Sipekne’katik Nation continue, as they report and the MEKS study revealed, continue to undertake traditional activities within the project area in a most significant manner (Sipekne’katik Form “A” 2016; MEKS 2016).

This process expects us to allow proponents to come to our unneeded territory and propose to do what they wish in the interest of economics. This leaves us in a difficult place as it leaves no opportunity for grassroots membership to have a voice when their rights and title are at risk. Our grassroots people have no voice. Consultation is not truly consultation after a decision has been previously made. It is information and notification only after a project is approved (Copage as quoted in Sipekne’katik, 2016).

Arguably, the “made-in-Nova Scotia” process does not address the meaning of this history, these treaties, and their meaning in the present because then they would have to accept that the Mi’kmaq peoples in this province do and should have more actual, formal control during these processes of development, and “consultation.” It is very doubtful that this policy ever intended to do that.

Furthermore, as outlined in the Chapter four policy analysis, the terms surrounding accommodation are entirely unclear. Especially, in those instances in which a government is found to have failed its DTC in court; what can the court then order to happen? Recently, the Sipekne’katik Nation won their appeal in the Supreme Court of Nova Scotia. However, with the uncertainties that exist in current Nova Scotian policy, and in Canada in general, the next step is unclear. What now can the court order the Province to do? Even with their court win, operations at the Alton Gas Natural Storage facility have not been stopped, and

the only clear accommodation being provided for the Sipekne'katik Nation is the repayment of their legal fees by the Province and Alton Gas, totaling around \$150, 000 (Rhodes, 2017). If the storage facility is permitted to continue operations, and the government is making it out of this process with only the ruling to pay court fees, then the current consultation process did not truly result in meaningful consultation, or the protection of recognized and affirmed Indigenous and treaty rights.

The main conclusions drawn from the media analysis component of the case study are in many ways aligned with current critical theories of Indigenous peoples in media. While the Alton Gas conflict was in some cases framed as an issue of Indigenous right, the media predominantly framed the conflict as an environmental matter, which transcends identity and impacts all Nova Scotians. Such evidence is in accordance with theories suggesting that media prefers to report on issues which are relatable to, and thus more engaging to non-Indigenous peoples (Corigall- Brown et. al., 2010).

Perhaps most importantly, in congruence with critical theories of Indigenous peoples in media (Corigall-Brown et. al, 2010; Harding, 2006), Indigenous peoples were often framed as threats or opponents to economic prosperity, or scientific reason. Indigenous peoples throughout the Alton Gas project were constantly pitted in media against discourses of economic prosperity, as “protestors” fighting for their rights, which went completely unexplained. The media had a tendency to focus on issues of Indigenous rights only as they pertain to the specific case or story at hand (Corigall-Brown et. al., 2010; Harding, 2006). This was revealed in the fundamental lack of historical and legal origins of the duty to consult, and lack of discussion or connection to current or similar Indigenous issues.

CHAPTER 6

DISCUSSION

6.1 AREAS FOR FURTHER RESEARCH

With the nature of this research project's research, there is far too big a scope and far too much to suggest for future research. Indigenous nationalism and autonomy, and how it may function within or outside the current model of Canadian federalism, is a huge undertaking with a lot of unknown implications. The question persists, how would a third order of Indigenous government impact upon the sovereignty of the Crown, and the Canadian state (Papillion, 2014; Russell, 2016, p. 74.)?

Some argue that Section 35 of the *Constitution Act 1982*, was never truly intended by the first ministers to provide a constitutional basis for a third order of government in Canada (Abele & Prince, 2006, p 579; Gibbins & Pointing, 1986). It is one thing to push for better incorporation of Indigenous self-government within Canada's existing institutions, it is another matter to seek to reaffirm Indigenous sovereignty outside of Canada's institutions of federalism. Martin Papillion notes (2014, p. 119) that the creation of a distinct third order of Indigenous government directly challenges orthodox conceptions of state sovereignty, in addition to posing various hypothetical institutional challenges for Indigenous peoples. For example, matters of representation. Would every distinct Indigenous nation, no matter their size, have equal representation in an institution?

This research does not attempt to answer any of these questions, rather it just intended to show that governments in Canada are constantly evoking discourses evoking reconciliation and the return to a "nation-to-nation" discourse, without relinquishing any

control over Indigenous peoples, or providing a detailed blueprint for what this “nation-to-nation” relationship actually means, or might look like.

With regards to this research project and the Nova Scotia case study specifically, there is definitely room for further research. This research could benefit greatly from a more detailed and inclusive analysis of consultation during the Alton Natural Gas Storage Project. More specifically this research could benefit from first-hand interviews with the parties involved, to gain better insight to answer the questions that still exist. It would be incredibly beneficial to gain better insight to the processes taken by government, and proponents and to uncover and understand any challenges each face in the consultation process as it currently stands. A project with interviews would not only help to better outline the specifics of the Alton Gas case study, but may also help to better answer broader questions about the consultative process as it pertains to proponents, such as;

- 1) Were there adequate resources for third party proponents who are made responsible for the procedural aspects of consultation?
- 2) Were there accessible means of communication between all parties during consultation processes?

Arguably, there is a tendency in this research to overlook the challenges that a proponent may face when engaging in consultation, as the focus tends to be only on the infringement of the proposed activity on Indigenous rights. More insight in this area could help to reveal ways in which policies could be improved to enhance consultation efforts on the part of the proponent by outlining clearer responsibilities and processes in which they could follow.

6.2 MAIN THOUGHTS AND CONCLUSIONS

The historical-discursive institutional analysis in Chapter three of this research revealed the ways in which Indigenous peoples were framed and addressed by settlers in Nova Scotia over time, by both pre- and post-confederation colonial governments. The analysis revealed that both the dominant institutions which dictated the lives and treatment of Indigenous peoples in Canada and Nova Scotia, were based upon colonial ideologies of Indigenous peoples. The supposed racial and cultural superiority of Canada's earliest colonial governments justified the violent and racist policies pursued by colonial governments. As historical institutionalists would suggest, these dominant ideas carried on throughout the development of the institutions and policies that followed. While such policies took on a less violent nature, the colonial ideologies of Indigenous peoples as inferior peoples justified the land appropriation policies which ensued, as well as the notion that the federal government could assume full responsibility for Indigenous peoples, dictating their identities, rights and very existence.

The historical-discursive analysis revealed that while the dominant discourses framing Indigenous people have changed to reflect Canada's present-day goals of reconciliation, all legislative power and power over lands continues to reside in the hands of the Provincial and Federal Crown. This was the case with Nova Scotia's current consultation policy as shown by the policy analysis and case study.

Nova Scotia's present-day consultation policies do not attempt to violently eradicate Mi'kmaq peoples from the land "as human bodies" the way the colonial predecessors had, but by means of more contemporary colonialism "in which domination is still the settler imperative but where colonizers have designed and practice more subtle

means” (Alfred, 2005, p. 597). The Province continues to exert Crown sovereignty over Mi’kmaq peoples. Current policies are similar to many problematic and paternalistic policies in Canada’s colonial past, in the sense that they are ultimately designed and interpreted by government.

Throughout the Alton Natural Gas Storage Project, the government and industry proponents controlled all aspects of consultation. It was also made clear, with each approval and permit issued by the government before meaningful consultation took place, that the government was able to take a rational approach to prioritize their economic and industry interests over their duty to consult with Indigenous peoples.

Provinces, according to decisions made by the Supreme Court of Canada, have a huge part to play in consultation and the recognition of treaty rights (McIvor, 2018). It is imperative that provinces no longer hide behind the inaction of the federal government in terms of consultation, and work with Indigenous peoples to establish consultation processes, and institutional mechanisms that facilitate Indigenous autonomy and reconciliation. When the governments of one nation (the settler nation) always have the power set the agenda, dictate the course, and always has the final say, this is not a nation-to-nation relationship, it is a nation-over-nation relationship.

The discourses of “reconciliation” and the “nation-to-nation relationship” evoked by recent federal governments, and the provincial Liberal Government in Nova Scotia, seem to be predominantly based on the government’s understanding of such concepts. To them, reconciliation seems to be solely about acknowledging the original sin, that sin being the forcible dispossession of Indigenous peoples in across Canada at the hands of British Colonial Governments. Reconciliation to the government does not seem to be about

actually rectifying the atrocities and broken promises outlined in treaties by colonial governments with any type of real constitutional, or policy changes that put authority in the hands of Indigenous nations. As reconciliation to recent federal governments, and the current provincial government in Nova Scotia, is about apologizing the original sin of their ancestors, they have completely disregarded the role they currently play in the extensions of the colonial legacy from Canada's past, to its present. The primary goal of governments, federally and in Nova Scotia, has been to develop approaches to reconciliation that foster forgiveness, social stability, and public legitimacy by acknowledging and atoning for past injustices in context sensitive ways (Short, 2005, p. 268).

Public apologies, the establishment of truth and reconciliation commissions, inquiries, and the symbolic adoption of conventions such as United Nations Declaration on the Rights of Indigenous Peoples are arguably all important steps in the process of reconciliation, however they are not in themselves solutions.

However, the recognition of Indigenous self-determination comes to be, it is imperative that it is not a process that is researched, dictated, and implemented by federal and provincial governments alone. As discussed throughout this study the incorporation or establishment of Indigenous self-government should not be a prescriptive process in which the Canadian governments force their colonial government structures upon Indigenous nations, Indigenous peoples need to have more control. Indigenous peoples need to exercise more control in dictating who they are and what they want, and this is not something that federal or provincial governments need to "give" to them, it is something they must recognize is inherent. Either our governments are confused and do not seem to know the meaning of the discourses of reconciliation or the nation-to-nation relationship

to which they constantly refer, or the confusion is part of an intentional practice in which they employ discourses to make it seem as though they are addressing this issue never fully intending to solve it. Most likely, it is the latter, as discourses allow governments to appear to be prioritizing the issues of Indigenous sovereignty, and garner support from the general populous, while never actually taking action that would threaten Canada's state sovereignty, or national/provincial economic interests.

Indigenous autonomy, improved consultation and reconciliation are not things that the government can claim to accomplish based on policies which continue to dictate and restrict the terms in which Indigenous peoples can identify as Indigenous peoples, how they can participate within the Canadian government, or how they can participate in consultation processes regarding their lands and their inherent rights. The genuine recognition of Indigenous peoples will ultimately involve a redistribution of power and resources within Canada. To fully decolonize and reconcile the nation-to-nation relationship that once existed, all levels of Canadian governments must recognize Indigenous peoples, not only as distinct cultures but as distinct political entities with rights to the lands they occupied prior to colonization, and must be treated as nations equal in status to the settler state.

Reconciliation is not solely an apology for the past, but a reorganization of the present. As all levels of Canadian governments continue to fail, Indigenous peoples and their allies across Canada are still fighting an ever-present colonial power for their right to self-determination.

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