

The Duty to Consult First Nations within the
Environmental Assessment Process: A Resource Industry
Perspective

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A thesis submitted in Partial Fulfillment of the Requirements for the
Degree of

MASTER OF ARTS
In Dispute Resolution

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ABSTRACT

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The legal doctrine, ‘Duty to Consult’, was set through a number of landmark court cases between 1997 and 2004. It is this duty that has helped First Nations receive official stakeholder status in the negotiation of land and resource use issues in British Columbia (BC), Canada. Later, policy initiatives, a best practices handbook, and procedure development shaped through the actual practice of consultation, contributed to the formation of an ‘in practice’ reality of this duty.

When making an application to undertake a resource extraction or utilization project, industry proponents must go through BC’s Environmental Assessment (EA) process. This process is one example of where the ‘Duty to Consult’ has been applied in the form of a required consultation with First Nations affected by a proposed project.

Despite the formation of law and policy meant to guide this area of practice and produce successful consultation activities, it is left unclear from law and policy alone what actual strategies are used by industry proponents to meet the requirements of consultation during an EA. However, as successful consultation is the goal, understanding the strategies alone is insufficient for creating a clear picture of the important considerations of this process. For this reason, the research sought to understand what overarching approach, aside from legal parameters and policy frameworks, guide the practice of consultation with First Nations in private sector resource industry projects. Identifying and examining the difficulties of consultation from the perspective of industry helped explain what the overall approach must be when undertaking this type of consultation and why this approach is of such importance.

In the last few years EA has gained greater attention in BC. Due to this, reviewing the legal context and documents that officially shape the practice of consultation within the EA process is timely, relevant and provides a basis for further research. The research involved interviews with industry proponents and staff at the Environmental Assessment Office (EAO). These served to develop an understanding of the individual experience of those working in the field. In developing a fuller picture of the subtleties of the consultation process, the interviews are supplemented with an analysis of the social and political context that influences consultation.

The analysis revealed that more effective consultations prioritize relationship-building as their primary approach and are responsive to the varying local conditions, as each community engaged with is unique. The findings present challenges perceived on the industry side that may help provide better understanding of the influences on the EA process and approach used by industry proponents. Although there are subtle differences between the issues identified by both the EAO and the industry proponents interviewed, overall the similarities were significant. All of those interviewed identified relationship-building between all stakeholders as a key approach to the process and to the long-term success of the projects being proposed. Given the historical context of the relationship between all stakeholders, the conclusion of the research is that, although building trusting relationships will be difficult given the history of relations, it is also the starting point for building greater understanding and repairing trust within this particular sector.

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CHAPTER 1: INTRODUCTION

The legal doctrine of the ‘Duty to Consult’ was set through a number of landmark court cases between 1997 and 2004 in Canada. Generally, the Duty to Consult means that the federal and provincial government have a duty to consult and at times accommodate affected communities, including First Nations communities, when development has the potential to affect a community and the land it is associated with (BC Government, 2010, p. 2). In situations where a resource based project is proposed to the government by an industry proponent, the project must go through an Environmental Assessment (EA) process. This is a government designed approval process for resource based projects. Sometimes these projects affect First Nation’s designated or claimed territory and, in situations such as these, consultation must take place with the affected First Nation (Brackstone, 2002).

Indeed, it is this duty that has helped First Nations receive official stakeholder status in the negotiation of land and resource use issues in British Columbia (BC). To further clarify expectations and protocol, the policy community in this area developed numerous policy initiatives, a best practices handbook, and procedures that were shaped through the actual practice of consultation and contributed to the formation of an ‘in practice’ reality of this duty.

While the Duty to Consult applies to various policy areas, one area that has received significant growth and attention over the past decade is the environment. In this policy area, the Duty to Consult is being applied in the form of a required consultation with First Nations affected by a proposed resource project as a part of the EA process. Consultation is one example of increased dialogue and attention being demanded prior to the development of resource based projects.

Despite the formation of law and policy meant to guide this area of practice, it is left unclear from law and policy alone what strategies are used by industry proponents to meet the requirements of this consultation during an EA. However, as successful consultation is the goal, also understanding the strategies alone is insufficient for creating a clear picture of the important considerations of this process.

To create a complete understanding of the process, the factors influencing its challenges described by the industry proponents and the Environmental Assessment Office (EAO), were sought out.

Since the First Nations perspective has been researched to a greater extent than that of industry, it was felt that the research would have more to contribute if the focus was on discovering the perspectives of industry and by extension the EAO. *By seeking further understanding of the perspective of industry and the EAO in relation to the difficulties that they perceive to exist in the EA consultation process, the purpose of the study, to identify the difficulties in applying the principles related to the 'Duty to Consult' as it relates to one issue, specifically the BC Environmental Assessment (EA) Process, is best supported.*

By documenting the challenges and perceived roadblocks to successful consultation, it was possible to identify the basis for the consultation approach that should be utilized and why this approach is of such importance. For this reason, the research considers first, what the challenges to successful consultation with First Nations within the EA process are, and second, what the overall approach is that should guide the practice of consultation with First Nations in private sector resource industry projects in order to overcome these challenges.

Those interviewed suggested that, relationship building is the approach that must dominate any consultation process in order for parties to find long-term success of both the projects being proposed, and in the agreements made when developing the accommodation measures. Due to historical, political, social, cultural and legal factors that have affected relations between parties, there is the necessity to re-evaluate and then re-build relationships between First Nations and government as well as First Nations and the resource industry. Without the establishment of a productive working relationship between stakeholders, the challenges to ongoing successful engagement with communities adjacent to the project are significant. With the long-term nature of the projects proposed today, developing relationships for the long-term has increased in importance. Despite the complicated and long history of the relationship between all stakeholders, this thesis suggests that building trusting relationships will be difficult given the challenges currently experienced, but also necessary as a starting point for building greater understanding and repairing trust within this particular sector.

Issue Identification

First Nations consultation became a part of the BC EA Process through provisions in the 1994 Environmental Assessment Act (EAA) that solidified First Nations participation in the process. In 2002, a new iteration of this Act was developed that was purposely developed to deregulate the process so that the assessment process can be “conducted within the limits of” and also be “consistent with, overall government policy, goals and direction” (Environmental Law Centre, 2010, p. 15). In this process, it was noted that the mandatory provision for First Nations inclusion decreased due to the removal of some pieces of the legislation previously in place in the Act (Environmental Law Centre, 2010, p. 15).

Regardless of the weight given to First Nations consultation in the EA process, the process has been in place to determine which projects are suitable to move ahead, which are not, as well as to determine the risk factors (Province of BC, 2010). With the recognition of First Nations rights and title, accommodations came to be crafted to mitigate or compensate for the impact to First Nations claimed or designated territory affected by a project being proposed. Currently, as a part of this EA process, industry must consult with First Nations and, where appropriate, in consultation with them, make detailed plans regarding how they will accommodate or mitigate their concerns (Respondent 5, Interview, 2013).

Through the latter part of the last century, and particularly up until 2004, court cases first clarified the right of First Nations populations to lay claim to their Native territory. Although not a legal definition, First Nations came to be used in reference to Indigenous populations of Canada. Later it was established that the federal and provincial government have a Duty to Consult and, where appropriate, accommodate those First Nations during the approval process of any project that affects First Nations’ designated or claimed territory. For this reason, when resource-based industry is interested in developing a project on or near an established territory, or a territory where those rights have been claimed but are yet to be formally established, consultation must take place as a part of the required EA Process (Brackstone, 2002).

Consultation has a legal basis and, it is established that it is the responsibility of the government to ensure that this legal requirement takes place. The legal conceptualization of consultation can be summarized through the 1998 court case of *Halfway River First Nation v. British Columbia (Ministry of Forests)* that explored the infringement of constitutional and treaty rights of the Halfway River First Nation. In this case, the court integrates a number of the concepts of consultation applicable to both treaty and non-treaty cases to express the following: Consultation is meant to, “ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, whenever possible, demonstrably integrated into the proposed plan of action” (Hill Sloan Associates, 2008, p. 8).

Aboriginal people is a legally defined term referring to the descendants of the original inhabitants of North America. The Canadian constitution recognizes three groups of aboriginal people -Indians, Métis and Inuit. These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs (Government of Canada, 2013).

As will be outlined later, even though there is no one method to carry out the required consultation, there are a spectrum of tasks that may be integrated into the act of meaningful consultation as well as a variety of requirements that are considered as contributing to the task of consultation. It can be summarized by the researcher that the end result of providing an opportunity for dialogue, and potentially for accommodation measures to develop, is what characterizes and defines activities as ‘consultation’.

Policy related to consultation, and informed by case and statutory law, has, in a limited way, been outlined by the BC government through a handbook related to First Nations’ consultation in the EA process. The document entitled, “Updated Procedures For Meeting Legal Obligations When Consulting First Nations” does not create formal protocols and has the aim of giving an overview of important considerations during consultation in terms of how it fits into the EA process and the legal Duty to Consult. Consultation, as the Handbook suggests, takes place on a spectrum, and for example, involves

only the serving of a notice of intent, or it may include full First Nations involvement in the EA Process (Province of BC, 2010, p. 1-25).

Decisions regarding consultation are dependent primarily on the level of impact the project is considered by its proponent and/or government to have, in combination with the strength of the land claim being made by the affected First Nation (Osbourne, 2006, p. 4). It has been established through law and government policy that consultation should be ‘meaningful’, have the intention of reasonably addressing Aboriginal claims, and be carried out through a process that is timely, proactive, and transparent (Osborne, 2006, p. 5). It is meant to, at a minimum, involve correspondence and discussion that aims at developing mutual understandings (Dougherty, 2008, p. 27). When a land claim has yet to be settled, First Nations do not have veto or approval power over provincial decisions in relation to land use, but the courts nevertheless stipulate that the consultation process must be engaged in, in good faith, by both First Nations and industry (Dougherty, 2008). Unfortunately, stipulations such as ‘in good faith’ are left relatively undefined.

Leaving stipulations such as these undefined leave room for interpretation on behalf of the person or business undertaking this process. For a proponent with the best intentions and a true commitment to the process, the enactment of the practice of consultation may be quite different than for a proponent committed only to the completion of the task. It can be understood that there may be a spectrum in how the proponents choose to fulfill this duty. However, regardless of how committed a proponent is to the process, roadblocks and challenges to successfully undertaking and completing the consultation process can be perceived to exist and, it is these that are identified through the course of this research.

Rationale and Importance of the Study

Canada has been known for its vast land expanses and for its ‘unlimited’ resources. In more recent years though, the limits of these resources have been increasingly felt and the demand for natural resources has increased worldwide. Debates surrounding water, timber, minerals, the extraction of natural gas, and most recently, the piping of oil across pristine wilderness has engaged the public more

than ever before. Making choices about land use and resource development has been a debate that has caught the public consciousness.

Issues related to consultation and whose interests should be considered when proposing projects such as pipelines across northern BC has elicited a significant response from the BC public. First Nations communities and territories lie in the direct path of the pipeline, many BC communities lie in the path of a potential oil spill along the BC coast and the drinking water of most of the province stands to be effected by a pipeline leak. As a result, consultation and what the law provides to ensure that it takes place, is something more British Columbians are now paying attention to.

The consultation process stands as an opportunity for connection to be made between stakeholders and for relationships to be built. By documenting the issues and challenges of consultation as perceived by industry and the Environmental Assessment Office (EAO), this study seeks to contribute to the formation of a greater understanding between those stakeholders by allowing the opportunity for deeper knowledge of the challenges of the EA process to be acknowledged. This is undertaken with the rationale that, as a result of the increased knowledge the opportunity for relationship building through consultation will be enhanced. For those interviewed, it is relationship building that was identified as the solution to the issues that plague the EA consultation process. However, how those relationships are built is something that continues to be considered by all stakeholders involved.

Finding opportunities to come together and share information and experiences to find wider understanding between stakeholders is at the heart of any dispute resolution process. Likewise, consultation, if there is a sincere interest on behalf of engaged parties, can provide an opportunity for these same goals to be achieved. By undertaking research and disseminating the research knowledge to interested parties, it may be possible to build understanding, address roadblocks, as well as further the effectiveness of, and commitment to, the pursuit of meaningful consultation. By providing insights into the challenges experienced by industry in undertaking meaningful consultation with First Nations communities, methods and approaches can be developed to address such challenges.

Thesis Limitations and Delimitations

There are a number of legal considerations associated with the Duty to Consult that are encapsulated within the EA process. When considering these legal considerations and the literature surrounding consultation, a conspicuous lack of first hand accounts of industry proponents explaining how the legal Duty to Consult is in actuality practiced through this process of consultation was evident. Given the importance of there being, what law considers to be, 'meaningful consultation', it is worth asking why there is not more literature documenting anecdotal feedback from practitioners in the field regarding how they perceive this duty, their perspective and experiences, as well as which actions they believe best enable meaningful consultation. This consideration placed a limitation on what clarification of practitioner perspectives could be gathered in the literature based research component of this study.

When exploring the information available, reference is commonly made to court cases and conceptual aspects of consultation with less focus on the actual experiences and practices. Unlike other processes -such as court cases or mediations- that are formalized and typically follow a set path and procedure, the bulk of consultation takes place in an informal context where industry proponents connect with First Nations in an informal setting, come to be exposed to the community, and discuss the community's characteristics (Respondent 5, Interview, 2013). Again, the subjective experience was relied on to shed light on aspects of this process.

As the research progressed it was noted by the researcher that greater information sharing has begun to take place between First Nations and industry. The information shared seems to be largely communicated verbally between parties, as a part of workshops or conferences, or in informal discussions between practitioners. There are more documented accounts of the First Nations perspective than those of industry as, overall, academic literature has been slow to document the first hand perspectives of industry

proponents on the topic being studied. Nevertheless, it is reassuring to note that communication is increasingly taking place between parties.

The limitation that this lack of documentation creates for the research, can be summarized as a lack of industry perspective in literature sources that creates a reliance on gathering primary research sources. Utilizing a research method that focuses on the subjective experience of industry proponents and the EAO in relation to the challenges of consultation was developed in order to provide deeper knowledge and insight into the topic being explored.

Having an industry perspective led to the only significant delimitation of the study, the decision to not focus on the first-hand perspectives of First Nations. Although the perspectives of First Nations are included, in a limited way, in the research findings and discussion, this is done through the utilization of literature based accounts and information gathered from primary sources in the context of understanding the dynamic and historical relationship between stakeholders.

The First Nations perspective has been researched to a greater extent than that of industry. By providing further understanding of the perspective of industry and the EAO in relation to the difficulties that they perceive to exist in the consultation process, the purpose of the study is best supported. This is because First Nations have been quite outspoken about the limitations and challenges they perceive to exist in the consultation process and, although it would be valuable to attempt to address these concerns from within the policy and legal landscape, headway can also be made by addressing the roadblocks to meaningful consultation perceived on the side of industry. This is because it is industry that undertakes the consultation practice and working to remove the challenges they perceive has the potential to improve the effectiveness of, and commitment to, consultation. Through the development of insights into the approach that should be utilized by industry for successful consultation, greater directive and focus can be sought by industry proponents ready to make that commitment to the development of a meaningful process.

Outline of Thesis

In British Columbia (BC), land and resource use issues consistently arise in relation to renewable and non-renewable resource projects. These projects often border or affect protected areas, various communities, but also First Nations' claimed or designated territories. Traditionally treaties between the government and First Nations were used to definitively determine the borders of claimed territories as well as the right of First Nations to make decisions related to land use in the territory designated by a treaty. Unfortunately, BC has a very low rate of treaty settlement and, as a result of the ongoing and sluggish treaty process, the issues related to the determination of land use and resource utilization in claimed areas is further intensified. Questions regarding whose interests must be consulted when resource projects are initiated are not as clearly outlined as after the successful negotiation of a treaty. From the governmental perspective, it is treaties that firmly designate territory, establish provisions for consultation, as well as clearly outline how consultation must take place and under what conditions. In the absence of a treaty decision regarding whether, and with whom, consultation must take place, a number of complicated considerations must be relied upon.

The legal Duty to Consult which provides the legal basis for consultation, varies depending on the following considerations: the strength of the First Nation's claim on the area under consideration; the level of impact the project is considered to have on the community; and consideration, evaluation and prioritization of what could be a large number of First Nations claims submitted for that area. Often times land claims are contested, unconfirmed and in conflict with the claims of other First Nations groups. It can be complicated for the industry proponent undertaking the resource project to identify who must be consulted and the level of consultation they must undertake when looking at the land claims for a specific area. As will be explored further through this research, complications such as these within the EA process, as well as evolving legal considerations, are only further compounded by the complicated nature of relations between 'First Nations and government' and 'First Nations and industry'. Undertaking consultation and fulfilling the legal Duty to Consult is challenging within this context for all parties involved.

With BC's move away from the dying forest industry and its further expansion into sectors such as mining and energy, it can be observed that new opportunities for different types of resource development are emerging for the province's resource sector. In these new opportunities, there is a more explicit focus on First Nations' legal rights. These legal rights have been developed through a number of court cases that defined the legal Duty to Consult and Accommodate. As well, what broad components should be integrated into the undertaking of meaningful consultation must increasingly be considered.

Establishing this legal requirement for consultation opened the door for a dialogue to take place that included a First Nations' perspective. As evidenced by the findings of this research, complications continue to manifest themselves for industry when it comes to understanding a community's needs, being able to incorporate them into their work plan, and, as a result, in communicating about and crafting the mitigation, accommodation, or compensation measures meant to address or 'make-up' for the impact on the community's land or resources.

Nevertheless, due to First Nations' increased legal standing there is an increased ability for First Nations to develop resource revenue sharing arrangements with industry. Having this standing has better positioned First Nations to claim their share of the economic and other benefits that typically come from resource development through agreements such as Impact Benefits Agreements (IBA's). However, due to the complications noted above, for First Nations to take advantage of this new legal landscape may not be as straightforward as first imagined, nor may it be uncomplicated for industry to initiate their inclusion in resource development decisions.

There are complications and challenges that arise in the pursuit of these types of agreements and in the time after agreements of this type are made. For the purposes of this research, it is specifically the challenges associated with the consultation required by the EA Process prior to agreement being reached that is of interest. Although agreements may be initiated prior to EA completion, more typically it is the EA process that segways to the development of these agreements. Through consultation, the level and type of accommodation required (land preservation, impact management, jobs) is more readily understood, as are hopefully the needs of the community. The challenges documented by the research are

those challenges associated with upholding the ‘Duty to Consult’ as it is expressed through the practice of consultation within the EA process when a land or resource-based project is proposed to the BC government.

This research sought to understand what, aside from legal parameters and policy frameworks, guide the practice of consultation with First Nations in private sector resource industry projects. However, as successful consultation is the goal, understanding the approach alone is insufficient for creating a clear picture of the important considerations of this process. Identifying the challenges that hamper the success of First Nations consultation became necessary for well-rounded research and a crucial factor in understanding the necessary approach to consultation that guides industry in this regard.

The ‘Findings’ chapter focuses on documenting the challenges identified by both parties to affect the success of the consultation process. These are divided into four categories: 1) Predispositions, attitudes and cultural considerations; 2) Social, political and historical considerations; 3) Law, procedural, and administrative considerations; 4) Relationships as the solution. Given all of the challenges that have been documented between stakeholders and outlined in the first three categories of the findings, it was natural for relationship building to be the approach considered key to successful consultation and to building better, hopefully more trusting relationships during consultation.

CHAPTER 2: BACKGROUND- LEGAL AND POLICY CONTEXT

Considering the legal context, particularly how common law has directly created the framework within which First Nation's consultation takes place, provides the necessary background and context within which to situate the research. Having a solid understanding of the legal considerations is necessary for understanding first, what contributed to the affirmation of a legal Duty to Consult and then second, to the integration of this duty into the EA Process as First Nations consultation. As well, some of the challenges communicated by interview participants were related to the EA process. For this reason, it is useful to consider the legal circumstances within which this process was developed to gain further insight into how these challenges emerged and why they persist.

Common law and legislation were first used to shape the parameters for consultation that led to the development of policy and practice. Legal considerations provide focus and depth to the other aspects that inform the process of First Nations consultation and stakeholder dynamics including, social considerations, history, politics, and culture. The Environmental Assessment Act (EAA) makes the legislative provisions for the EAO, the EA Process, and the consultation that is encapsulated within it. This is not to say that political, historical, cultural or social considerations do not affect practice or the formulation of law itself, but only that, in this case it is law that is referred to, or amended for, the purpose of affirming rights. And, it can be perceived that it is law that serves as the basis –perhaps justification– for any consequent action.

Law, policy, and practice are quite tightly wound in this particular area. The interpretation of case law, in conjunction with statutory law –regulations– and government policy is, for one, important to understanding the context industry proponents within this industry work. But, it is also a tool and a perspective that can be utilized for tracing the evolution of First Nations relations within Canada and the evolution of the general social conscience. Finally, it is a valuable key to help understand how

complications in these relations –born from perceived injustices- are at the heart of, and have manifested themselves as, roadblocks and shortfalls in the current consultation process.

Below is a survey of the important legal considerations surrounding the Duty to Consult First Nations in the EA Process. These are provided in historical order and it should be noted that each new consideration builds on those established prior to it, reflecting the slow evolution of the political and social perspectives of the time in which they are established. Finally, government policy and the EA consultation process phases are reviewed.

Common Law

Section 35 of the 1982 Constitution Act was used as a basis for the case law decisions that will be outlined in this section and is considered the basis of aboriginal claims to both rights and title within Canada. Section 35 of the constitution has been integral to the treaty process moving forward and has acted as a basis for the courts to include a consultation component in the Environmental Assessment Process. (For further detail on section 35 see Appendix 1)

Section 35 is the basis from which three landmark court cases decisions have formed legal precedent in common law. These cases offer clarification of the definition of aboriginal rights and title as well as treaty rights.

Delgamukkw v. British Columbia. This landmark Supreme Court decision from 1997, confirmed not only that aboriginal title does exist, but also that this title extends to the land itself and not simply to the right to use the land (hunt, fish, gather). Further, it was established that government must consult with First Nations if these rights are to be affected and that they may have to compensate First Nations as a result. The Delgamukkw decision affected the Treaty process by officially recognizing First Nations as a legitimate party with jurisdiction in these negotiations and legitimate claims to title and ownership of the land in question (BC Treaty Commission, 1999). This decision was at the forefront of shifting and shaping law in this particular area as it was the first time that First Nations were recognized to have a

legitimate interest in the encroachment of development on their traditional territory. (For further definitions and clarification of aboriginal Rights and Title see Appendix 1)

In its decisions, the Supreme Court made four important statements regarding aboriginal rights and title. These include:

- 1) Aboriginal title is a right to the land itself (BC Treaty Commission, 1999, p. 2). This expanded the definition of aboriginal title from simply the right to use the land for traditional purposes, to also include property rights (BC Treaty Commission, 1999, p. 2).
- 2) Permitted use of aboriginal lands was no longer limited to traditional practices (BC Treaty Commission, 1999, p. 2).
- 3) The cultural relationship to the land must be preserved and land use must not impair the potential for traditional use of that land by future generations (BC Treaty Commission, 1999, p. 2-3).
- 4) Aboriginal title is a constitutional right and interference with this title can only take place if this interference passes the constitutional tests of jurisdiction (BC Treaty Commission, 1999, p. 2).

The court also indicated that, although the right to manage Crown land that is subject to aboriginal title would be limited, the province still has the right to grant resource tenures if the purpose and action passes a two-pronged test (BC Treaty Commission, 1999).

- 1) The purpose would have to be compelling and substantial and be examined on a case-by-case basis (BC Treaty Commission, 1999, p. 5). Some examples of this included: mining, agriculture, forestry, economic development, environmental protection (BC Treaty Commission, 1999, p. 5).
- 2) The action of the government must be consistent with the relationship of trust between the Crown and aboriginal peoples (BC Treaty Commission, 1999, p. 5). Consultation is

considered central to this relationship and necessary before interests in aboriginal land can be granted to a third party (BC Treaty Commission, 1999, p. 5). Further, First Nations are entitled to share in the economic benefits that are derived from these lands (BC Treaty Commission, 1999, p.5).

A key factor brought forward in the wake of this court case, was the inability of First Nations people to veto projects that would affect First Nations claimed territory, despite aboriginal right and title being more clearly defined. It seemed that the courts would still be the sole recourse for First Nations people to petition for activity to be halted, although negotiation rather than litigation was the recommendation of the court in relation to the settlement of land and resource use issues (BC Treaty Commission, 1999). This said, a court would not make an order to halt the activity unless it felt satisfied that First Nations interest will be irreparably harmed and that the ‘balance of convenience’ between the parties to the lawsuit would favour the stopping of that activity (BC Treaty Commission, 1999, p. 3). One other recourse for First Nations people as it relates to resource development within claimed territory, is to negotiate interim measures with the provincial and federal government that stipulates how the land will be used during the treaty process as well as how the financial benefits will be shared by all parties (BC Treaty Commission, 1999).

As has been explained earlier, due to the legal necessity for consultation, negotiation with industry in relation to the method and location of the resource development is also a possibility. The strength of the claim over the area in question, as well as other factors, play a role in the influence that First Nations people are able to have throughout development in a given area.

Outcomes of Haida Nation v. BC (Minister of Forests) and Taku River Tlingit v. BC (Project Assessment Director). Precedent setting court cases stemming from Section 35 of the *Constitutional Act, 1982* must be considered by the EAO when making decisions under the EAA. Both the Haida Nation and Taku River court cases provided necessary clarification regarding the duty of provincial and federal

governments to consult with, and, in appropriate circumstances, accommodate First Nations knowledge and interests. Until these cases were heard it had not been definitively established that the provincial and federal government had any Duty to Consult First Nations when aboriginal title was claimed but had yet to be established (Osborne, 2006).

In 2004, the *Haida Nation v. British Columbia* case led to a decision being handed down by the supreme court of Canada that focused on the level of consultation required when the Crown made a decision under the *Forest Act*. The Haida case was important because it set the framework for how government must consult with First Nations when making decisions that could adversely affect aboriginal rights (Environmental Assessment Office, 2010). Two main points came of the Haida decision:

1. The Crown must consult First Nations when it is considering any action or decision that could adversely affect any asserted aboriginal rights (including title).
2. Determining the consultation's nature and extent depends on two factors:
 - (i) the asserted claim's strength, and
 - (ii) the extent to which the right may be adversely be affected by the government decision or action.

(Environmental Assessment Office, 2010, p. 16).

Lastly, the proponent's role and the delegation of responsibility regarding First Nations' consultation was clarified by the Supreme Court. Although the responsibility for consultation was ascribed to government, it was said that "procedural aspects" can be forwarded to project proponents in order to support the Crown's duty in this area (Environmental Assessment Office, 2010, p. 16).

The Haida Nation case affirmed that the interests of First Nations people, discovered through consultation, should be considered in conjunction with the interests of society as a whole (*Haida v BC*, 2004). So that, "such decisions require discretionary decision-makers to balance factors which include not

only the development and exploitation of the Province's resources, but also environmental, social and cultural factors, including aboriginal interests" (Haida v. BC, 2004 p. 29).

In Haida v. British Columbia the Supreme Court of Canada gave the following remarks as a part of its conclusion regarding the balance of interests.

A provincial duty of fair dealing which recognizes the need for decision-makers to take into account ongoing aboriginal land uses and cultural interests prior to making decisions regarding the allocation of Crown lands and resources is reasonable. Its performance permits the balancing of aboriginal interests and other public policy considerations pending the negotiation of treaties. The Crown's obligation to consult, and to take seriously aboriginal concerns where it is likely that government action may affect those interests does more than simply meet the requirements of fairness. It also satisfies the honour of the Crown by providing for the reasonable consideration of aboriginal interests in the decision-making process. (Supreme Court of Canada: Council of the Haida v. British Columbia (Project Assessment Director), 2004, p. 41).

Of particular relevance to this research is the affirmation that the duty to consult applies in circumstances where established rights and title can be impacted, but also to cases where these rights and title have simply been claimed (Osborne, 2006). Given the ongoing treaty process within BC, this affirmation that the Duty to Consult applies in both of these circumstances is quite important.

The Taku River Tlingit First Nation v. British Columbia (project assessment director) was a decision by the Supreme Court of Canada that dealt more specifically with Environmental Assessment and was released the same day as the Haida decision. In this decision the Supreme Court of Canada concluded that the EAO process had fulfilled the Crown's obligation to consult and accommodate despite

the challenge by Taku River Tlingit First Nation of the validity of the evaluation process that led to the issuance of an Environmental Assessment Certificate (Environmental Assessment Office, 2010).

In all three court cases there were some substantive principles and consequent recommendations that were encouraged and meant to be adopted by proponents and the EAO when consulting with First Nations (Environmental Assessment Office, 2010). The recommendations included suggestions such as: start consultation as early as possible; share all relevant information with First Nations; clearly explain proposals and government decisions; ensure opportunities for First Nations to provide feedback; genuinely consider aboriginal concerns and attempt to find ways to address them; and, be respectful, open, reasonable, and responsive (Environmental Assessment Office, 2010, p. 17). Although vague, these recommendations provide some guidance about the spirit in which consultation should take place as well as basic principles to keep in mind. These recommendations were developed from seven legal principles that will now be outlined in greater detail.

1) Source of Duty to Consult. The source of the Crown's Duty to Consult is said to be grounded in 'the honour of the Crown', a concept considered central to all of the Crown's interactions with aboriginal peoples (Osborne, 2006, p. 2). It was established that the Duty to Consult and accommodate is separate of the fiduciary duty of the Crown vis-a-vis First Nations and the trust relationship that overarches this in relation to aboriginal interest. The Duty to Consult is instead grounded in section 35 of the Constitution Act and the implied honour of the Crown that requires an honourable negotiation process. This same honour also requires that the Crown engage in negotiations that will lead to the settlement of treaty claims (Osbourne, 2006).

2) Threshold to Trigger Consultation. The threshold to trigger this obligation was purposely set very low by the courts (Osborne, 2006). It is outlined that the Duty to Consult is triggered at any time when the government has "knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it." (Quoted from *Haida v. BC* in

Osbourne 2006, p. 3). The purpose of the low threshold is to ensure that aboriginal interest and claims are not rendered meaningless prior to the claims that affect those interests being successfully negotiated. The threshold applies even if the Crown believes themselves to be acting within their jurisdiction (Osbourne, 2006).

3) Scope of Duty. The court set out that the scope and content of the Duty to Consult would vary depending on the case. In assessing the scope of the duty two main issues must be considered: 1) Scope is proportionate to the strength of the case made for the right or the title of the area in question 2) How serious the potentially adverse effect would be on the right or titled that has been claimed. If the claim for that title or right is very weak, serving of a notice of intent, disclosure of information, and discussing of issues that arise may be sufficient. On the other end of the spectrum, where a risk of non-compensable loss is high, or potential infringement of rights or title is high, then thorough consultation must be undertaken (Osbourne, 2006). (A more complete list of activities considered components of meaningful consultation can be found in Appendix 1)

4) Duty to Accommodate. It must be noted that consultation and accommodation are two separate legal considerations, with separate legal sources and outcomes. The two are not automatically associated. The duty to accommodate is derived from the Crown's obligation to act honourably in relation to aboriginal peoples and is triggered through the consultation process if amendments to the proposed activity are considered appropriate. Accommodation is most likely to occur when there is a strong case for aboriginal claim and the likelihood of adverse effects to this claim high (Osbourne, 2006).

In this way, consultation stands to potentially reveal a duty to accommodate. Accommodation means that concerns be addressed and that interests are reconciled, in order to potentially avoid or simply mitigate impacts on aboriginal rights and treaty rights. It is considered that agreement is unnecessary although both parties are required to make an effort to understand and address the other's concerns or compromise as necessary. The government balances accommodation of aboriginal interest with the

interests of the wider society (Province of British Columbia, 2010). In that, the interest of First Nations people are considered in balance with many other factors both social and economic. If First Nations interests are in direct contradiction with the interests of the wider society including economic considerations, then outcome may be less favourable for the First Nation involved. Overall, the courts have not clarified if accommodation must be financial/ economic when a claim is yet unproven. Accommodation has been found to have taken place without any financial compensation (Province of British Columbia, 2010).

5) Crown Can Determine How Consultation Will Take Place. It was left open to provincial governments to assess what procedural mechanisms and regulatory schemes would be appropriate for meeting the requirements of consultation and accommodation outlined by the federal courts. But, it was stated that these mechanisms were not to be discretionary in nature (Osbourne, 2006). It is not the courts mandate to create a blanket scheme for how this duty should be carried out on the ground nor are the courts able to make appropriate decisions about each province's circumstances that would need to be considered.

6) Lack of Aboriginal Veto. Whether aboriginal rights have been established, or simply claimed, is crucial to whether aboriginal consent is required for a proposed initiative to be approved. In the cases where aboriginal claims have yet to be proven to the Crown, the process is quite different than when there is the potential for infringement on an established claim. In the case of an unproven claim, resource management decisions are meant to only balance the aboriginal interest with that of the wider public interest served by the proposal. The consultation process is therefore undertaken with the purpose of harmonizing conflicting interests through having those interests heard in good faith. That those concerns are heard in good faith is often enough to satisfy the courts that the consultative process has been undertaken even when the aboriginal group is not in support of the proposed initiative (Osbourne, 2006).

7) Obligation to Consult is Held by the Crown. The responsibility to consult First Nations is held solely by the Crown. This said, although the Crown is legally responsible for this duty, it may delegate procedural components of this consultation to the third party through section 11 of the EA Process. In this way third parties are not liable for this duty or failing to fulfill it, and can only be held liable through either negligence or contract (Osbourne, 2006). A lack of liability means that the industry representative or the proponent themselves are not liable for the duty not being fulfilled to the required extent.

These seven principles help guide the consultation process by providing parameters for engagement. Parameters are accomplished by ascribing duties and responsibilities to the Crown as well as limitations, groundwork, and context for how and why actions are to be carried out as outlined.

The Environmental Assessment Office (EAO)

British Columbia (BC) is unique in that it is the only Canadian province to have its own dedicated Environmental Assessment Office (EAO) that was established in 1995 under the Environmental Assessment Act (EAA) (Environmental Assessment Office, 2010). It is the EAA that gives the EAO the power to conduct Environmental Assessments and to make recommendations in regards to if and how a proposed project should proceed (Environmental Assessment Office, 2010).

The EAO oversees all major environmental projects within BC in an integrated process and it is the point of contact for all parties including proponents, government agencies, stakeholders, First Nations, the public, and local governments (Environmental Assessment Office, 2010).

The EAO has a number of responsibilities. Some of these include: determining if a major project requires an Environmental Assessment; specifying the assessment process; to highlight adverse effects; issue an Environmental Assessment Certificate; ensure the information required for a proper Environmental Assessment is provided; and ensure access to information (Environmental Assessment Office, 2010). (For a more comprehensive list see Appendix 1)

Legislation and Regulations

A comprehensive Environmental Assessment (EA) may be required by one, or both, the provincial and federal government prior to project approval. The federal government undertakes the assessment process as outlined by the Canadian Environmental Assessment Act (C-15.2) which is overseen and applied by the Canadian Environmental Assessment Agency (CEAA). Each of the provinces and territories also has its' own Environmental Assessment Acts. Each Act covers the provincial/territorial responsibilities associated with assessment, and each Act varies widely in nature and scope (Booth and Skelton, 2011).

There are three main aspects that make up the legal framework within which Environmental Assessment in BC occur.

1. The Environmental Assessment Act
2. Regulations under the Environmental Assessment Act
3. Common Law

Environmental Assessment Act. The Environmental Assessment Act (EAA) was put into place in December of 2002 to replace the old legislation that had come into effect in 1995. The purpose of the EAA is to create a streamlined assessment process, and enable decisions that are necessary for the attainment of an Environmental Assessment Certificate (Environmental Assessment Office, 2010). Through the Environmental Assessment Act the scope and powers of the Environmental Assessment Office as well as the administration and application of the Environmental Assessment Process are all provided for by the legislation within this Act. It is because the EAO oversees the EA process and encapsulated consultation that it is valuable to understand the Act and encapsulated legislation and the bearing it has on the consultation process.

Importantly the Act stipulates that any activity (operations, construction), of what would be classified as a reviewable project, cannot take place without an Environmental Assessment Certificate

being issued. As well, other provincial agencies may not give permits or approvals prior to the certificate being issued (Environmental Assessment Office, 2010). Having restrictions on permitting and approval is of importance because it solidifies the requirement for moving through the EA process and the encapsulated consultation.

Although the EAO staff collect information and interact with the process at a lower level responsibility for oversight of the process resides finally with two main actors. The EAA gives decision-making authority to the EAO Executive Director and the Minister of the Environment. The Minister of Environment's powers are mainly associated with certificates including: granting, suspending, cancelling, extending or re-instating and under the Act the Executive Director has two main responsibilities (Environmental Assessment Office, 2010). The first, is to determine whether an environmental assessment is required for a particular project. The second, is to both establish and modify the process that will take place for that assessment. It is here where process decisions can be made at a higher level. As well, the Executive Director delegates components of the process to EAO staff and provides the reasons and recommendations to the decision-making ministers at the end of the review process (Environmental Assessment Office, 2010). Lastly, the EAA also gives authority to the Lieutenant Governor in Council to pass regulations. Regulations have the same force of law as an Act but can be amended more easily and crafted to deal with more detailed and technical matters (Environmental Assessment Office, 2010). (For more information on specific regulations please see Appendix 1).

Government Policy

New federal and provincial policy development has emerged as a response to the newly expanded legal duties of the government in relation to aboriginal rights and title. Policy is meant to inform the attitudes and approaches around any First Nations interactions –consultation or otherwise. In these policies it is possible to appreciate some of the subtleties of what informs the parameters of First Nations consultation and relationship-building. Two of the policies are next outlined that speak directly to the

building of the desired First Nations-government relationship as well as to a commitment to help address historical inequities.

The New Relationship (policy). In 2005, a vision of reconciliation, respect, and recognition fuelled talks between the province of BC, the Union of British Columbia Indian Chiefs, the British Columbia Regional Assembly of First Nations, and the First Nations Summit as they set out to pursue a ‘new relationship’ (Province of British Columbia, 2010, p. 4).

Reconciliation of the relationship between First Nations and government is considered to be the major focus of this policy. The intention behind reconciliation is to acknowledge the historical differences and concerns of First Nations and government as well as reconcile those differences where possible in order to allow the relationship to move forward. The challenge of achieving various forms of reconciliation is due in part to the different perspectives related to the extent and existence of aboriginal rights and title (Province of British Columbia, 2010, p. 4). It is the vision of reconciliation and a new relationship that is meant to then guide new agreements between the province and First Nations in an effort to strengthen relationships, provide a means of building sustainable economies and address aboriginal rights and title, including treaty rights (Province of British Columbia, 2010, p. 4).

This ‘New Relationship’ is considered integral to a revitalization of the Crown – First Nations relations. Transforming relations is an approach by the Crown to assist with the decolonization of aboriginal people in BC and in Canada (Morin, 2013). BC government initiatives to improve government relations with First Nations, start with the premise of building and sustaining a government-to-government relationship with First Nations groups and their leaders and organisations. This policy document details new processes and structures that will facilitate new methods of working together and engaging in decision-making processes was created (Government of BC, 2012).

One major issue addressed was in considering how to increase First Nations economic development and close the socio-economic gap through the potential of resource revenue sharing

agreements (Government of BC, 2012). Overall, this policy document seeks to outline a vision statement and the associated goals, principles, and action plan as well as the appointment of working groups and committees.

Transformative Change Accord. The Transformative Change Accord (TCA) was signed in November of 2005 by the Federal government, the province of BC and First Nations leadership council. In establishing a new relationship based on mutual respect and recognition, the TCA is meant to close the gap economically and socially between First Nations and other British Columbians. The TCA's goal is to address and reconcile differences between the Crown and First Nations on issues of aboriginal rights and title. This Accord was meant to be a tripartite binding commitment on the parties to improve the quality of life for aboriginal people (BC government, Transformative Change Accord, 2013).

Policy such as the TCA help set a direction for First Nations government relations. As well, it seeks to establish different patterns of relating as well as acknowledgement for some of the pervasive issues felt by aboriginal people in Canada. Both of these policies help set the overall national tone as well as lay the foundation for practices such as consultation to be accepted acknowledged and utilized.

The Environmental Assessment Process

The following section gives an overview of some important considerations within the Environmental Assessment (EA) process. A summary of four phases of the process is provided with two tables that depict associated steps. Through examination of the EA process, context to the challenges that stakeholders experience when engaging with this process will be better contextualized when considering the research findings.

Environmental Assessment allows for the opportunity to review a project's potential adverse effects – environmental, health, social, heritage, or economic. The goal of the process is to allow a well-informed decision about a project to be made by the responsible ministers and for the potential negative affects to be avoided or mitigated. Typically an Environmental Assessment (EA) takes 16-20 months to

complete but the review period will differ depending on the complexity of the project (Environmental Assessment Office, 2010).

One aspect of the EA Process is consultation. The government has a legal duty and obligation to consult with First Nations when a land use decision may impact aboriginal rights or title. The level of consultation that takes place will be dependent on the nature and the scope of the aboriginal interest being impacted and the strength of claim (Province of British Columbia, 2010). Not all projects will require in depth consultation and at times First Nations may only be given notice of the proposed project.

There are a number of 'Best Practices' for consultation that are outlined and summarized by the BC government. Consultation is said to be: practiced in good faith, with the intention of substantially addressing concerns of First Nations people; talking together for mutual understanding; enabling proper understanding of aboriginal interests and to accommodate them appropriately; most effective with reasonable timelines are given and information sharing is reciprocated (Province of British Columbia, 2010, p. 7). It is hoped that through these 'best practices' consultants and the province can realize a "respect for aboriginal and treaty rights"; an "improved relationship between the province and First Nations"; a "predictable and transparent process"; and "reconciliation of rights and interests" (Province of British Columbia, 2010, p. 7). The province also hopes that through the process of consultation, a better understanding of aboriginal rights –nature and scope- will be gained (Province of British Columbia, 2010).

Due to extensive aboriginal claims within BC, many government decisions related to Crown lands and their resources often involve First Nations consultation (Province of British Columbia, 2010). Two conditions, existing together trigger this Duty to Consult. First, if the Province has knowledge, or should have knowledge of a claimed or proven aboriginal right (including title) or treaty right (i.e. an aboriginal Interest) then the duty is triggered (Province of British Columbia, 2010, p. 8). Second, a proposed government decision that may impact that claimed or proven aboriginal right or treaty right also triggers the duty (Province of British Columbia, 2010, p. 8).

However, a project must be deemed reviewable before consultation within the EA process can take place. Approximately 95% of projects are deemed reviewable and some examples are: industrial projects, energy projects, water management projects; waste disposal projects, mine projects, transportation projects, tourist destination resort projects. If a project is deemed non-reviewable it moves directly to permitting (EAO, 2013). (For more information on reviewable vs non-reviewable projects see Appendix 2).

If a project is deemed reviewable, then within the first month, a procedural order under section 11 of the EAA establishes the scope of procedures, and method by which the EA will take place. This procedural order is created by the project lead for comment by First Nations and the proponent. Overall, it is meant to direct the proponent in regards to the parts of the project to be assessed, the affects of the project that should be considered in the assessment, as well as the action and activities they are responsible for including the timeframe and activities required for the consultation component (Environmental Assessment Office, 2011).

Under section 11, consultation with First Nations may be delegated to the proponent (Environmental Assessment Office, 2011). The responsibility for this includes: explanation of the technical aspects of the project; to learn about First Nations interests, uses, and rights on the land in question; to create strategies to mitigate the potential impact of the project on aboriginal rights or title that have been established or asserted; to develop strategies to accommodate First Nations interests or concerns (Environmental Assessment Office, 2011, p. 23). It is the Crown's responsibility to ensure that their duty for consultation has been fulfilled. For this reason the EAO must assess whether the consultation that was undertaken satisfies this duty (Environmental Assessment Office, 2011).

A document called the "Application Information Requirements" is created by the EAO and submitted to the proponent (Environmental Assessment Office, 2011, p. 24). In this document is outlined the information that must be included in the application and the issues to be addressed (Environmental Assessment Office, 2011).

The EAO then seeks feedback from First Nations, the working group and the public once the first draft has been completed. Feedback is accomplished through an RSS feed on e-PIC, that allows interested parties the opportunity for written input within a specified time-frame and for the proponent to hold a public open house in as many locations as is appropriate. It is the proponent's responsibility to respond to the issues brought up in the public forum and all responses are posted on e-PIC along with public comment. Once the EAO has completed its final draft of the application information document it is issued to the proponent and, once finalized it is then posted on e-PIC (Environmental Assessment Office, 2011).

There are two more important aspects of the report. The first, is the 'table of commitments' that outlines commitments related to monitoring and mitigation strategies for the effects of the project. The second, is a report outlining the consultation activities that have already taken place, or will take place, during the review process (Environmental Assessment Office, 2011).

Once completed and submitted, the EAO, the working group and First Nations have 30 days to review the application for completeness and to assess if the plans for consultation are adequate. A written evaluation of the consultation that has, and is proposed to be done by the proponent is also created by the Project Lead. Any deficiencies identified by the EAO must be addressed by the proponent before the application can move forward (Environmental Assessment Office, 2011).

The Consultation Process. If consultation goes ahead, four main phases are undertaken. These phases are outlined in a 25 page handbook that is provided by the EAO to industry proponents and meant to be the main directive in this process. These phases will now be reviewed in greater detail, but an outline of this process can be seen in Table 1: General Consultation Process.

Phase 1: Preparation. Requires that the proponent undertake basic research and analysis of the area in which the development will occur, including documenting its population, legal considerations, studies, etc., in order to prepare for consultation (Province of British Columbia, 2010, p. 9). To do this, it is necessary to identify all of the First Nations bands, community groups, or nations in the affected area that have interests (right/title) either asserted or confirmed. It is also necessary to identify treaties and

process agreements (Province of British Columbia, 2010). In order to identify these groups, the proponent must consult court decisions, litigation files, traditional use studies, information or correspondence previously provided to the government, as well as look for publically known assertions of claim and any 'statements of intent' made for the area as a part of the BC treaty process (Province of British Columbia, 2010, p. 9). In the existence of a treaty or consultation process agreement that has been made between the First Nation and the government, the proponent must follow the protocols for consultation outlined in that agreement (Province of British Columbia, 2010).

The identification and research process is meant to give the opportunity to the proponent to gain an understanding of not only the nature of aboriginal interests in the area but also the potential impact that any proposed decisions about the project may have on those interests. These interests can include such things as: title; right to harvest a specific resource; legal status of the claimed or proven aboriginal right, title, or treaty right; the location and possible geographic extent of that interest (Province of British Columbia, 2010).

As the final consideration of Phase One, consultation levels are considered. The level of consultation required is based on the strength of claim related to the potential for the aboriginal rights in question to be affected. As well, major projects would require a more lengthy and deeper engagement level. Three levels to consultation can be considered to exist; notification, normal, and deep consultation.

Based on the documented consultation that the proponent undertakes, the EAO will be able to advise the decision makers if the Duty to Consult and accommodate has been fulfilled. If this has been fulfilled the government is able to issue an Environmental Assessment Certificate where appropriate (Province of British Columbia, 2010).

Phase 2: Engagement. Engagement can be defined as a phase of the EA process where First Nations are engaged for multiple purposes or on multiple levels. First Nations may be engaged for the purpose of consultation. It is recommended that engagement should begin as early as possible, even prior to the beginning the EA Process. Detailed records should also be kept of these engagement activities.

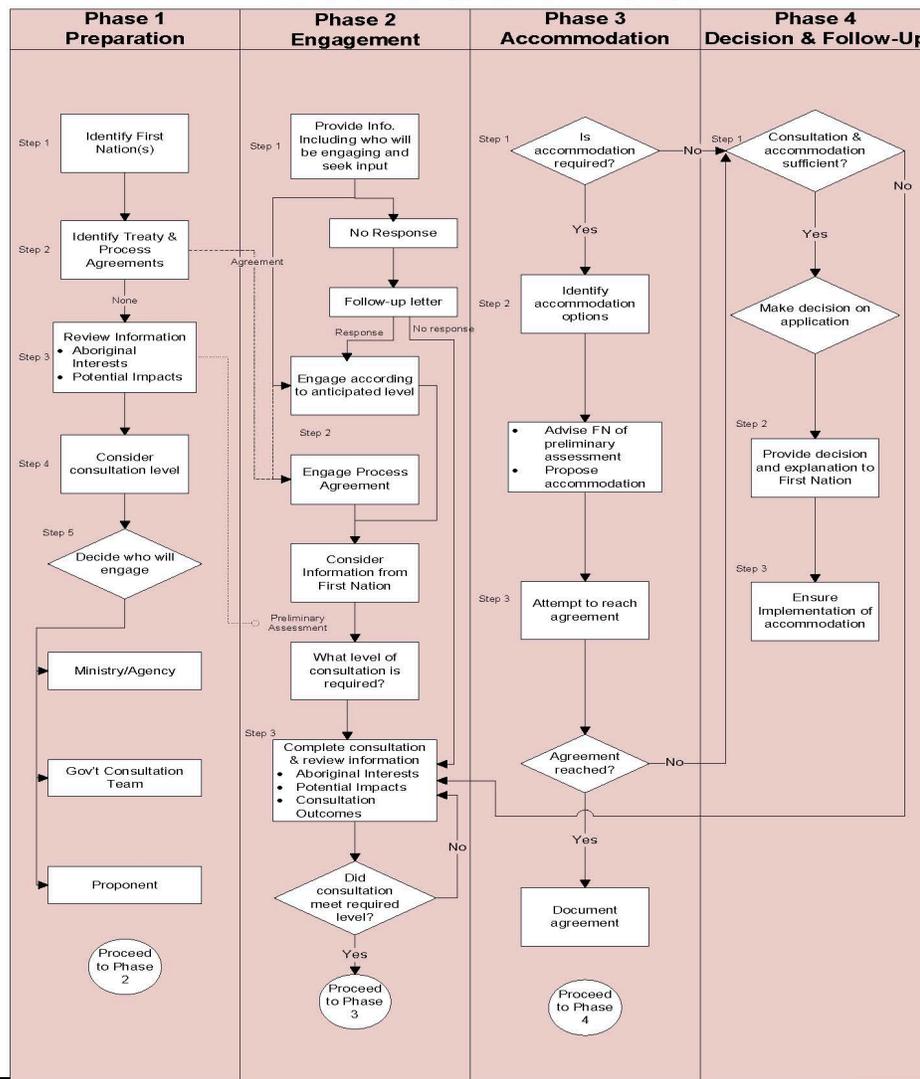
To begin the engagement phase an introductory letter is written to affected First Nations (Province of British Columbia, 2010). In this letter a number of points are included. A few of the most important are: information about the proposed decision or activity; information the province already has about known aboriginal interests and potential impacts; identification of reasonable timeline goals for responses and the overall consultation process (Province of British Columbia, 2010, p.15). (For a more detailed list see Appendix 1).

Engagement and consultation allow industry proponents the opportunity to better understand First Nations views and perspectives, resolve emerging issues, as well as address and accommodate aboriginal interests. If the First Nation's group does not respond to the initial written communication, follow-up letters or other forms of communication should be used to attain a confirmed First Nation's response and establish engagement. When further information is not provided by the First Nation, it should still be considered if there will be significant impact on aboriginal interests and if there are opportunities to accommodate or mitigate when crafting a decision. In the case of treaty rights or a court declaration, the focus is on determining the seriousness of the impact on those rights rather than simply making contact with that party (Province of British Columbia, 2010).

There may be opportunities to resolve areas of disagreement or develop accommodations through the consultation process. Discussions during consultation are meant to focus on gaining information about the nature and extent of potential impacts. In the case of an infringement to a proven treaty right, legal advice may be necessary to establish the appropriate accommodation measures and justification (Province of British Columbia, 2010).

Table 1: General Consultation Process

Diagram General Consultation Process



(Province of British Columbia, 2010, p. 21)

Phase 3: Accommodation. When the activity will adversely affect aboriginal interests or an infringement on a proven aboriginal right, title, or treaty right, accommodation measures are likely to be necessary (Province of British Columbia, 2010). Accommodation is defined as actions to avoid or mitigate impacts on aboriginal interests, as well as measures crafted to promote “the broader interests of First Nations groups” (Province of British Columbia, 2010, p. 18). The goal is to “seek a compromise while attempting to harmonize conflicting interests” (Province of British Columbia, 2010, p.18). Accommodation measures typically include any of the following: mitigation; avoidance; proposal modification; commitments to take other action; a spectrum of land protection measures; and, impact monitoring (Province of British Columbia, 2010, p.19).

Accommodation(s) may be fixed as an agreement or as a decision (Province of British Columbia, 2010, p.18). Either way, the terms must be sufficient to fulfill the legal duty to accommodate where appropriate. Other information that may also be included when considering accommodation strategies are, the broader societal interests, as well as the valid objectives of the Crown (Province of British Columbia, 2010).

Revising the project plans or mitigating the impacts of the project are not uncommon. When mitigative measures are insufficient, then economic or financial accommodations can be considered in the case of permanent or ongoing infringement on a strong claim or when the First Nation is negatively affected economically (Province of British Columbia, 2010). An accommodation measure proposal is presented to the First Nation that includes: 1) A description of the information considered in assessing the need for, and level of, accommodation; and 2) Reasons for supporting the appropriateness of the proposed measure. (Province of British Columbia, 2010, p.19).

After giving the First Nation a reasonable opportunity to respond, an effort must be made to reach agreement. If an agreement cannot be reached documentation must be provided by the proponent that shows sufficient consultation and a willingness to undertake the proposed accommodation measures. Documentation must show how accommodation measures link to the potential impact on aboriginal interests (Province of British Columbia, 2010).

Phase 4: Decision and Follow-up. Prior to issuing a EA certificate the decision-makers will review the consultation and accommodation record to assess whether the level of consultation was appropriate considering the strength of claim, nature of the aboriginal interest, as well as the seriousness of the impact. The adequacy and appropriateness of any accommodation measures will also be assessed and the province can decide that further consultation and/or accommodation measures are required. In addition, when a treaty or process agreement is in effect, the province must ensure that the process undertaken has been consistent with this agreement (Province of British Columbia, 2010).

The decision, along with the consultation and analysis, is provided to the First Nation in the case of normal or deep consultation efforts. For less in depth consultation efforts, the First Nation may only be notified of the decision. It is the decision maker that ensures that accommodation measures are fulfilled and follow-up to this effect may occur (Province of British Columbia, 2010).

Application Process. Once the proponent has been notified that the application has been accepted, the EAO has 180 days to review the application. Copies must be distributed by the proponent to all of the parties participating in the review, including First Nations and the working group put together by the EAO. The application is also posted on e-Pic and in local libraries so that the public can review the application (Environmental Assessment Office, 2011).

A public comment period will be placed on the website of between 45 and 60 days is initiated soon afterward. The proponent must make sure that it records all comments made by First Nations, the public, and other government agencies during this time-period. A response to each of the issues raised is provided by the proponent. The response can include clarification over information in the report and in the application, or can require making further commitments in order to address the concerns. A response is to be completed within two to three weeks of the completion of the public comment period and posted to e-PIC (Environmental Assessment Office, 2011).

Table 2: Operating Guides and Tools**Table
Operating Guides and Tools**

Process	Operating Guides	Tools
Phase 1: Preparation		
1. Identify First Nation		<ul style="list-style-type: none"> • Consultation Area Database (CAD) • First Nations Quick Queries (FNQ2) • Consultation Summary: Template and Reference Guide (Consultation Summary)
2. Identify treaties and process agreements		<ul style="list-style-type: none"> • Aboriginal Engagement and Corporate Information System (AECIS) • CAD • FNQ2
3. Review readily available information	<ul style="list-style-type: none"> • Provincial Preliminary Assessment Guideline • Coordinated Consultation Toolkit 	<ul style="list-style-type: none"> • Remote Access to Archaeological Database • Historical and ethnographic research prepared by the Ministry of Attorney General, Aboriginal Research Unit • AECIS • CAD • FNQ2 • Consultation Summary
4. Consider a level of consultation		<ul style="list-style-type: none"> • Consultation Summary
5. Decide who will engage First Nation(s)	<ul style="list-style-type: none"> • Operational Guidance on the Role of Proponents in First Nations Consultation • EAO Service and Fairness Code • EAO 2009 User Guide • Coordinated Consultation Toolkit 	<ul style="list-style-type: none"> • Consultation Summary
Phase 2: Engagement		
1. Provide information and seek input	<ul style="list-style-type: none"> • Referral Letter Content Guides 	<ul style="list-style-type: none"> • Consultation Summary
2. Engage First Nation(s)	<ul style="list-style-type: none"> • Operational Guidance on the Role of Proponents in First Nations Consultation • Provincial Preliminary Assessment Guideline 	<ul style="list-style-type: none"> • Consultation summary
3. Complete consultation at appropriate level		<ul style="list-style-type: none"> • Consultation summary
Phase 3: Accommodation		
1. Review consultation and need to accommodate	<ul style="list-style-type: none"> • Accommodation Guidance 	
2. Identify accommodation options	<ul style="list-style-type: none"> • Accommodation Guidance 	
3. Propose accommodation and attempt to reach agreement	<ul style="list-style-type: none"> • Referral Letter Content Guides 	
Phase 4: Decision and Follow-up		
1. Assess consultation and accommodation record		<ul style="list-style-type: none"> • Consultation summary
2. Provide decision to First Nation	<ul style="list-style-type: none"> • Referral Letter Content Guides 	<ul style="list-style-type: none"> • Consultation summary
3. Ensure implementation of accommodations		<ul style="list-style-type: none"> • Consultation summary

(Government of British Columbia, 2010, p. 22)

During the 180 day period which is the time allotted to complete the public review, the working group plays a key role since the EAO coordinates working group meetings and technical sub-group meetings to deal with specific issues. The proponent attends these meetings when they are needed to

address issues that have been raised. It is the role of the EAO staff to facilitate the process and consensus among the members of the working group and sub- groups. First Nations are encouraged to participate in the working group but may also be consulted independently in circumstances where it is appropriate to do additional consultation or in circumstances where the First Nation has declined to be an active member of the working group (Environmental Assessment Office, 2011).

Assessment Report. During the 180 day review period the EAO begins drafting the assessment report (Environmental Assessment Office, 2011). This report includes the assessment findings with: any issues outstanding; the extent to which issues have been addressed; First Nations consultation and whether the Crown's Duty to Consult and accommodate has been met (Environmental Assessment Office, 2011, p. 34).

If the First Nation band disagrees with the assessment they are given the opportunity to prepare a submission for the EAO which is forwarded directly to the responsible Ministers (Environmental Assessment Office, 2011). The responsible ministers are also provided with recommendations (with reasons) from the Executive Director whether they are to issue an environmental assessment certificate (Environmental Assessment Office, 2011, p. 34).

A draft environmental assessment certificate is created. The Certificate includes: the details by which the project is to be designed and constructed; the commitments the proponent has made in order to address the concerns raised in the assessment process; periodic reporting requirements; and a deadline by which the project must be started (Environmental Assessment Office, 2011, p. 34).

It is not uncommon for there to be in excess of 100 commitments listed on the certificate. All of the conditions and commitments of the certificate are legally binding on the proponent once the certificate is issued (Environmental Assessment Office, 2011).

Minister's Decision. Ministers responsible for making the decision of whether to issue a certificate are identified by order in council. The Minister of the Environment is always involved, but the

accompanying minister is selected based on the industry that the project under consideration falls under. For example, a mine project would have the Minister of Energy, Mines, and Petroleum Resources involved in the decision-making process (Environmental Assessment Office, 2011).

Once all documents have been put together, the Executive Director submits the paperwork to the responsible ministers who then have 45 days to make a decision on whether to issue the environmental assessment certificate. All of the documentation submitted throughout this process are used to support the decision that is made (Environmental Assessment Office, 2011).

The ministers have three courses of action available to them: 1) Issue an environmental assessment certificate with any conditions they consider necessary; 2) Refuse to issue the certificate; or 3) Require further study or assessment (Environmental Assessment Office, 2011, p. 35). Once the decision is made, the proponents, First Nations, and government agencies are notified. The decision, the assessment report, the Executive Director's reasons and recommendations, and the environmental assessment are placed on e-PIC (Environmental Assessment Office, 2011).

CHAPTER 3: LITERATURE REVIEW

When reviewing the relevant academic literature, four categories and focuses could be identified: considerations that contribute to consultation barriers; process and perspective considerations; consultation approach and goals; and possible solutions. The relationship between these considerations can be highlighted by considering the historical relations between the parties which is at times difficult, contentious, and at odds with one another. The importance given to any of these considerations is dependent on perspective, but it can be summarized that much of the literature focuses on the difficulty of the tasks associated with consultation and implementing any type of stakeholder driven process. In the literature there is a focus on research that highlights the First Nations perspective. The perspectives of industry can also be found, albeit to a lesser extent.

Considerations that Contribute to Consultation Barriers

Given stakeholder history, law, and politics, as well as cultural and social considerations, it is not surprising that, the literature's best documented issues are the barriers to finding a successful consultation process. McGregor characterizes the context within which this circumstance occurs by saying that aboriginal land title has historically been withheld by government in order to make way for European interests (2011, p. 301). However, he believes this is not a side effect of poor relations, but rather the affect of the policies and tools of systematic exclusion that still remain (McGregor, 2011, p. 301). Now, it is the challenge of resource management to work around and within these policies in order to include First Nations (McGregor, 2011, p. 301). Not addressing the barriers to inclusion has been a major component of what has now become a historically deteriorating relationship between aboriginal and non-aboriginal people in Canada due to this (McGregor, 2011, p. 301).

McGregor touches on an important concept; the connection of poor relations between stakeholders, historical inequities, and the context in which these relations have developed and why. In the literature these challenges take on a few conceptual themes such as: power, culture, relationships, and

the policy and legislative framework within which these sit. Overall, challenges to the consultation process were considered to develop in a number of ways and, dependent on the perspective, what is considered to be the driving factor will vary.

For Fortier, Wyatt, Natcher, Smith, and Hébert, these challenges start with the constitutional framework of Canada who gives provinces authority for management of public lands and resources (2013, p. 53). Due to the different levels of jurisdiction, a complex mix of responsibilities, powers and policies is created that affect and inform relations (Fortier et al, 2013, p. 53). Each province's natural resource policies reflect their specific needs, the resources available within that province, and the political priorities and ideologies of the government (Fortier et al, 2013, p. 53). It was noted that it may be hard to rectify all of these competing interests in a stakeholder driven process that is also situated within such a complicated policy framework (Fortier et al, 2013).

Authors Voinov and Bousque also explain that in resource management, finding success in a stakeholder driven processes is most challenging because stakeholders may be local, federal, private and public organizations, individual citizens or interest groups, all of which have different and often conflicting interests (2010, p. 1268). Managing these interests in a complex policy framework is what makes finding an outcome that will be agreeable to all parties all the more challenging. Difficult relationships are conceptualized to be either the cause, or product, of these factors (Voinov & Bousque, 2010).

The complicated context is only exacerbated in BC because, unlike elsewhere in Canada, most First Nations in BC do not have signed treaties with the government, a circumstance that leaves much of BC still under claim by First Nations (Lowe & Shaw, 2011, p. 12). There is much speculation as to why there is such a lack of treaty settlement in BC. According to Alcantara and Nelles, there are a number of factors that may contribute to treaties depending on whose perspective you solicit (2006, p.705). Some believe that the government only settles treaties when they believe it to be necessary to access the resources contained in the land in question (Alcantara & Nelles, 2006, p. 706). For others, different understanding of the treaty process, power differentials, and the incompatibility of the goals and strategies

employed by First Nations within the institutional structures that govern treaty negotiations, is what make negotiations ineffective (Alcantara & Nelles, 2006, p. 706).

The unsettled nature of land claims has created a unique circumstance within BC that can also be seen as contributing to a less than ideal economic and social situation for First Nations in this province. As Lowe and Shaw point out, “First Nations communities experience high (and disproportionate) levels of poverty, violence, illness, and unemployment as well as growing populations” (2012, p. 14). The decline of resource extraction industries, particularly fisheries and forestry that created employment in these communities, means that social and economic challenges are exacerbated (Lowe & shaw, 2012, p. 14). Cultural hardships, the loss of language, spiritual practices, and intergenerational knowledge transfer, are especially prevalent in the BC coast’s isolated communities whose remoteness and lack of internal capacity also make economic development and communication with government or industry difficult (Lowe & shaw, 2012, p. 14). In situations such as these the connection between economic and social challenges was made in the literature along with the affect that this has on culture.

Different perceptions held around important concepts such as culture, its role in process development and implementation, and its potential contribution to consultation barriers, is seen throughout the literature. Differences in culture, is one of the most noted challenges in consultative processes, and is thought to only add to the difficulties and conflicting interests around land use and politics. In this conception of culture as a creator of difference between stakeholders, what is repeatedly noted is its contribution to the significantly different European and aboriginal worldviews. For example, according to McGregor, from a First Nations perspective, the Earth is a conscious being (2011, p. 302). This perception is reflected in aboriginal people’s interactions with their forest environment, their way of life, their spirituality, and is used as a basis from which respect for the land and all living things is developed (McGregor, 2011, p. 302).

Influenced by culture, Europeans had a fundamentally different view of the forest as a frightening place, or something that had a utilitarian value to be exploited (McGregor, 2011, p. 302). This is in stark contrast to one Frist Nations’ conception described by Murray and King of “Hishuk-ish-tsa’walk, or

‘everything is one,’ a term frequently used among the Tla-o-qui-aht [nation] to describe a sense of sustainability and of an interconnectedness of human and non-human elements” (2012, p. 391). In this cultural conception, humans are envisioned as part of ecosystems, with human social and economic activities occurring in harmony with ecological processes (Murray & King, 2012, p. 391).

These cultural differences have been seen to impact the effectiveness of land planning processes. According to Wyatt, due to cultural differences and the resultant ways of conceptualizing the natural world, it can be difficult to integrate the views and knowledge of First Nations into a highly technical scientific process (2008, p. 175). For example, as Lewis and Sheppard explain, social patterns and beliefs are not readily accommodated in conventional resource management planning processes but are the primary source of cultural and resource use values for First Nations peoples (2006, p. 291).

Along these same lines, Satterfield, Gregory, Klain, Roberts and Chan discuss the difficulties of defining and identifying culture so that it can be categorized in such a way that we can then measure and incorporate it into different evaluatory processes (2013). These difficulties arise in part from the many perspectives that can bring forward competing ideas around what would be considered an important aspect of a specific culture, and the weight that can be given to these characteristics. In resource use issues this translates into difficulties around how factors that are most important to the stakeholders are understood and accommodated. However, according to Satterfield et al., in order for negotiations to move forward, there must be recognition of the concerns that are most important to First Nations even if cultural differences make this recognition more difficult (2013).

The complications caused by different conceptions of land use due to cultural differences, is only made more complicated by what Lewis and Sheppard identify to be a lack of effective communication and meaningful consultation between resource managers and First Nation communities due to, not only the differences in cultural outlook, but also to the attitudes, processes and procedures used (2006, p. 292). Issues in the overall land use and resource management plan are created and persist because resource managers may not be equipped to comprehend First Nation values that don’t fit into typical approaches and understandings of the environment (Lewis and Sheppard, 2006, p. 292). Acknowledgement of

culture and the effect that this has on the ability for consultation process to be effective is important for these reasons. In the literature, finding understanding on land use planning is attempted prior to development of a management plan and began with seeking understanding of the differences in stakeholder culture, attitudes and practices.

Communication is an important piece in this but also a challenge identified in the literature. According to Grimble and Wellard, because a variety of uses can exist for natural resources, and not all uses are compatible, that competition and potential disagreement between stakeholder groups over these resources may result (Grimble & Wellard, 1997, p. 197). Effective communication around these differences despite the complicated context within which this processes exist was considered in the literature necessary in order to make decisions.

However, even with communication, these processes seek to balance conflicting objectives, and trade-offs between the stakeholders may take place despite this type of agreement (Grimble & Wellard, 1997, p. 197). Unfortunately trade-offs imply that some sort of a sacrifice for one or both of the stakeholders is the likely outcome (Grimble & Wellard, 1997, p. 197). Communication between stakeholders may not be the only challenge, internal differences and communication issues may be present here as well. When a variety of options are proposed, a community may have to make a decision between projects with immediate benefits versus investment into activities that will ensure a more continued flow of income or future utility (Grimble & Wellard, 1997, p. 181). It was explained that consensual agreement may not always be found internally for these stakeholder groups on issues such as these that also create difficulties with the external stakeholder groups as well (Grimble & Wellard, 1997).

For affected communities, decision-making is difficult because there may be differences of opinion within the community which effects dialogue between the community and industry. The literature identified that complicated power dynamics and politics may make it even more difficult for discussion with an industry proponent to fully integrate the will of the affected community or other expressed environmental concerns. According to Goertz, the reason for this is that “the notion of empowering aboriginal peoples [in a decision-making process] is viewed as possible only at the sufferance of the state”

(2013, p. 11). Keeping control over the decision making processes and outcome is one key way in which power is kept with the party who holds this control. Reed also explains this as being due to the perceived potential that through “the empowerment of previously marginalized groups”, “unexpected and potentially negative interactions with existing power structures” may occur (2008, p. 2420). This is considered a concern despite the potential and through the suggested process structure, “participation can reinforce existing privileges and group dynamics” that then “discourage minority perspectives from being expressed” (Reed, 2008, p. 2420).

Different conceptualizations of the effects of power in participatory processes are something noted in the literature. According to Reed, the resultant power inequalities in the process can become a barrier to meaningful engagement (2008). The most common ways that the effects of power are discussed in the literature, are in conjunction with the assessment process and the authority over decision making as well as participant efficacy.

For example, one critique within the forest industry noted by Wyatt, is that the assessment, monitoring, and certification processes do not necessarily give First Nations a decision making role, but instead only encourage the modification of practices to account for First Nations concerns (2008, p. 175). The requirements of the assessment processes are often therefore aimed at moving a project toward approval when the interest and concerns of First Nations may be more comprehensive than this (Wyatt, 2008, p. 175). The critique is exemplified by Booth and Skelton when they state, a process that puts the environment first would look significantly different than the one currently in place (2013, p. 54). The priority and weight given to certain situations was considered to affect process construction and the outcomes it creates. In the literature, the power over the final decision is a key asymmetry in the process that shapes it definitively.

How the process is conceptualized and shaped is important for the actors that engage with it and the success or frustrations that they experience. Power asymmetry in any co-operative relationship or process, is considered by Alcantara and Nelles to be important (2006). It is of importance because variances in power stand to affect the motivations of the actors entrenched in the process and can also

produce a coercive asymmetrical relationship between those stakeholders (Alcantara & Nelles, 2006, p. 172-173).

Asymmetries in relations and in negotiations can stem from a variety of sources including bureaucratic organization, public opinion, access to resources, availability of information, or other bargaining chips (Alcantara & Nelles, 2006, p. 172-173). A highly polarized public that gives weight to one opinion, and supports one stakeholder over the other, can affect the political cost of compliance or non-compliance as well (Alcantara & Nelles, 2006, p. 172-173). “Interestingly, perceptions of power asymmetries can often impact the character of co-operation more than actual power distributions” (Alcantara & Nelles, 2006, p. 173). Negotiating around power differentials can create further barriers in participatory process. How the participants view and interact with the power structure that exists is thought to affect not only the success of the process but the experience of actors within that process.

As Reed explains, “the existence of non-negotiable positions or actors with veto power, limits the extent to which the process can empower participants to influence decisions” that are important to a participant’s view of the process (Reed, 2008, p. 2421). A lack of influence results in cynicism of the process and leads to “declining levels of engagement” that puts the “credibility of participation at risk” (Reed, 2008, p.2421). The exercising of power within a participatory process can in this way affect significantly the relationships within the process but also the effectiveness of the process itself (Reed, 2008).

For industry in their relationship with First Nations, Goetz observes that there is an explicit reluctance to change the power relationship to a more productive dynamic (2013, p. 11). When coupled with the long history of troubled relations between aboriginal peoples and government or industry, this reluctance has come to represent one of the most significant impediments to mobilizing the necessary shifts (2013, p. 11). The resulting reality is that, “attempts at negotiating new relationships must contend with a firmly entrenched legacy of suspicion and distrust” (Goetz, 2013, p. 11). Booth and Skelton state that there is lack of trust on both sides, but that this also unfortunately translates into a lack of willingness on the part of government and its processes to respect First Nations concerns (Mar 2011, p. 54).

Booth and Skelton go further to explain that, a failure in the relationships is at the heart of why the EA process fails, even if the EA itself eventually receives government approval (Booth & Skelton, 2013, p. 54). Failure of relationships is something that makes all stakeholders suffer, not just First Nations (Booth & Skelton, 2013, p. 54). And, although there is no cost to implementing good relationships, it is the hardest thing to achieve because “people cannot be compelled to behave appropriately if they do not wish to do so” (Booth & Skelton, 2013, p. 54). In order to do so, it was thought that they must conceptualize there to be an importance to a successful relationship and prioritize it as such (Booth & Skelton, 2013).

If this is not the case, an absence of trust and a lack of genuine interest on the part of all stakeholders to work together to resolve issues, although not the only setback to stakeholder relations, is considered an important one. Breakdowns in communication and the development of unproductive relationships between First Nations and government mean that there are always larger issues on the negotiating table that cannot be addressed within the EA Process. As well, limited venues for First Nations to air their grievances with government mean that the assessment process gets used as a venue for unrelated issues to be highlighted. Conversely, First Nations refusal to participate when they feel unsatisfied with the progress of the process does not help work toward the resolution of issues (Booth & Skelton, 2011).

Issues within the EA process go further than a breakdown in relations. Some of the other issues noted are: unrealistic timelines for First Nations to respond by, given their lack of capacity and funding; lack of proper training and competency in the consultants that work in the field; lack of clarity around expectations, standards, and best practices within the process; and lack of direction from the EAO regarding key issues with legal basis such as ‘strength of claim’ that leads to conflicting ideas about who should be consulted in a particular case and the level of consultation required (Booth & Skelton, 2011).

It is also noted by Booth and Skelton that there are areas of First Nations concern that cannot be accommodated because there is no provision to do so within the assessment process (2011, p. 63). Coupled with this, Lewis and Sheppard state that the effectiveness of the actual consultation procedures

that gather those concerns is limited due to the conventional techniques used, including maps, reports, and open houses to present technical information to indigenous community members and other groups without technical knowledge of the project (2006, p. 292). Also, failures in the gathering of information and incorporation of that knowledge are only exacerbated by the lack of veto power of First Nations that results in a power asymmetry in the process. These considerations create further tensions and also challenges the trust between parties (Booth & Skelton, 2011, p. 72). According to Booth and Skelton the process is flawed for these reasons and worsened only by a circumstance where industry can make an effort to accommodate, but once that accommodation fails the application is submitted without further consideration for First Nations interest, or lack thereof, in the project continuing (Booth & Skelton, 2011).

Many complex and interconnected challenges to this process are cited and outlined in the relevant academic literature. These challenges touched on a number of themes: power, culture, relationships, communication, and the policy and legislative framework within which these sit. The interaction between these factors is highlighted by the unique perspectives put forward in the literature. To consider these challenges further, process considerations are outlined prior to examining the approach and goals of consultation, as well as the possible solutions to the barriers identified.

Process Considerations

Process and procedure considerations are often documented as being centered on lack of clear instruction, guidance, legal ambiguity, knowledge or capacity, and the affect that this has on undertaking the required consultation. As well, it is thought that the process does not have the capacity to integrate all perspectives, and as a result, outcome and the ability to formulate meaningful solutions for all parties is affected. In the literature there is a connection between the process, procedures and how they are carried out but also with how different perspectives are expressed then assessed for value before being utilized or incorporated.

Procedural aspects of the process can cause frustrations for both parties. It is explained that,

although it is the provincial government's duty to consult with First Nations, there is a lack of clear direction from government about the expectations of the engagement processes (Fox, 2011, p. 25). Lack of clear direction causes frustration in industry and aboriginal circles because lack of clarity serves to create a barrier to carrying out resource development work (Fox, 2011, p. 25). The lack of clear guidance means that both First Nations and industry must develop their own best practices drawn from experience, and formalize these into agreements (Fox, 2011, p. 25). Schrieber also notes that consultation guidelines are only general and simply outline that the process should be “meaningful” and “selected in relation to the nature of the proposed activity” (2006, p. 30). It is felt that these directions lack specifics even if the means by which the duty can be fulfilled through letters, meetings, telephone calls, and site visits is stated (Schrieber, 2006, p. 30).

First Nations people are also challenged in procedural ways by this process. As Fortier et al. explains, when negotiating access to land and resources with governments and industry, aboriginal groups are “usually obliged to comply with processes and procedures established by governmental agencies” (Fortier et al, 2013, p. 52). Accordingly, many communities adapt their own institutions and governance structures so that they are able to manage these negotiations (Fortier et al, 2013, p. 52). The creation of institutions is typically accomplished by “establishing a specialized unit under the responsibility of the Band Council” (Fortier et al, 2013, p. 52). Due to what is cited in the literature as being a lack of capacity and process knowledge on the part of First Nations this can be a challenge.

Schrieber explains that aside from process challenges, the First Nations perspective is also marginalized and neutralized in the engagement process. Consultation, he states, is focused on reconciliation (2006, p. 30). This focus on reconciliation proposes a Canadian multicultural relationship that values diversity, but in such a way that it seeks to align First Nations interests with those of all Canadians (Schrieber, 2006, p. 30). The principles of inclusion and cooperation that drive this, are integrated into consultation at the expense of recognition of the cultural uniqueness as well as historically based rights to land and resources that are held by First Nations people (Schrieber, 2006, p. 30). Through the “balancing of interests and concerns”, First Nations claims are effectively transformed into

“discourses about the public interest” (Schrieber, 2006, p. 29). In this way First Nations perspective is not valued for its unique contribution (Schrieber, 2006).

It is explained in the literature that consultation ideally gives the opportunity for the unique perspectives of individual stakeholders to come forward and for there to be the potential to negotiate land use planning. In this process, compromise is potentially necessary so can cause an inherent disjuncture between the process purpose and procedures and the process outcome.

According to Schrieber, First Nations concerns voiced in the consultation process are further lost due to the necessity for First Nations to not be seen as frustrating the process that has been laid out to manage their concerns (Schrieber, 2006, p. 29). Further, in this process, First Nations people are “subject to constant evaluation by government and industry as to the soundness of their claims and the reasonableness of their objections” (Schrieber, 2006, p. 29). Booth and Skelton point out, that First Nations perspectives are documented as subjective opinions while those of non-native decent were seen to offer views that are “something less challengeable” (2011, p. 57). The subjugation of indigenous knowledge further undermines the validity and value of the First Nations perspective. How views are incorporated and evaluated into any participatory process was considered important to examine as well as tied to how processes are conceptualized and shaped. For this reason, the process, procedures, and perspectives surrounding consultation and the challenges that exist due to these considerations, are also determined in the literature to have a connection to the approach and goals of the process.

Approach and Perspectives of First Nations Consultation

Academic literature considers the approach to engagement important to meeting the goals of any participatory process. Approaches to consultation with First Nations require specific methods to manage concerns. Varied within the literature dependent on perspective and which goals were considered necessary to address in those interactions. Due to the long history of stakeholder relations and the large number of variables considered when defining the goals, decisions related to the best approach may be complex and dependent on subjective understanding of the circumstances that exist. The literature

identified a connection between the difficulties of engaging First Nations in a complex legal and policy environment and the different approaches to undertaking that consultation. It is theorized that the use of a bottom-up, participatory, stakeholder centred approach was the most effective method.

According to Fortier et al., aboriginal rights and title have been subject to an ongoing process of definition based on treaties, court decisions and government policies (2013, p. 47). “The result is a complex mosaic of policy and legislative contexts across Canada” (Fortier et al, 2013, p. 47). Within this mosaic, a range of agreements and partnerships with governments and industry have been established with the goal that First Nations groups may be able to influence activities, receive benefits from resource extraction on their traditional lands, further develop internal capacities and institutions, as well as participate in the management of those resources (Fortier et al., 2013, p. 47-48). Within this complex ‘mosaic’ the approach used in the development of those partnerships and in the later implementation of those agreements emphasized in the literature. Finding an approach that best enables the development of the partnerships is of importance because it helps orient helps focus participants to a process that will enable a positive outcome (Fortier et al., 2013).

Decisions about engaging First Nations in such a complex legal and policy environment is thought to be difficult for all stakeholders. How engagement should be undertaken is considered by numerous of authors, with the perspective that some form of a participatory approach is the most appropriate. For authors, Fraser, Dougill, Mabee, Reed, McAlpine, their investigation of participatory processes and environmental management considers whether it is more advantageous to use a bottom up or top down approach to research and engagement within a community (2006). In their analysis they discuss the use of a research framework and evaluation process that is developed from the top down. They assert in this type of a process that local community members may be alienated and locally important factors may be missed (Fraser et al, 2006, p. 115). In this process community members may not be engaged and it cannot be ensured that the framework used is relevant to that community (Fraser et al, 2006, p. 115). In a bottom up approach individuals from the community can be engaged to develop the

framework and ensure that factors important to the local community are incorporated (Fraser et al., 2006, p. 115).

Generally the literature focused on the need for a bottom up, stakeholder driven approach to consultation and environmental management as a whole. In Reed's article on stakeholder participation and environmental management he discussed the importance of stakeholder participation in any process that deals with environmental concerns. When discussing the ideal approach to be used, Reed argues that, "stakeholder participation needs to be underpinned by a philosophy that emphasizes empowerment, equity, trust and learning. Where relevant, participation should be considered as early as possible and throughout the process, representing relevant stakeholders systematically" (2008, p. 24817). Reed goes on to explain that, "the process needs to have clear objectives from the outset, and should not overlook the need for highly skilled facilitation" (2008, p. 24817). Focusing on the approach itself is not enough, there are philosophical factors that also influence whether the consultation will be successful (Reed, 2008).

However, when considering the consultation approach to be utilized, a connection was made in the literature between enabling a participatory process and the ability of the process to overcome the complicated context within which it is situated. Having a participatory approach based on inclusive relationship centred philosophies was considered of importance. Once established, it was considered possible to then explore what type of approach to consultation is required as well as decisions and potential solutions for how to overcome the other challenges to this process.

Possible Solutions

Finding solutions to the troubles that plaque the EA process are described in the literature with primarily two different focuses. While some solutions presented are more general, the two primary categories are 1) building better relationships between parties and 2) the use of more participatory models of decision-making. It can be summarized that the important concept in the literature around building better relationships was the thought that this would also lead to better processes and vice versa.

Dependent on the literature reviewed, considerations were tackled from a process perspective or a relationship perspective.

Acknowledging that First Nations have knowledge, beliefs, values, norms and practices that are culturally distinct, and that these cultural factors are represented in First Nations traditional knowledge and management practices as well as social systems, is why Wyatt makes this the starting place for building better relationships (2008, p. 176). Coexistence means finding ways to integrate these into the mainstream system in a way that they complement rather than compete with one another (2008, p. 176). Co-management and other participatory models are a means for supporting this goal and building equitable relationships between both parties (Wyatt, 2008, p. 176). In this way, co-management has the potential to shift relations to create more effective partnerships (Goetze, 2013).

Relationship Building. There are a number of different components and considerations that were identified in the literature as contributing to the building of positive productive relationships. Booth and Skelton assert that the development of “sound, positive and respectful relationships” is what is at the heart of making an EA successful (2013, p. 54). To achieve this, and begin to mitigate many of the concerns of First Nations, they state that the government, as the dominant, most powerful stakeholder, must accept this responsibility for “creating positive and respectful working relationships with First Nations people, without resorting to a courtroom” (Booth & Skelton, 2013, p. 54). Coming to understand one another better is necessary for a positive relationship to develop and be maintained (Booth & Skelton, 2013, p. 54). Positive relationships can be achieved through initiatives targeted at developing mutual understanding (Booth & Skelton, 2013, p. 54). Voinov and Bousque explain that to find mutual understanding, the “social relations between the stakeholders, their ability to communicate and exchange information and knowledge, and the skills and methods” used is important because these things are used to contribute to the “efficiency of the participatory process” (2010, p. 1269). Relationship building was something considered important to relationships between stakeholders in the long term, but also to best enable stakeholders to engage in potentially shorter-term business relationships successfully. Important

concepts such as trust, respect, and mutual understandings were touched on by the authors when considering what characteristics these relationships should have.

Having a strong relationship can lead to strong business and economic partnerships. According to Petrucci and Tallman there are five keys to successful partnerships in a participatory process or in the co-development of a resource-based project (2011, p. 86).

The first is to *identify key goals and objectives*. By doing so this assists partnerships to be driven by a “mutual understanding of their vision, purpose, and objectives, as well as, what is to be accomplished” (Petrucci & Tallman, 2011, p. 86). The clarity makes it easier for partners to work collaboratively with purpose and creates an environment where sensitive issues can be raised related to each other's role and performance in accordance with the goals and objectives (Petrucci & Tallman, 2011, p. 86).

The second is to *build effective relations*. To achieve success in a partnership, mutual confidence, trust, and commitment to both the project and nurturing the relationship must be present (Petrucci & Tallman, 2011, p. 86). This is because a willingness to be transparent and work together is what builds strong trusting relations (Petrucci & Tallman, 2011, p. 86).

Third, it is necessary to *clarify roles, responsibilities and expectations*. A solid framework based on clarity of roles, responsibilities, and expectations must be built through early establishment of those distinct roles and responsibilities (Petrucci & Tallman, 2011, p. 86).

The fourth is to *share resources*. Both independent access to resources and sharing of those resources is important to the collective strength of the partnership and the ability for individual efforts to be increased (Petrucci & Tallman, 2011, p. 86). Different types of resources such as information, expertise, and connections with other stakeholders can be valuable to these efforts (Petrucci & Tallman, 2011, p. 86-87).

Lastly, proper *management of the partnership* is important. Power sharing, accountability, and responsibility are important to successful partnership (Petrucci & Tallman, 2011, p. 87). Participants will each have different reasons for committing to the partnership even if it is mutually established (Petrucci

& Tallman, 2011, p. 87). Although it is beneficial that participants bring different resources, skills, and expertise, managing these differences can be difficult and dependent on successful management of the partnership overall (Petrucci & Tallman, 2011, p. 87).

The literature considered the foundation of positive relationships for successful partnerships can also be developed. It was identified that many of the same characteristics that were considered to be generally important to relationship building between stakeholders are also identified as important to business partnerships. Trust, confidence, openness and a willingness to work together were just some of the characteristics mentioned in the literature. Having these characteristics be prevalent in any relationship was considered worthwhile, and once established, they also help to make the consultation process less challenging.

Developing a Participatory Process Successfully. The literature focused on the characteristics of a successful participatory process and what is important to consider as a result. According to Reed, “stakeholder participation may improve the quality of environmental decisions”, but it does so “with one strong caveat: the quality of a decision is strongly dependent on the quality of the process that leads to it” (2008, p. 2421). Identifying the characteristics of a successful process is therefore important to enabling the ability to make good decisions via that process (Reed, 2008).

It was often noted that to effectively consult and accommodate First Nations peoples two practices should be abided. The first, is to “engage early on with First Nations impacted by a project and provide timely information” (Labeau, 2012, p. 9). Reed also states that, engaging with stakeholders as early as possible is considered essential to the development of “high quality and durable decisions” through a participatory decision-making model (Reed, 2008, p. 2422). The second practice, is to “ensure an effective and efficient consultation process” that could be used to develop future agreements such as including Memorandum of Understanding (MOU) or Impact Benefit Agreements (IBA) which allow parties to move forward and consider future opportunities with greater certainty (Labeau, 2012, p. 9).

IBAs are a mechanism used to establish a formal relationship between industry and local

communities (Whitelaw, McCarthy & Tsuji, 2009, p. 205). There are three primary purposes to these agreements (Whitelaw et al., 2009, p. 205). The first is to “address the adverse effects of commercial activities on local communities and their environments”, the second, to “ensure that First Nations receive benefits from the development of resources” (Whitelaw et al., 2009, p. 205). It was determined that through agreements such as these business partnerships can be more definitely developed (Whitelaw et al., 2009).

To find the opportunity for these agreements to develop, it is considered that a process that facilitates the right stakeholder dynamics must also be created. Reed discusses the benefits of using a stakeholder participation model of decision-making. He states that stakeholder participation has “the potential to increase the public trust in decisions and civil society”, if participatory processes are perceived to be “transparent and consider conflicting claims and views” (Reed, 2008, p. 2420) Further, it is thought that these processes have the potential to “empower stakeholders through the co-generation of knowledge” and increase “participants’ capacity to use this knowledge” (Reed, 2008, p. 2420). As well, “the likelihood that environmental decisions” will be “perceived to be holistic and fair”, and account “for a diversity of values and needs”, while “recognizing the complexity of human-environmental interactions” is something also thought to increase through this process model (Reed, 2008, p. 2420).

According to Reed there are two important factors to consider when looking at a participatory model. The first is to ensure “that participants have the power to really influence the decision”, and the second is to ensure that “participants have the technical capability to engage effectively” with that decision” (Reed, 2008, p. 2424) He goes on to explain that “if a decision has already been made or cannot really be influenced by stakeholders, then participation is not appropriate” (Reed, 2008, p. 2423). Participant efficacy in the consultation process is a common theme in the literature and plays a central role in conceptualizations of the process particularly around participation and engagement.

An example of these types of decisions are the government-to-government negotiations (BC and First Nations governments) that are the result of legal precedents that determined First Nations people to have recognized legal rights regarding any decision made in the use of their traditional lands (Lowe &

Shaw, 2012, p. 24). In order to be provided with these rights First Nations needed to be also be afforded “decision-making” status rather than simply “interested party” status in negotiations (Lowe & Shaw, 2012, p. 24). Without this status for decision makers First Nations people were considered simply participants without any actual power to ensure their views were to be considered in the decision process (Lowe & Shaw, 2012).

It is agreed by Voinov and Bousque that better decisions, less conflict, and more success is found when decisions are implemented using a stakeholder driven process (2010, p. 1269). This bottom-up approach, can make decisions easier to implement in societies compared to a top down institutional approach to decision making will create friction in the wider society (Voinov & Bousque, 2010, p. 1269). According to Fortier et al, there is the potential for these collaborative arrangements to provide a range of benefits including employment, profit sharing, reduction of potential conflicts, and the space for First Nations people to participate in decision-making (2013, p. 53). If agreement is to be reached successfully through a collaborative process then the values and opinions of the stakeholders are clarified, sources of disagreement noted, and compromise solutions developed (Grimble & Wellard, 1997, p. 181). It is thought that by empowering stakeholders to help design, implement, and find an agreement to the potential benefits to those involved can be agreed on by participants. For these two authors, ownership of the process also means that participants also own the outcome.

Important conceptualizations of the participatory process and its benefits are focused on the potential for empowerment of stakeholders and greater level of integration of interests of those involved. In order for this to be enacted, the process must rest on certain characteristics.

Reed outlines five important aspects of a participatory model of decision making:

- 1) Stakeholder participation needs to be underpinned by a philosophy that emphasizes empowerment, equity, trust and learning.
- 2) Participation should be considered as early as possible
- 3) The process needs to have clear objectives from the outset, and should not overlook the need for highly skilled facilitation.

- 4) Local and scientific knowledge can be integrated to provide a more comprehensive understanding of complex and dynamic natural systems and processes. Such knowledge can also be used to evaluate the appropriateness of potential technical and local solutions to environmental problems.
- 5) To overcome many of its limitations, stakeholder participation must be institutionalized, in order to create organizational cultures that can facilitate processes where goals are negotiated and outcomes are necessarily uncertain.

(Reed, 2008, p. 2426).

Coupled with Reed's five suggestions are four considerations for success in economic development projects with First Nations people that are outlined by Petrucci and Tallman. The first is the development of *shared value*. Shared value in economic ventures is supported through ongoing commitment from those partners who feel they have something to gain and contribute (Petrucci & Tallman, 2011, p. 87). Shared value can give meaning and purpose to community members through increases in employment, strengthening community programs and infrastructure, and community values being respected in the process (Petrucci & Tallman, 2011, p. 87). For corporations, success in engaging their organizations is met through good business that is tied directly to the organization's objectives (Petrucci & Tallman, 2011, p. 87).

Second, developing *First Nations business acumen, capacity, and readiness* is considered of value. Different First Nation communities have maintained different levels of capacity, business acumen and readiness to take on, and successfully engage in, economic development partnerships with industry (Petrucci & Tallman, 2011, p. 87). A "mutual process of growth and education" is considered necessary in order to achieve success between partners and in these ventures (Petrucci & Tallman, 2011, p. 87).

Third, it is necessary to *separate politics from business*. Economic development in First Nations communities cannot thrive without stability in First Nations governance and politics (Petrucci & Tallman, 2011, p. 87). This makes working with Band Councils difficult and for there to be a preference to work

with First Nations individuals or development corporations (Petrucci & Tallman, 2011, p. 87). However, in these cases, separating politics from business is often difficult (Petrucci & Tallman, 2011, p. 87). By identifying governance issues, “creating checks and balances for accountability, engaging and including the community members in a shared vision, and articulating clear objectives and expectations these issues can be lessened (Petrucci & Tallman, 2011, p. 87).

Fourth, developing a *shared long-term vision that is inclusive of all members* is something that should be engaged in. For the partnership to be successful, the First Nation community must also accept the partnership that is being developed (Petrucci & Tallman, 2011, p. 87). This can be achieved through noted economic benefits, increased standard of living, the preservation of cultural values, and community development of a unique long-term vision (Petrucci & Tallman, 2011, p. 87).

It was noted by Booth and Skelton that overall, the development of participatory processes is complicated and affected by a number of factors (2011). First Nations people with engagement and consultation issues, but industry and consultants struggle with this process as well (Booth & Skelton, 2011). Although there was an overall perspective in the literature that participatory models that seek to engage stakeholders are favourable, in any participatory process, identifying these stakeholders can be complex and requires not only for those stakeholders to be accurately identified but for the relationship between them to also be investigated and understood (Reed, Graves, Dandy, Posthumus, Hubacek, Morris, Prell, Quinn & Stringer, 2009, p. 1947). Once identified, these stakeholders need to be given the power to influence what happens and have an interest in doing so (Reed et al, 2009, p. 1947).

Summary

Academic literature focuses predominantly on the perspectives of First Nations people, rather than on the perspective of industry proponents. However, information on industry actors is still available, and from the business perspective, suggestions for key considerations in building business partnerships are outlined. As well, insights into different process considerations and the barriers to consultation that

are experienced by all participants can be identified, with the greatest amount of information available focused on documenting the challenges of the process.

When considering the challenges, there was a focus on the breakdown in relationships, the creation of power asymmetries and a lack of trust. Key aspects and characteristics of positive working relationships and business partnerships of different types are summarized or mentioned in the literature, potentially as a result of the overwhelming barriers to the process that are noted.

Framework

The study of First Nations consultation within the EA process can be categorically framed based on a number of overarching themes. Themes can be broadly identified as questions and considerations associated with 1) Social aspects 2) Process mechanics 3) Barriers to consultation, 4) Possible Solutions. These broad categories are used to identify key aspects in the literature, direct the development of initial interview questions, as well as provide the substantive frame used during the interview process.

Although the subjective experience is relied on to drive the interview questioning, this framework can assist to sufficiently narrow the field of study. The interview subjects were asked questions that could be attributed to the four broad categories outlined above. The perceptions and experiences of those interviewed varied, and as a result, information provided in relation to each of the categories differed depending on perspective. As a result, the findings present the differing perspectives and ideas brought forward by the interview participants and their perceptions of the EA consultation process. The categories used to present those findings became more specified as a response to these unique views.

Further details of the interview process, other methods, and the methodology are outlined in the following chapter.

CHAPTER 4: RESEARCH METHODS AND METHODOLOGY

This research utilizes methodologies and methods that both directly and indirectly support the discovery and documentation of the subjective experience of those that work within the resource development industry. Starting with an interpretive research paradigm, a qualitative approach was then employed. To further orient the study, and influence the research methods, some ideas from grounded theory were borrowed during the data collection phase of the research. The primary method used, and its relevance to the research will be explicated later in this chapter.

Indirect Framing of the Research

Aspects of the research methodology indirectly served to frame and guide the research. These aspects will be explained prior to the exploration of the direct methods that were utilized.

The design of the research was affected by the interpretivist research paradigm. According to McKenzie and Knipe “The theoretical framework, as distinct from a theory, is sometimes referred to as the paradigm and influences the way knowledge is studied and interpreted” (2006). This particular paradigm influences the research in a few key ways.

In this research, interviews were used to draw a clearer picture of the individual experience within the field being studied. Interviews are in line with the intention of an interpretivist research paradigm to understand the human experience and are also based on the idea that social reality is constructed (McKenzie & Knipe, 2006). It is for this reason that the interviews were structured in such a way as to allow for the perspective and experience of the individual to emerge along with the knowledge that was unique to participants and their experiences. It should be noted that in the interpretivist approach, research is not begun with a theory but rather theory is generated through the process of the research and qualitative data collection methods relied upon (McKenzie & Knipe, 2006).

Methodology. According to Creswell (1994) "A qualitative study is defined as an inquiry process of understanding a social or human problem and based on building a complex, holistic picture formed with words that reports detailed views of the informants" (p. 15). Therefore a qualitative approach is used as the overarching methodology in this study.

The interpretive approach falls within a qualitative methodology and incorporates the notion of "Verstehen" a term first discussed by Max Weber (as cited in Bhattacharya, 2012, p. 34). This notion classically conceptualized an inseparability of understanding from interpretation driven by the "researcher's desire to understand (and therefore interpret) social reality" (Bhattacharya, 2012, p. 54). Clifford Geertz emphasizes, "that it is interpretation, rather than exact understanding, that qualitative researchers can hope for" (as cited in Bhattacharya, 2012, p. 43). There is the belief therefore that the only first-hand understanding that exists is the understanding that lies with the subject themselves. This said, interpretive models often allow for the communication of the subject's experience through the research process (Bhattacharya, 2012).

An interpretive approach was used to consider the subjective experience of those working in the resource development field, their interpretations of the industry, government, and First Nations relations, including the application of law, policy and practice in their field, and importantly, challenges that are felt throughout and in relation to these factors. Working from a theoretical perspective that values the subjective experience is a natural choice due to the nature of the research inquiry.

During this research project, grounded theory was not used in its entirety and is not determined to be a foundational theory to this study. However, it does offer philosophical and practical aspects that can be utilized since they were useful in the research model. As an interpretive approach, grounded theory focuses on the subjective experience, as well as small-scale interactions, and understandings that focus on interpretation and social meaning. As well, this approach sees meaning as being constructed via human interaction (Hesse-Biber & Leavy, 2005).

An underpinning to this theory is the suggestion that it is possible to construct theories directly from the data. Through the use of an inductive approach that the development of theory is reversed from

development and testing of theory, to research and emergence of theory (Hall et al., 2013). Through this study developing and interpreting knowledge was a constant practice.

Another component to this approach that is recognized by Strauss and Glaser, is the idea that the researcher enters the field with the intention of being open to realizing new meaning, and that through the gathering of data and its analysis, one is then able to progressively identify the focus from which other components will then be integrated (Cowley & Heath, 2004). It is for this reason that, for Strauss, the research question should be formulated around the “phenomenon to be studied” as well as from what one knows of the subject (Cowley & Heath, p 143, 2004).

The following are three aspects of the Grounded Theory approach have been utilized in the research:

Circular Process and Theory Generation. As data was gathered from each interview with EA process participants a circular process of analysis was utilized. In this study the process starts by gathering observations, moves to looking for themes in the data, which leads to the formulation of tentative ideas or hypotheses. This then leads the researcher to explore these ideas further by gathering more data that can finally assist in the generation of theory. The process can also be considered analytical induction (Hesse-Biber & Leavy, 2005).

In grounded theory the theory/hypothesis articulated at the end of the study is “closely related to the context of the phenomenon being studied” (Creswell, 1998, p. 56). The interest in clear articulation of the subjective experience of industry participants meant that superimposing a theory about the nature of this experience prior to it being communicated to the researcher would have skewed the findings of the research through a narrowing of the researchers line of questioning. This would have resulted in the data and findings being also limited by the views of the researcher. At the end of the research, based on perspectives communicated by those interviewed, a theory that reflected the findings of the research was developed. Theory is expressed as a series of assertions and consider the nature of stakeholder relations and the possible solutions to the issues experiences in the consultation process.

To implement this method of data collection and theory generation, interview questions were developed from the review of relevant documentation in this field. With each progressive interview the new knowledge gained allowed the opportunity to build a broader knowledge base as well as test the information attained from one interview against that gained from the next. Ideas, patterns, and themes about the process itself and the context within which this process sits emerged as the data collected increased.

As both primary and secondary sources were used to collect data during the course of the research, each new piece of information was considered within the larger context of all data collected, weighted against other sources, identified for what was unique to the perspective, and integrated into the research knowledge as it was seen to fit against other information and within the themes that emerged. The interview process allowed for the narrative of the participant to guide the interview direction. Those interviewed were asked questions to target and draw out information specific to the unique perspective of the participant interviewed, and attempt to compare the perspective of the current interview participant with that of other participants interviewed.

Themes in the data emerged through the integration of each new data source. Considerations emerged that were political, cultural, social, historical, and legal in nature. When discussing the EA process and its encapsulated First Nations consultation, these considerations came to form four categories: 1) Historical, social, and political considerations; 2) Law, procedures, administrative considerations; 3) Attitudes, predispositions, and cultural considerations and; 4) Relationships as the solution.

Given the history of relations between stakeholders, factors within the framework that emerged and how they contribute to the issues and challenges of the overall process were considered. As a result, it is theorized that relationship building between stakeholders is an approach that should dominate the consultation process in order to overcome the factors that hamper its success.

Subjective Experience and the Phenomena. Grounded theory is used to study circumstances where “individuals interact, take actions, or engage in a process in response to a phenomenon” (Creswell, 1998, p. 56). The particular phenomena and process studied in this research explores challenges

experienced during the application of the 'Duty to Consult' First Nations in the BC EA process. Due to there being a focus on this particular phenomenon, this aspect of grounded theory is useful and appropriate.

To implement this aspect of the methodology the subjective experience of those involved is captured through interviews with people that are close to the consultation process in resource based projects. These participants were industry consultants, worked directly for industry groups, or were a party to the process in different ways. All participants interviewed, took action and engaged with the EA process in some manner and, as a result, participated in the phenomena being studied. For example, their views are captured using an interview style that was open and flexible in order to allow the specific views and experiences of those interviewed to emerge. The goal of this was to capture the uniqueness of each subject's experience.

Direct Methods used to Guide the Research

The following section outlines methods directly used to guide and undertake the research.

Research Design. The research focus and purpose was about discovering perspectives of industry and the EAO. The goal of the study was to seek understanding from the perspectives of industry and the EAO in relation to difficulties they perceive to exist in the EA consultation process. The research question and purpose was formed around this goal in mind and asks, *what are the difficulties in applying the principles related to the 'Duty to Consult' as it relates to one issue, specifically the BC Environmental Assessment (EA) Process?*

Through the review of literature a number of overarching themes were identified that provided the framework for the research. These categories were broad and identified questions and considerations associated with 1) Social aspects 2) Process mechanics 3) Barriers to consultation, 4) Possible Solutions. These categories served to direct the research questions and provide framing for the research.

The factors were later focused further to create four response categories that the findings identified: 1) Historical, social, and political considerations; 2) Law, procedures, administrative considerations; 3) Attitudes, predispositions, and cultural considerations and; 4) Relationships as the solution. Through this research process and the development of greater focus in the categories and research framework, as it was communicated by the interview participants, presentation and discussion of the findings could be undertaken, as could the discovery of theory meant to help explain the phenomena being investigated.

Interview Sample. Interviews were used as the main tool in gathering primary data in the research. To find interview participants, a letter was emailed asking if they would be interested in participating in an interview. The letter outlined the research project, the focus of questions that would be asked, and the time period necessary for the interview (see Appendix 5).

For each interview participant questions for the interviews were drawn from a larger bank of questions developed and combined with questions that arose naturally during the course of the interview. The knowledge of the participant and the interest in having them communicate their unique views and experiences with the EA process is what also provided direction to the interview questions. To organise data, and as a result formulate a theory, themes were identified in the data as they emerged. Data included similarities, differences, areas of agreement and disagreement between participants.

Utilizing the research question that was based on the major goals and objectives of the research, a number of findings related to issues and concerns associated with First Nations consultation were attained. As provided for in the research design, four categories came to be seen to characterize the challenges within First Nations consultation. The findings are presented using the four themes that emerged.

Interviews continued until data saturation point was reached. Originally it was estimated that a total of approximately ten industry consultants and five government officials within the relevant ministries would be interviewed. In actuality this number was significantly less. Due to the relatively narrow research topic considered and the relative coherence in the views expressed, fewer than the initially anticipated number of interviews needed to be undertaken. In this study, saturation point was

reached once two government officials within the EAO were interviewed and the perspectives of eight industry participants were considered. It is at this point that the interview phase of the research was ended.

Two government employees from the Environmental Assessment Office were interviewed. One interview (EAO Interview 1) was completed on January 17, 2013. The second interview took place on January 30, 2013 (EAO Interview 2). These two participants wished to have their names withheld. The perspectives of eight industry proponents were integrated into the research findings. These interviews took place between January 10, 2013 and March 3, 2013.

This category of individuals can be characterized by the work that they do in education and consultation as it relates to First Nations engagement. They were chosen because they had knowledge that shed light on the variety of perspectives that exist within this field of practice. Two of those interviewed had a focus in their work on First Nations education within the resource industry, two dealt almost exclusively with First Nations consultation, and the remaining four participants focused on both education and engagement of other types including consultation. No two individuals were from the same organization although six were active within the mining and exploration sector.

Discussion of Interviews. The in-depth interview seeks to get at deep information or knowledge that the interviewee possesses. This mode of interview is said to be “issue oriented and focused on gaining information and insight from the perspective of the interviewee” as well as having the potential to access less known or less popular perspectives as well as subjugated knowledge (Hesse-Biber & Leavy, 2005, p. 25). Further, the in-depth interview is used when examining the social life of participants in the particular topic of focus and to look for and identify emerging patterns in the interactions that they describe (Hesse-Biber & Leavy, 2005).

In addition to the depth interview process, a semi-structured interview process was used in which a certain set of questions was relied upon to loosely guide the conversation. The purpose of allowing for a loosely structured process, was to allow respondents to discuss what is of interest or considered important to them with the hope that the answer would allow for unexpected information or directions to surface

(Hesse-Biber & Leavy, 2005). There is a preference for this kind of interview because the purpose of the study is to discover and explore the subjective experience and knowledge of individuals working in the field.

Allowing freedom for the interview respondent to direct the researcher to the questions and knowledge in areas otherwise unknown, was very valuable in this study. Having flexibility in the interview process allowed for questions to be tailored to meet the needs of the research at a particular juncture and to also allow for the freedom necessary to enable the relevant knowledge of the research subject to come forth.

The intention to not be initially evaluative of views, but instead seek to understand and present the areas of commonality, as well as underlying differences in opinion and perspective that are pervasive in this field of practice. In this project, despite the freedom given to the interviewee to discuss what they felt were the most relevant, similar experiences were often brought up between the parties. This was seen to only increase the validity of the research findings because the offering of this information was largely unprompted by the researcher.

In order to guide the process, develop knowledge in specific areas, and control the breadth of the project, a substantive frame was developed to outline the range of issues or subtopics that the researcher was interested in exploring (Hesse-Biber & Leavy, 2005). Being conscious of the substantive frame allowed the opportunity to both work with a semi-structured interview process as well as ensure that the topics that were worked with 'in-depth' got addressed through the course of individual interviews and throughout the study.

The major topics focused within the substantive frame and during interviews were derived first, from the goals and objectives of the research and second, from areas where it was determined that interviewees could clarify or add to knowledge being drawn from the literature being reviewed and the four categories observed at that time. From the goals and objectives of the research the following was undertaken:

- 1) Further understand what, aside from legal parameters and policy frameworks, guides the practice of, and approach to, consultation with First Nations in private sector resource industry projects.
- 2) Identify the challenges that hamper the success of First Nations consultation.
- 3) Allow a theory to emerge regarding the approach that should be used by industry proponents undertaking consultation with First Nations in the EA process.

The questions asked were responsive to the knowledge and experience of the interview respondent but were also directed toward seeking knowledge that satisfied the goals of the research. Examples of questions asked interview participants:

- 1) What do you think are the greatest challenges for industry proponents when they make decisions about how to engage with First Nations?
- 2) What do you consider to be the main challenges for First Nations people in regards to engaging with the consultation process?
- 3) For those within the EAO, what are the concerns currently under consideration and how may these improve the review process?
- 4) How do you feel the EA process has been shaped, challenged, or enhanced by the existence of cultural differences?
- 5) Would you say that, as a general rule, First Nations people see the benefits of coming to an arrangement with industry or they do not?
- 6) How is it decided when, and to what extent, to accommodate First Nations?

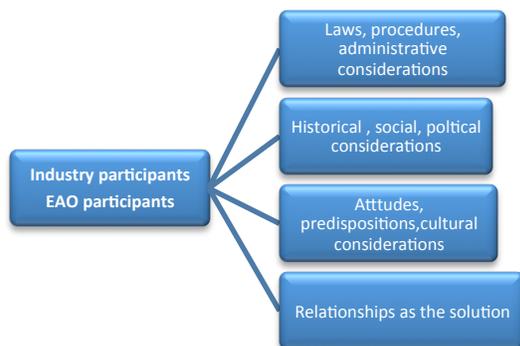
Analysis

In order to analyze the interview data gathered, the researcher, with the consent of the interview subject, did one of the following: A) Took hand written or typed notes during the interview B) Voice recorded the interview and later took notes/transcribed the video into a document so details could be reviewed more readily.

Within qualitative methods, interview data was analyzed to develop new interview questions, considerations, themes and ideas about the data being collected and overall research findings. These were noted and brought forward into the next interview.

Although the data is discussed further in the findings and discussion section, it can be noted that the findings are divided according to the four categories identified from responses of two research groups that were interviewed. Those categories are: 1) Historical, social, and political considerations; 2) Law, procedures, administrative considerations; 3) Attitudes, predispositions, and cultural considerations; 4) Relationships as the solution.

This chart shows how the findings from the two groups interviewed are organized and presented.



In the findings section, the data gathered using the research methods and methodology outlined above will be presented. The perspectives of the ten individuals interviewed from the EAO and industry were identified and then sorted using four categories listed above.

Ethical Considerations

There were no significant ethical considerations identified in the course of the research. Research participants were considered to be ‘competent adults’ and were given the opportunity to decline the invitation to participate. As well, they were kept anonymous in the presentation of the research findings.

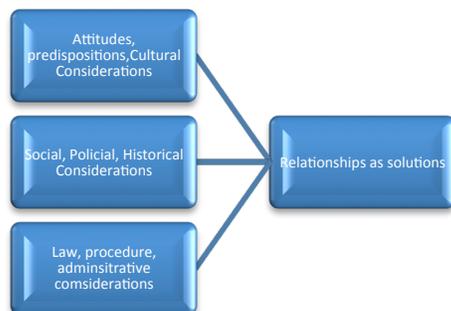
Prior to the interview taking place, informed signed consent was attained from all participants. This was done after an explanation of the study was given along with the opportunity to have any

questions answered. Participants were able to abstain from answering any questions they were not comfortable with, and given the option to withdraw their information from the study at any time. First Nations communities were not researched directly as the research focus was on the EAO and industry proponents. In the ethical review of this study all of the risk factors to be considered were rated as 'very unlikely'.

CHAPTER 5: FINDINGS

To gather the data for this research project, a total of ten interviews were conducted from two different stakeholder groups that connect with the EA consultation process. Of these ten, eight people that worked on behalf of industry in relation to First Nations consultation were engaged, as well as two from within the EAO.

Both of the stakeholder groups interviewed identified issues and considerations that they perceived to both be relevant to First Nations consultation today and to affect the consultation process. It can be summarized that legal, historical, social, cultural and political considerations emerged during the course of the research and during the interviews to create four response categories that are based on the conceptual framework identified in the literature review: 1) Historical, social, and political considerations; 2) Law, procedures, administrative considerations; 3) Attitudes, predispositions, and cultural considerations and; 4) Relationships as the solution.



The first three categories contribute to the challenges experienced by the EA consultation process while the fourth category is the solution that was proposed by those interviewed to overcome the challenges. The challenges identified were mentioned consistently among those interviewed. Although not all respondents focused on the same issues and considerations, all participants did at some point in the interview speak to each of the four categories. For all participants, relationship building was identified as a focal point when considering solutions to the issues that they identified in the course of the interview.

In line with the goal of the research, the Findings seek to present without interpretation the perspectives of industry and EAO staff interviewed. In the Discussion Chapter following later, the ideas brought forward from the Findings are integrated with the literature review concepts, legal considerations, as well as other contextualizing materials. It is the intention that contextual information be brought to the Findings when considered further later in the thesis.

Cultural Considerations

Culture, was seen by respondents to encompass unique characteristics in work habits, ways of interacting and relating and, most importantly, in different conceptions related to land use and a people's relationship to that land. The effects of culture on consultation were outlined by the respondents to have three main themes: land and resources; prejudiced perspectives; and its relevance today. Culture was noted by nine of those interviewed to have an effect on the EA consultation process and the challenges associated with it.

Culture and the Land. All respondents from both industry and the EAO identified the presence of cultural differences in how First Nations conceptualize their relationship to the land and its resources and identified this as a contributing factor in the challenges in the consultation process. The issue was characterized by respondents as follows: Different ideas around how land and resources should be utilized have meant that there are also different ideas about what is considered to be appropriate for the land affected by the project. This then creates challenges to project development due to debates over appropriate use of the land affected by that project.

According to one respondent, "First Nations' identities are connected to the land", and there is the notion that this connection comes from "having ancestors in that land" (Respondent 1, Interview, 2013). "There is an importance in this relationship and the Creator that is missed by science and European culture" (Respondent 1, Interview, 2013). Some of these differences are exemplified through First Nations land use models that are characterized by a lack of exclusive ownership over the land and community sharing of resources (Respondent 1, Interview, 2013).

This connection to the land was seen by these ten respondents to contribute to the definition of First Nations notions of land use. For one respondent it was also considered linked to the idea that First Nations speak for the environment. This EAO staff member characterized First Nations as the “voice of the planet” because they “think way longer term than we do” (EAO Interview 2, 2013). For First Nations land use planning considers more fully principles of sustainability than is often incorporated into industry and government plans (EAO Interview 2, 2013)

Sustainability in land use planning was a notion identified by five respondents to be important to First Nations. One EAO respondent stated that it is for this reason that they believed that there is “more that should be listened to” when it came to First Nations ideas on land use despite there being a lack of cross cultural understanding around the environment and resources (EAO Interview 2, 2013). In essence First Nations are thought to have “different ideas about place and relationship to our environment” than we do (EAO Interview 2, 2013). These different conceptualizations are not always seen by respondents to offer something positive to the process. Instead all of those interviewed both in Industry and the EAO saw cultural differences and perspectives around land use to be a challenge.

Although the EA process was seen to offer space to talk about the agreements, eight of those interviewed, both in the EAO and industry, noted that attempts at cultural respect and understanding were lacking in interactions. According to the EAO staff interviewed, despite there being some initiatives on the part of industry to bridge this gap, in actuality industry is “quite removed from that kind of cultural sensitivity” and agreements are more difficult to reach as a result (EAO Interview 1, 2013). Lack of cultural awareness and full appreciation of the other was something noted by all respondents to contribute to the challenges in stakeholder interactions in all aspects of this process.

History and the Development of Prejudiced Perspectives. Two of the respondents that worked with industry in the EA consultation process specifically discussed prejudice and bias against First Nations peoples, identifying this as an issue. These two respondents felt that prejudice and bias of those that worked within the resource industry as well as views held by many Canadians, had a leading influence on interactions. In land use, particularly, they felt that biases influenced feelings of respect for

First Nations knowledge and practices, and for the methods of utilizing and managing the land (Respondent 1 and 2, interviews, 2013).

One respondent explained, First Nations land management policies and sustainability plans were historically in place and oriented around notions of respect and sharing. If anything, First Nations people were “always taught to be generous” (Respondent 2, Interview, 2013). “Anything first was given away”, meaning your first kill, catch, or berry harvested was shared, as was “anything extra” (Respondent 2, Interview, 2013). This was in stark contrast to Europeans approach to resource use (Respondent 2, Interview, 2013).

It was explained by this same respondent that there was “for Europeans an excitement around land and resources and a wish to possess these” (Respondent 2, interview, 2013). The philosophies that First Nations held around the use of land and resources did not match those of the Europeans and First Nations were considered by Europeans to stand in the way of their goals being actualized (Respondent 2, Interview, 2013). This is because the “Canadian response [to this vast land and its resources] was that the land must be used for economic enterprise and settler demand” (Respondent 1, Interview, 2013). “Treaties were undergone as a result [and] at the negotiation table, in exchange for land and buildings as well as access to wildlife, fishing rights, and modest amounts of money, treaties were entered into” (Respondent 1, Interview, 2013).

The significant cultural differences Europeans had with First Nations over conceptions of land use planning, led to stereotyping of First Nations peoples that one respondent believed was due largely to Christianity and the government. It was explained by this respondent that stereotyping later manifested itself as racism and created the conditions for genocide of First Nations peoples to occur in Canada. Racism, and the resulting genocide, was identified by this respondent to be critical to the erosion of First Nations culture and First Nations presence in their traditional territories. This enhanced the ability of Europeans to assert their control over the First Nations land and resources as well as alienate First Nations peoples from the European population (Respondent 2, Interview, 2013).

Culture Today. How culture and cultural differences are today utilized or overcome in the EA process, in stakeholder relations, and in land use questions, was a theme present in the interviews.

For seven of the respondents interviewed, considering the inclusion of a First Nations perspective was noted to be important. This inclusion was thought by one respondent to be complicated by the historically divisive nature of relations as explained in the following way: Today “there are aboriginal peoples seeking to find balance between involvement in industry and their communities” (Respondent 3, Interview, 2013). This is complicated by the question of whether working for industry is “joining the dark side” or whether working within industry can be a place “where the First Nations people can be heard” (Respondent 3, Interview, 2013). Although there is a history of exclusion, there may be the possibility that by having more First Nations people in these positions, discussions around land use that consider a First Nations perspective can take place at a senior level (Respondent 3, Interview, 2013). Unfortunately, it was noted by one respondent that what the government, the company, and First Nations say often times do not “line up well” and having these discussions at any level with the intention of incorporating all these perspectives is going to be complicated and challenging no matter what the circumstances (Respondent 3, Interview, 2013).

A disconnect between stakeholder perspectives was identified by all respondents to hamper the process in a number of different ways. One respondent explained that when industry speaks with First Nations about the land affected by a potential project, different ways of expressing the relationship that First Nations have with that land and land use can cause confusion and frustrations on both sides (Respondent 3, Interview, 2013). For another respondent this disconnect was explained further. They gave an example of this situation as follows: when you are walking the land and it is explained to you that using that lake water for your project would be inappropriate because there are “ancestors within that lake” if there was not a level of cultural sensitivity and understanding on the part of industry it is likely that the two sides would not understand each other on this issue (Respondent 4, Interview, 2013).

Another respondent believes that this disconnect is said to be made worse by different conceptions around industry integrated opportunities and economics philosophies (Respondent 5, Interview, 2013). In

that, employment opportunities may be a part of the accommodation measures and plan for the community, but there is a work plan that must also go forward for the company. When there are differences around how this work plan will be rolled out and the participation that is required on an individual and group basis then enacting the work plan is made more difficult (Interview 5, 2013).

Cultural differences and the complications that this has in terms of the conversations and agreements that must take place between First Nations and industry were seen by respondents to create challenges in a variety of aspects of the EA consultation process. Although there are a number of reasons for this identified by interview respondents, cultural reasons were not the sole factor identified. Social, political, and historical considerations were also considered by respondents to be important.

Social, Political, Economic and Historical Considerations

A connection was identified between the current historical, social and political contexts. This includes how historically relationship patterns between First Nations and industry or First Nations and government developed, but also economic circumstances, and political or governmental considerations.

Six of the respondents discussed the Indian Act and the effect that it had on the internal organization, politics and governance of First Nations groups. It was recounted by one respondent that through this Act First Nations means of governance was re-organized, forcing them into a two-year election cycle. The respondent explained that, under the hereditary system there were no elections and so this re-organization significantly impacted and undermined the traditional community structure. The result for some communities was that no government structure was then in place at all (Respondent 6, Interview, 2013).

Four of the respondents spoke about the connection they perceived between the loss of governmental structure, the erosion of the social fabric of the community, and the current economic issues felt by First Nations communities today. As was explained by one respondent, through the course of history, communities lost their social fabric and suffered economically so that they now experience a situation that can be characterized as “Indianomics” (Respondent 7, Interview, 2013). “Indianomics” is an

“economic cycle of small contract work for communities” that is due to there being little to no employment opportunities available in the communities themselves (Respondent 7, Interview, 2013). In the communities they have lost their connection to the land, resources and community structure that has resulted in a dependency on outside employment and government support (Respondent 7, Interview, 2013).

A connection between the economic and social factors was made in the interviews with seven of the respondents speaking to the difficult economic and social issues that plague First Nations communities. According to one First Nations person who works on behalf of industry as a liaison for his community, in these communities “people are striving for the Canadian dream and not achieving it” (Respondent 7, Interview, 2013). For First Nations there is a standard of living that is lower than the average Canadian and there is a resulting significant interest in those communities to identify possibilities that will improve their situation. There are challenges but also a “recognition that First Nations need to change their mentality in order to move forward” (Respondent 7, Interview, 2013). This is seen as the first step to breaking the patterns in the communities that have led to social and economic inequities. As a result, some First Nations are reconsidering the “business of resources” believing that this may be the “way of the future” for their communities (Respondent 1, Interview, 2013). This connection between the economic and social considerations was considered important to these respondents when looking at the cause of the dismal conditions within First Nations communities and the rationale behind partnering with industry to improve them.

Given the challenges to partnering with industry and the traditional conceptualization some First Nations groups hold in relation to the land and resources, five respondents identified that there are internal community struggles that come with the consideration of these opportunities. For example, one respondent explains that in traditional systems of governance how a “specific piece of geography is cared for” is of importance (Respondent 3, Interview, 2013). The respondent went on to explain that traditional values such as these typically compete with the perspective that partnering with industry may be beneficial to improving conditions for the community. The internal differences this causes is only

worsened by first, disagreement over whose opinion and judgment is to be used and respected when making decisions of this nature for the community. Second, that after the Indian Act and through the melding of traditional and imposed forms of governance within the community, identifying the decision makers and decision process can be a challenge. It was also noted by this respondent that this circumstance can potentially lead to heated debates internally that are only worsened by inflated community expectations regarding the benefits a proposed project could bring to the community (Respondent 3, Interview, 2013).

Inflated expectation within communities about the benefits of resource development was cited by seven of the respondents. One respondent questions, “How do you possibly manage the expectations of a group that is underemployed and doesn’t have any opportunities?” (Respondent 3, Interview, 2013). For another respondent, these expectations meant that even when simply doing exploratory, zero impact activities there was the expectation that significant compensation would result for the community. At times, there would be demands that would be inappropriate for the circumstance but understandable in the context of the economic desperation felt by some of the communities (Respondent 4, Interview, 2013). The respondents considered it difficult to manage expectations given the current economic state of the communities that they came into contact with.

Social, political, economic and historical considerations were said to contribute to the challenges of consultation. Given the difficult internal conditions in these communities, expectations around what benefits can be found from partnering with industry in resource development were said to result. There are however also legal, procedural and administrative considerations that were identified by respondents as creating challenges to the viability and ease of developing partnerships with First Nations.

Legal, Procedural, Administrative Considerations

The challenges with the application of the duty to consult were considered to be not only legal in nature, but also encompassing the procedural and administrative considerations associated with the application of this duty as well. According to two respondents, from a legal standpoint, there is much

debate over which actions are engagement and which are consultation that results in questions about whether consultation has been met in the legal sense (Respondent 6 & 8, Interview, 2013). This is only further complicated by the procedural and administrative challenges mentioned by respondents.

According to eight of those interviewed, one of the major challenges in meeting the legal requirements of consultation are the difficulties associated identifying which group should be consulted and to what extent. As one respondent explains, “the treaty process stopped at BC” so making decisions over who should be consulted is more difficult than elsewhere in Canada (Respondent 1, Interview, 2013). This is due to the situation that is explained by one of the EAO respondents. Given that there are 203 communities in the province that are all considered “unique”, and that “on the coast there are a high density of [claim] assertions, deciding whose assertion is most valid or valid at all” is difficult and very complicated (EAO Interview 1, 2013). “Synthesizing who to talk to is huge” and takes a “massive” amount of research (EAO Interview 1, 2013). If this alone were not complex enough, “new evidence” can be “brought forward during the process” that changes the focus of the consultation effort (EAO Interview 1, 2013). As one respondent explains, “government throws the responsibility [for consultation] onto industry” through section 11 and, as a result, the workload and complications then fall to industry (Interview 7, 2013). Although it is government that is legally responsible for consultation it is industry that undertakes the actual consultation process along with the difficulties of identifying those with whom they must consult.

Seven of those interviewed spoke about the lack of capacity of First Nations to deal with the demands of consultation. There were a number of reasons cited for this. Industry has significantly more resources and expertise in this specified field. This has meant that the capacity of industry to deal with these challenges in the process is one matter, but for First Nations the chronic lack of finances and internal capacity due to a lack of specified expertise necessary, can be overwhelming and make consultation more difficult for all parties. According to one respondent, a lack of band financial and human resources means that a band can be “buried in paperwork” while they make an effort to respond to all of the requests and referrals that they receive from government and industry (Respondent 3, Interview,

2013). In a “place such as North Eastern BC where there is lots of coal, sometimes a band is required to process 30, 000 referrals with only three people” (Respondent 3, Interview, 2013). To make matters worse, according to this respondent “industry wants to check off boxes [in the EA application] and will simply ship out the paperwork” without bothering to make an in-person connection (Respondent 3, Interview, 2013). Unfortunately, there is “no money in the [First Nations] budget to pay for the referral process” and as a result the “cash for this comes out of other budgets, in mine, it is education since this is the only one with a surplus” (Respondent 3, Interview, 2013).

According to one respondent referrals can give you as little as 30 days to respond and there is no time to “process all the stuff that comes through the office” (Respondent 3, Interview, 2013). In the case where consultation is done correctly, the “band is met with in person, shown the map, the proposal is talked about, and addressed properly” (Respondent 3, Interview, 2013). In these cases, a relationship has been built that includes trust. From here things can be signed off on quickly to allow the process to then move forward more efficiently (Respondent 3, Interview, 2013).

Procedural and legal challenges along with the economic, social, historical, and cultural challenges and considerations were identified by respondents to be a barrier to successfully completing the consultation process. As a response to these challenges, relationship building was believed to be the remedy for the difficult circumstances that the respondents identified.

Relationships as the Solution

The relationship of primary interest to the respondents was the relationship between industry and First Nations. Although the EAO considered themselves outside of the process due to their third party status, they were still able to comment on the relationship between First Nations and government (as a whole) as well as First Nations and industry.

All of those interviewed identified that there was a need for building better relationships in order to overcome the challenges that they identified. For one respondent asking “how we can repair the issues that are out there, for First Nations and everyone else” in conjunction with, “how can we can grow

together and work together?” were the questions necessary to consider when looking at how to move forward and the state of the relationships between stakeholders (Respondent 7, Interview, 2103).

According to all of the respondents, building better relationships was also the key to a successful consultation process and to building better agreements between the stakeholders. A link between successful consultation, better agreements, and building the capacity of First Nations affected by a project was discussed by five of the respondents. According to one respondent, for companies at the “forefront of consultation work” the “projects that they run serve as good examples of successful agreements between industry and First Nations and the necessary development of long-term working relationships to do this” (Respondent 3, Interview, 2013). In these examples, industry is seen to “build partnerships to build capacity” in the First Nations affected by the project (Respondent 6, Interview, 203). This is seen to be accomplished through providing jobs, education, training opportunities, and responding overall to the community’s needs, First Nations are then “able to become self-sufficient and no longer depend financially on Ottawa” (Respondent 6, Interview, 2013). Financial independence is conceptualized to be attained through industry specific training and long term job opportunities in the adjacent resource development project.

Another respondent explained the situation by saying that when maintaining successful long-term partnerships, “signing the agreement is not the end of this process. Informal and formal meetings will take place during the course of the year, cooperation agreements can be signed, and there can be support for education and training of adjacent communities as well as mentorship programs”(Respondent 3, Interview, 2013). According to this same respondent, “building partnerships helps educational and training opportunities to happen” (Respondent 3, Interview, 2013). This was considered by the respondent to be important because they believed that “building capacity and [community] sustainability” is accomplished through “building long-term careers” and “supporting bands to build new skills” (Respondent 3, Interview, 2013). These skills and careers can then be actualized through industry opportunities hopefully for the long term.

For these respondents, to move forward and work together for the long-term, relationship building during the consultation process was considered necessary to being able to understand and respond to community needs when building agreement.

It was noted by both the EAO staff as well as four of the industry respondents that not all industry proponents do a good job when undertaking consultation. The two EAO respondents stated that they were well aware that, “some industry proponents go out there and do an excellent job of engagement. Others make a mess of it and, in actuality create further complications in the relationship with the community with whom they must consult” (EAO Interview 2, 2013).

Building these relationships, building opportunities, and undertaking successful consultation was not said by any of the respondents to be easy. According to one respondent, some First Nations “have a suspicion of industry or outsiders” and this means that even making the first connection with that community is going to be a challenge (Respondent 6, Interview, 2013). However, as another respondent affirms, there is still the need to “build relations” and that this can be accomplished by “being honest” and not “beating around the bush on issues” that will affect the community (Interview 8, 2103). In order to do this, it is necessary to engage First Nations early on in the EA process so that they are “kept abreast of what is going on” (Respondent 8, Interview, 2013). If this is not done then there is likely to be misinformation about the project that will not be dispelled and this will cause further challenges down the road with that community and their attitudes toward the project (Respondent 8, Interview, 2013).

Those interviewed had different theories on, and approaches to, building the necessary relationships and undertaking successful consultation processes. For one respondent, successful consultation means building and personalizing the relationship, and in other words having that connection be, “person A to person B rather than company A to company B” (Respondent 6, Interview, 2013). As this respondent explains, through this, interest based discussions can be engaged in and relationship building can happen “so that over the long-term the issues have been heard and they know where you are coming from” (Respondent 6, Interview, 2013). Another respondent perceives forgiveness and respect to be important to addressing past issues and being able to build relationships for the future. For this

respondent, this includes building new relationships between stakeholders but also working toward building a new definition of Canada that includes a First Nations perspective and identity (Respondent 2, Interview, 2013).

The attitudes to relationship building during consultation were noted by four of the respondents to be important. One of the EAO staff characterized the importance of relationship building to the EA consultation process as follows:

“Some industry proponents work hard and are successful at creating positive working relationships with First Nations while others are not. There is a balance between First Nations lack of veto power in regards to whether a project goes forward, and the legal stipulation that government must not simply run over First Nations interests. In cases where there is ongoing opposition and industry has made a mess of the consultation process, the decision as to whether a project goes through may be more challenging” (EAO Interview 1, 2013).

It was suggested throughout the interviews that the consultation process is an opportunity to make a connection and create positive productive working relationship between stakeholders that will lead to better long-term agreements. As the EAO explains, the community plan that is developed through the process “stays there with that community and [that plan] is about fostering a good relationship” (EAO Interview 2, 2013).

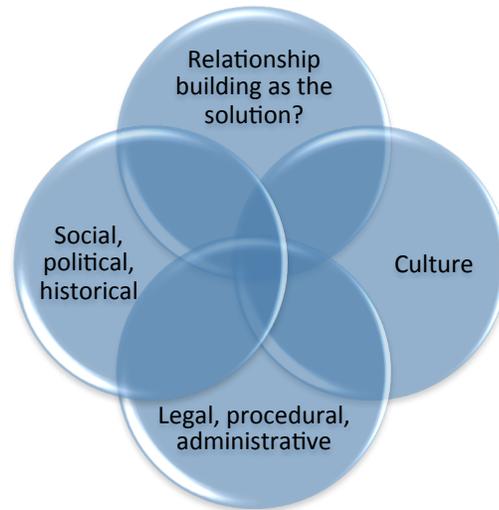
The interview findings will be considered in the discussion section in conjunction with the legal texts from Chapter 2 and the literature reviewed as a basis for the research. The key themes of the research findings will again be touched on, as will the categories that emerged through the interview process.

CHAPTER 6: DISCUSSION – UNDERSTANDING THE RELATIONSHIP

Challenges associated with the EA consultation process were identified in the literature reviewed and during the interviews undertaken. Through the interviews, participants identified that building better relationships between First Nations and government and First Nations and industry was a solution to the challenges they felt existed in this process. In the literature, building better relationships was also considered key, but that utilizing a more participatory processes that both depended on and facilitated the creation of better relationships and, as a result, business ‘partnerships’ was a correlation considered also important.

Considering the data from the primary sources in conjunction with relevant literature, can help investigate further the findings of the research. This investigation is useful to understanding the relationships between stakeholders and to further explain the categories of consideration that have emerged in the findings. These categories were: 1) Historical, social, and political considerations; 2) Law, procedures, administrative considerations; 3) Attitudes, predispositions, and cultural considerations and; 4) Relationships as the solution.

In this discussion the legal data is woven in with the perspectives from the literature and interviews to offer the opportunity to see the connections between information sources as well as the different ideas that emerged through the research. To do this, a slightly amended categorization is used to allow data from all sources to be integrated, considered, and discussed. These are: the role of culture within the social, political, and historical considerations; law, procedures, administrative considerations; before building relationships: establishing a First Nations perspective; building relationships: can law help?; building a better relationship: what is important.



The Role of Culture within the Social Political and Historical Considerations

General issues that have developed historically between the Crown and First Nations have been well documented in academic literature. It can be observed that European colonialism, and the resultant push for First Nations sovereignty has gone on for many years to now become a greater part of the national consciousness.

In the interviews this colonial history is recounted. As one interview respondent explained, there is a clear record of First Nations people residing on this land that goes back much farther than Europeans first contact with this country (Respondent 1, Interview, 2013). As a result, “Canada is something that happened to aboriginal people” (Respondent 1, Interview, 2013). First Nations resided in this land and Canada came to be initiated formed around them with little to no First Nations participation. It is this notion that makes First Nations alienation and disenfranchisement within the Canadian nation-state all the more contentious, and puts it at the heart of the issues alongside First Nations forced assimilation (Respondent 1, Interview, 2013).

At the onset of European contact with First Nations people the concept of the “two canoes” characterized the relationship (Respondent 1, Interview, 2013). This notion conceptualized First Nations and Europeans both doing business alongside each other, one not interfering with the other, and both thriving (Respondent 1, Interview, 2013). This continued for approximately 70 years until tension began

to grow between the European nations that had come to do business in Canada (Respondent 1, Interview, 2013). As Europeans sought to stake claim to the land and resources in the area, differences between aboriginal and European ways became more apparent (Respondent 1, Interview, 2013). European notions of exclusive ownership over the land came to play a key role in the evolution of the European – First Nation relationship, and contributed to First Nations people seen as an impediment to settler and economic progress (Respondent 1, Interview, 2013). Aboriginal people, by the hand of the Royal Proclamation, the 1867 Indian Act, unfairly negotiated treaties, illness, stereotyping, racism, and other socio-political constructs, were disempowered and disenfranchised from the land that they had historically inhabited, their communities, and the new Canadian nation-state.

The repercussions to this are noted in the interviews but also in the literature. First Nations communities as a result of colonial forces came to experience higher than average levels of social and economic issues including poverty, substance abuse, illness and violence (Shaw, 2012, p. 14). As a result, First Nations cultural and spiritual practices slowly eroded (Shaw, 2012, p. 14).

Cultural differences were acknowledged in both the literature and the interviews as important. Although culture was highlighted to a greater extent in the literature than in the interviews, the same ideas around its importance emerged. It was widely discussed that First Nations people and European conceptions regarding their relationship to the land and resources were widely different. EAO staff (Interview, 2013) identified First Nations people as having a longer-term vision of our land and resources and McGregor (2013) explained that First Nations people have a tie to the land that is culturally unique. The importance of this is that First Nations people conceptualize their place within their surrounding environment differently than Europeans and this, as Lewis and Sheppard explain, came to influence First Nations social patterns and beliefs about land use (2006). Later different conceptions of human's relationship to the land made the integration of First Nations views and knowledge hard to measure and incorporate into conventional resource management processes (Sheppard & Lewis, 2006). How factors considered important to each stakeholder are understood and provided for is something that presents a challenge as a result of different perceptions related to land and resources (Satterfield, 2013).

As can be seen, these land use issues between First Nations and Europeans have a long history within Canada. Europeans came to historically dominate the land and resources, but in recent decades, First Nations' have continued their demands for clear legal rights and recognition in a manner that has led to a number of court rulings, Charter considerations, official government reports, and policy decisions that have sought to shift the nature of aboriginal people's relationship within, and to, Canada by addressing issues and questions around aboriginal rights and title.

A political resurgence of First Nations nationalism that demands a unique status for First Nations within Canada, as well as a shrugging off of the paternalistic relationship Canada has afforded First Nations for many years, has been tied to a push for more defined legal rights and clearer processes around resource development that includes definitively the First Nations perspective. This assertion has seen many First Nations people request recognition as a third order of government alongside French and English Canada; to be recognized as an official stakeholder in the Canadian nation-state (Bakvis et al, 2009). But, in order for this socio-political shift to occur, and for there to be, as interview 'Respondent 2' puts forward, the "creation of a new Canada", there is the "necessity to decolonize" and to "decolonize the colonizer" (Interview, 2013). In this perspective there is considered to be a clear revitalization of the relationship, achieved through an understanding of the cultural, legal, and socio-political considerations and their implications.

One interview respondent discusses the importance of building a definition of Canada that is actively injected with characteristics that all Canadians, including First Nations, consider important, such as respect (Respondent 2, Interview, 2013). It is the perspectives and relationships between all of the people of Canada that must shift including First Nations, other Canadians, government, and its institutions. However, this complicated by the notion Goertz asserts, that the idea of empowering First Nations is often seen to come at the expense and suffering of the state or, in the case of resource development, wider society (2013, p. 11).

Ultimately who holds the decision-making power is important in resource and land use questions. This is tied to a number of considerations as well as the consequent position each stakeholder is afforded in these processes and the opportunity they are given to influence it.

Law, Procedures, Administrative Considerations

Although power was not a theme explicitly named in the interviews, it did come out explicitly in the literature reviewed. Power was considered in the literature to be a characteristic of imbalances in the relationship between stakeholders, with its symptoms felt in the processes developed to deal with land use issues. Power asymmetries, or imbalances, were manifested in the ability or inability of participants to influence decisions with a lack of influence resulting in participant cynicism and disengagement (Reed, 2008).

One key consideration tied to power and relationships is the conception of a fiduciary responsibility /relationship that the Crown has for, or with, First Nations. In the 1950's this idea of a fiduciary relationship was solidified. Derived from the common law tradition and the embedded historical notion that First Nations were unable to care for themselves, it set the tone and context of Crown-aboriginal relations. The Indian Act gave shape to the general perspective that aboriginal people were wards of the state. As a result, their care and welfare were not only an obligation of the state, but also considered a part of the political trust (Parliament of Canada, 2002). Many negative impacts to First Nations populations were a result of this Act.

In the 1984 landmark decision *Guerin v. R.* the legal consequences of this duty were more completely outlined. Most importantly, the Crown's position was said to be between aboriginal people and third parties and that due to the fiduciary obligation of the Crown, Crown thereby had the discretion to decide the aboriginal interest. And, it is through the fiduciary nature of Crown's obligation, that Crown's conduct would be appropriately regulated when dealing with the land on behalf of aboriginal peoples (Parliament of Canada, 2002).

Throughout this time period other court cases further defined this fiduciary relationship and duty,

but what is important to note is that, by the nature of this fiduciary duty, First Nations people were not afforded an equal power position vis-à-vis the Crown. As wards of the state, First Nations people's capacity to independently affect major decisions in relation to resources or land-use was limited by the Crown's position as fiduciary. Consultation with First Nations people was not therefore a key consideration in land-use planning.

In the 1990's, with *R. v. Sparrow*, the scope of the fiduciary concept was extended using section 35 of the Constitution. Two important pieces came from this decision. Although the court affirmed that the Crown has a responsibility to act in a fiduciary capacity with respect to First Nations people, this relationship was not to be adversarial but instead trust-like. This was the historic relationship that was to be widely understood when recognizing and affirming aboriginal rights. Secondly, it is with this special trust relationship in mind that any action or legislation that could infringe on aboriginal rights should be considered (Parliament of Canada, 2002).

The notion of a justification test was introduced in the court and included asking: whether the "infringement has been minimal, whether fair compensation has been available, and whether the affected aboriginal group has been consulted" (Parliament of Canada, 2002, p. 6). It was acknowledged that this justificatory standard may place a heavy burden on the Crown (Parliament of Canada, 2002). The departure from the narrow legal conception of the fiduciary obligation of Crown, to include the notion of a trust-like relationship, is important because it left the potential for a shift in the power differential between First Nations people and the Crown. This was especially true when it was combined with the idea that First Nations should be considered or consulted when their rights are affected.

Delgamuukw v. BC (discussed in depth in Chapter 2) was a court case that took place in 1997 and considered to be the major turning point in aboriginal relations, aboriginal title, and the treaty and consultation processes. The case of *Delgamuukw* confirmed that aboriginal title (the right to the land itself) does exist (BC Treaty Commission, 1999). Now that aboriginal title was considered a legal right, consultation must take place in relation to that right. First Nations people secured a clearer role and position in land-use decisions and significantly more leverage and power relative to the Crown.

Later, cases like Taku River and Haida would solidify consultation as the Crown's legal duty. Solidifying the duty was accomplished using the Constitution Act and a departure from the Crown's obligation solely as a fiduciary (Osbourne, 2006). It meant that instead of this duty being derived from the fiduciary obligation, it was instead seen as being derived directly from the Constitution Act and what would be defined as the "honour of the Crown" (Osbourne, 2006, p. 23).

Canada has been slow to formally acknowledge First Nations as independent nations who have natural rights associated with the land and resources within Canada. According to one interview respondent, the idea that, for First Nations people, Canada is an ethnic homeland, and their identity is inextricably connected to the land and the ancestors that now reside within it, has been a hard concept for Canadians to grasp (Respondent 1, Interview, 2013).

BC has been even slower than the rest of Canada to settle the treaties with First Nations that affirm these land rights (Domvile, 2005). The slow treaty process has contributed further to the unique circumstances outlined in the above sections, but also to the need for an even more established working relationship with First Nations due to the absence of a treaty relationship. However, as Goertz explains, since the issues and symptoms of the failing relationship have gone unaddressed for so long, attempting to negotiate a new relationship is now more difficult given the entrenched nature of the feelings of distrust and suspicion (2013). The circumstance exacerbates the persisting socio-political and economic inequities to further fuel hard feelings and the difficult relations between First Nations and government (Goertz, 2013).

It is important to consider the wider context when looking more closely at the BC Environmental Assessment Process. Consultation with First Nations is but one small piece in EA overseen by two government agencies - the BC Environmental Assessment Office and the Canadian Environmental Assessment Agency. In light of First Nations assertions for greater sovereignty and national recognition outlined above, it is possible to develop an understanding of how consultation has become such a critical issue and a source of contention in relation to land and/or resource extraction projects in claimed or designated First Nation's territory. Consultation has been a crucial avenue for First Nations to assert

themselves in the land planning processes, for their perspective to be heard, and for there to be the potential that their wishes will be integrated and needs met. For these reasons the importance of the relationship and the power differentials that exist between stakeholders is something that can be connected to the legal parameters that were developed and that exist around the consultation process.

Building Relationships: Establishing a First Nation's Perspective

Tensions that arise from conflicts related to the assertion of First Nations sovereignty and rights also seep into and colour differences in environmental planning and land management. These tensions have come to be characterized as a conflict that stems from cultural differences between First Nations and the prevailing government and industry partners in regards to a people's relationship with the land (Paci et al, 2002). Aside from the cultural considerations already noted, one interview respondent suggests that this tension is further exacerbated by the unrecognized fact that First Nations have traditionally had land management policies in place that were meant to promote sustainability (Respondent 2, Interview, 2013). These policies are coupled with a knowledge of the land that comes from many generations of occupying an area (Respondent 2, Interview, 2013). First Nations traditional role as stewards of their lands had been ignored as a result. In this way, these two factors only further exacerbate the struggle around First Nations right to control land use as would be considered culturally appropriate (Paci et al, 2002).

Finding a way to incorporate the traditional knowledge into statutory law and/or government policy, as well as into the EA Process and industry driven resource based projects, has been a major part of First Nations' struggle for inclusion and representation within the formal government system (Paci et al, 2002). First Nations' struggle to be recognized as a third order of government within Canada and their consequent legal battle to have those rights and title officially recognized within the legal system, has been considered key to gaining recognition as an official stakeholder when resource based projects are considered. Given that cultural rights have historically been given formal recognition and solidly

established primarily through the use of the legal system, it is unremarkable that recognition of a unique cultural perspective in relation to land use would run in tandem with this.

The EA Process incorporates traditional knowledge studies into the information-gathering process. First Nations people are given the opportunity to incorporate knowledge of the area and how a proposed project would impact the area's traditional and current uses. Nevertheless, the weight given in the EA process to a project's potential impact on traditional use is dependent primarily on the strength of claim of the area in question, wider society's interests, and the level of impact the project is thought to have on the First Nations effected (EAO, 2013).

Internal struggles within various First Nations groups complicate this issue further. Traditional interests that wish to see the land left intact, struggle and compete with the motivation to welcome economic development opportunities into traditional territory (Respondent 3, Interview, 2013). For a population that suffers from a very high unemployment rate, dismal standard of living, and a lack of opportunities, managing the expectations and balancing the differing opinions and interests can be a struggle (Respondent 3, Interview, 2013). Within and across various First Nations groups the openness to industry development in traditional territory can be varied (Respondent 3, Interview, 2013). For those interested in welcoming development, the motivations for this are primarily economic and hold the notion that there is a right to benefit from the resources used and extracted in claimed territory (Respondent 6, Interview, 2013). There seems to be an expressed consciousness that, due to unpreparedness and a lack of legal support, First Nations have historically 'missed out' on the opportunities and benefits associated with resource extraction (Respondent 7, Interview, 2013). For those First Nations in favour of resource development within their territory, there is the message to industry that there is a readiness and a willingness to work in partnership, if that partnership is going to be for mutual gain (Respondent 6, Interview, 2013). Long-term considerations such as the education, training, and economic stability for future generations seem to be at the forefront of the rationale provided for this engagement and relationship building activities that are evolving between First Nations and the resource industries in BC (Respondent 2, Interview, 2013).

These relationships are meant to break the economic cycle of small contract work for communities and the poverty and instability that come from this (Respondent 7, Interview, 2013). This interview respondent characterizes the social and economic challenges that plague First Nations as ‘Indian-omics’ (Respondent 7, Interview, 2013). These challenges are long term and are manifested as a large discrepancy between on and off reserve living conditions and an overall interest in addressing the challenges and disparities that have plagued First Nations in order to find something better for the future (Respondent 7, Interview, 2013). This respondent believes that looking at how they can move into the future with what they have is crucial to seeing a shift, but that a change in the mentality of First Nations themselves is also necessary in order to see that change (Respondent 7, Interview, 2013). Those likeminded to this respondent, see this shift coming from a mutually beneficial partnering with industry rather than from looking to government (Respondent 7, Interview, 2013).

It was noted in the literature, but more predominantly in the interviews, that there is a willingness on the part of some First Nations people to find mutually beneficial agreements around land resources. There are powerful motivations for this, however the relationship between First Nations and industry is often complicated by a number of factors.

For this reason, before a relationship or business partnership can be built, a mutual recognition of the circumstances and perspectives of the stakeholders involved, including a First Nations perspective, needs to be developed. First Nations people are widely recognized in the literature and in the interviews to have a unique cultural view and relationship to the land and its resources. Making the time and effort to find this understanding around these considerations is even more necessary for all stakeholders given the complex policy and legislative framework within which this process sits. As McGregor points out, this complicated framework creates barriers to First Nations ability to take part in the process and, given the history of relations, it has now become the challenge of resource management to work around these in order to include First Nations (2011, p. 301). For Wyatt, there is a significant connection between the ability to develop these relationships and the ability to find success in a process such as this one (2008). At essence finding a means to co-exist, starts with the acknowledgement of belief, values norms etc that

make a culture distinct (Wyatt, 2008). It is this acknowledgement that is at the heart of any successful new relationship.

Building Relationships: Can Law Help?

Law has sought to play a role in directing stakeholders to find a new relationship and new ways of coming to agreement when considering the utilization of land and resources. This was done primarily through the reconceptualization of aboriginal rights and title that was outlined in common law cases. From here policy directives, such as ‘The New Relationship’ were established by the government with the intention of setting the tone for future exchanges between First Nations and government.

However, the way in which the law is constructed around First Nations consultation has also been cited as one of the major issues associated with the EA consultation process and an impediment to the development of positive working relationships within it. Lack of internal capacity coupled with lack of funding means that First Nations peoples struggle to respond to requests from industry and, industry in their haste to move forward, miss the opportunity to build relationships (Respondent 3, Interview, 2013). This is only exacerbated when important areas of concern for First Nations people cannot be integrated into the EA process or when expectations regarding the accommodation measures are disappointed. As noted by Booth and Skelton, an attempt can be made to consider aboriginal interests, but the EA process allows projects to potentially move ahead whether those interests are properly addressed or not (2011). As Reed acknowledges, if the “decision has already been made, or the decision cannot be influenced by stakeholders, then participation is meaningless and inappropriate (2008, p. 2423). Finding the provisions for inclusion through the legal or policy framework is only valuable when the actual inclusion has purpose and weight in relation to the decision.

For the EAO, the legal framework, or policies like the New Relationship were thought to have more impact on the development of working relationships and came up more frequently in the interviews and than they did for industry proponents. Although for industry there is an acute awareness of the legal framework that guides their mandate and tasks, the social, economic, historical, and political

considerations that challenged engagement and relationships were closer to the front of their consciousness and squarely within their frame of reference.

For industry, the focus of their task was on finding agreement regarding project direction and scope. For this reason, interpersonal and stakeholder relationships coupled with political, social, and historical considerations were cited as playing a heavier role in the challenges or successes of engaging First Nations and building beneficial working relationships.

Further, complaints from industry proponents were noted in the literature around the lack of clear guidance from government in relation to the engagement process as well as a lack of clear communication of their expectations (Fox, 2011). Even if there were provisions in law to ensure an equitable process that better addressed First Nations concerns, diffuse tension, and improve relations within the EA process, government is perceived to have failed to communicate and direct industry in this regard. As Reed notes, for First Nations people, the neutralization and marginalization of their perspectives, a situation considered inherent to the EA process, has meant that disillusionment with the process can result due to a perceived inability to see their interests met (2008). This situation is only worsened if engagement is not completed in a genuine manner with the interest of hearing, mitigating, or accommodating the concerns of those affected, a circumstance that is noted by the EAO to exist (EAO Interview 1, 2013).

The EAO, despite their focus on legal considerations also did acknowledge the challenges associated with the historical relationship between stakeholders that causes difficulty in negotiating agreements and in building relationships based on law and policy alone. It was communicated by those interviewed in the EAO that for both sides to move forward into the new relationship it was necessary to experience success in future partnerships (EAO Interview 1&2, 2013). The success of these partnerships is thought to be dependent on the ability to balance interests and accommodate First Nations concerns, while at the same time considering the needs of the wider public (EAO Interview 2, 2013). This is unfortunately difficult due to the often-competing interests of these stakeholders in the EA process that potentially serves as a barrier to improving relations (EAO Interview 2, 2013). For the EAO, relationship-

building in this context was still considered an imperative to finding success in negotiations despite its challenges (EAO Interview 1&2, 2013).

It can be summarized that, while new legal considerations and precedents have also provided new opportunities for equitable relationships and new business partnerships, building these relationships may be difficult to realize given the many other factors at work within this process.

Building a Better Relationship: Overcoming the Challenges

All parties interviewed cited relationship-building as the most important consideration in the consultation process, despite the critiques of there being a lack of clear guidelines around how to actually build a relationship within the EA process. Further, it was expressed by both the EAO staff interviewed, that industry proponents must undertake consultation activities that show a commitment to creating working relationships and that, if this process fails, the decision regarding whether the project is to go ahead is made more difficult (2013).

The relationship between the participatory process and relationship building has been touched on, and it has already been established that both aspects can be seen to have the potential to affect the other. In one option, the relationship between parties can be guided strictly by the parameters of the process in order for that process to facilitate the relationship. As noted in the accounts of the EA process outlined in the legal context considerations, the interview data, and the literature, this particular process lacks detailed guidelines or frameworks regarding the more personal relationship building components of consultation. From the interview data, it can be extrapolated that the relationship forged through consultation is going to be unique to the parties involved and shaped by the individual and group dynamics that are present. Although it was noted by all those interviewed that the motivations for creating that relationship may vary, the existence of such a common theme is worth discussing.

Consultation within this field has been slowly evolving. And, as stated by an EAO staff person interviewed, the practice and methods of engagement have had to change, be flexible, and be responsive

to the varying and unique situations of each community with whom consultants are engaged (EAO Interview 1, 2013). This is so that each interaction is shaped by the environment, context, climate, and people involved. As well, the political climate created by the government in power was noted by the EAO as having an impact on negotiations and consultation (EAO Interview 1, 2013).

Due to the historically complicated nature of relations between all parties, and the uniqueness of the communities engaged, how any participatory process is to be undertaken is theorized differently depending on perspective. However, as communicated in seven of the interviews, there must be a willingness on behalf of all parties to engage in a genuine way with each other. For one respondent, successful relationship building, means making a connection on a personal level with the motivation of a true interest and openness to the other (Respondent 6, Interview, 2013).

Petrucci and Tallman identify five keys to successful business partnerships. Within these five keys, building effective relationships is outlined to be accomplished through mutual confidence, trust and a commitment to the project and the relationship (Petrucci & Tallman, 2011). As well, in the management of this partnership, power-sharing, accountability, and responsibility are all also considered to be important (Petrucci & Tallman, 2011). For Booth and Skelton, the creation of “sound, positive, and respectful relationships” is at the heart of the EA process and is what leads to the development of mutual understandings (2013). Although both parties can be motivated by the promise of a mutually beneficial working relationship, if persistent issues are not adequately addressed the agreement is unlikely to be either durable or long lasting.

The development of better relationships was considered in the literature to also be connected to more effective participatory processes both because as Fraser et al. state, the views of individuals affected by the proposal could more readily be engaged. And, as Reed argues, stakeholder participation can then be underpinned by a philosophy that emphasizes “empowerment, equity, trust, and learning” (2008, p. 24817).

The “New Relationship” policy document developed in 2005 had the purpose of identifying methods of strengthening First Nations-government relationships as a means of building sustainable

economies and addressing issues surrounding aboriginal rights, title, and treaty rights (Province of British Columbia, 2010). This 'New Relationship' is considered integral to a revitalization of the Crown – First Nations relations (Respondent 1, Interview, 2013). Acknowledging the importance of respect and trust in any relationship, business or otherwise, is an important step in setting an intention for the direction of the relationship. Even if the document is considered aspirational, it still provides a baseline for both parties to measure how they are doing in this capacity.

In the interviews and academic literature, relationship building was an approach considered to play a key role in overcoming the multitude of challenges that were also identified by these research sources. As well, a well built participatory processes was also given equal emphasis in the literature as a tool for overcoming process challenges.

CHAPTER 7: CONCLUSIONS AND IMPLICATIONS

The purpose of this thesis has been to identify the difficulties in applying principles related to the “Duty to Consult” as it relates to one environmental issue, specifically as it applied to the BC Environmental Assessment (EA) process. Identifying and examining the difficulties of consultation helped explain what the overall approach must be when undertaking this type of consultation and why this approach is of such importance. It was established that the key approach to successful consultation was the building of better relationships between stakeholders. Developing participatory processes that are equitable, open, and inclusive are also considered as contributing to these relationships.

The courts have been a valuable recourse and starting point for creating a shift in the processes utilized and in creating a new framework from which to conceptualize the relationships between parties. However, for an evolution of Canada’s relationships with First Nations to take place, the attitudes of individuals and the wider Canadian society must also evolve. Given that the courts have taken a small step back from this arena, it would seem that there is agreement that for now this shift must happen without further significant guidance from the courts.

In the resource industry the shaping and moulding of relationships is triangulated. The motivation for the profit that is offered through resource exploitation is negotiated not just between industry and governments but now between industry and First Nations as well. As a result there are important relationships that are being forged here also. In this second relationship, the boundaries and rewards of negotiating a successful agreement are not as set in stone, and particularly in BC, the agreements that are crafted can vary greatly depending on the circumstances. For interested First Nations people, negotiating the terms of their inclusion in the profit that can be acquired in this sector is dependent on the competency and capacity of the community, as well as the willingness of industry to negotiate in good faith with the purpose of building a sustainable equitable long-term working relationship.

It can be observed that the competency and capacity of First Nations is increasing, as has the willingness of industry to forge advantageous partnerships due to the long-term nature of projects in sectors such as mining and energy that differ from short-term mentality of the forest industry. As well, emerging perspectives that see 'relationship building' with First Nations as a keystone to negotiation and the creation of a successful long-term project promote this further. Consultation in any industry is slowly becoming the norm and considered crucial to any type of community relations.

Key implications that result from this research can be identified:

- 1) Identify further the experiences around participant efficacy in the consultation process.
 - a. Implications of held perceptions surrounding the ability to affect process outcome
 - b. Perceptions around process participation and action taken as a consequence of participant input
 - c. The effect of participant disillusionment with the process on the relationship with other stakeholders and key relationship characteristics such as trust
- 2) An investigation of what new pathways of communication can be created between government and industry to help give feedback to government about the challenges of the EA process from an industry perspective.
- 3) Further investigation of how anecdotal information documenting the experiences and lessons of those working within the industry could be shared more effectively between stakeholders.
- 4) Investigate long-term business relationships between industry and First Nations people to identify what has made the partnership successful.

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APPENDIX 1: LEGAL CONSIDERATIONS

Section 35: Constitution Act 1982

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

(Constitution Act, 1982: Section 35)

Aboriginal Rights and Title: defined.

Aboriginal rights are described as:

.....practices, customs or traditions integral to the distinctive culture of the First Nation claiming the right. A practice undertaken for survival purposes can be considered integral to a First Nation's culture. Some examples of aboriginal rights are hunting, fishing, and gathering plants for traditional medicines and spiritual ceremonies. Aboriginal rights may be connected to a particular piece of land, and are generally not exclusive.

(Province of British Columbia, 2010, p. 5)

Aboriginal title is described as follows:

. ... a subcategory of aboriginal rights that has its own test for proof. It is a unique interest in land that encompasses a right to exclusive use and occupation of the land for a variety of purposes. Those uses must not be inconsistent with the nature of First Nation's historical attachment to the land. A claimant must prove exclusive occupation of land prior to sovereignty.

(Province of British Columbia, 2010, p. 5)

Treaty rights are rights held by a First Nation in accordance with the terms of a historic or modern treaty agreement with the Crown. Treaties may also identify obligations held by a First Nation and the Crown" (Province of British Columbia, 2010, p. 5).

Regulations developed under the EAA

The four most relevant regulations are the following:

1) Reviewable Project Regulation. This regulation determines the types of projects that trigger an environmental assessment. These 'triggers' are referred to as thresholds by the EAO (Environmental Assessment Office, 2010, p. 15). An example of a pre-determined 'threshold' would be the production capacity of a particular operation.

2) Prescribed Time Limits Regulation. There are specified timeframes within which certain stages of the process must be carried out (Environmental Assessment Office, 2010). Time limits apply to actions required for both the EAO and the proponent (Environmental Assessment Office, 2010).

3) Public Consultation Policy Regulation. How public consultation should occur during the environmental assessment process is specified under this regulation (Environmental Assessment Office, 2010). For instance matters related to: providing public notice; ensuring access to information; establishing public comment periods; and holding open house forums are outlined (Environmental Assessment Office, 2010).

4) Concurrent Approval Regulation. This regulation outlines the process of concurrent permitting which allows proponents to apply to have other agencies consider applications for provincial permits and authorizations at the same time that an Environmental Assessment is being undertaken (Environmental Assessment Office, 2010). This is limited by the stipulation under the EAA that permits or approvals cannot be issued unless the responsible ministers issue an Environmental Assessment Certificate (Environmental Assessment Office, 2010). This regulation therefore provides the opportunity for decisions in relation to other permits or approvals to be made within 60 days of the issuance of a certificate (Environmental Assessment Office, 2010).

APPENDIX 2: LISTS

List of activities Considered Components of Meaningful Consultation

- Give notice to the affected aboriginal groups;
- Gather information to test policy proposals;
- Disclosure of information;
- Seek aboriginal opinion on the proposal;
- Inform aboriginal opinion on the proposal;
- Inform aboriginal groups of all the relevant information upon which the proposal is based;
- Listening with an open mind and be prepared to alter the original proposal before a decision is made;
- Provide feedback during the consultation process;
- Offer reasons for a decision, if necessary (Osbourne, 2006, p. 4).

List of EAO Responsibilities

- determining if a major project requires an Environmental Assessment;
 - specifying the assessment process to follow;
 - ensuring the information required for a proper Environmental Assessment is provided;
 - ensuring access to information;
 - providing opportunities for government agencies, First Nations, local governments, stakeholders and the public to comment on the proposed project;
 - managing issues and balancing interests;
 - carrying out the Province's legal Duty to Consult and accommodate First Nations' rights and title;
 - ensure that all potential environmental, economic, social, heritage, and health effects of a proposed project are considered;
 - at conclusion of the process, prepare a comprehensive assessment report that canvasses all the issues raised by government agencies, First Nations, local government, stakeholders, and the public;
 - highlight any potential adverse effects associated with a project and consider whether and how those effects can be avoided or mitigated through conditions or commitments from the proponent;
 - forward this report, and the EAO's Executive Director's recommendations, to the two responsible ministers who then decide whether or not to approve the proposed project;
 - issue an Environmental Assessment Certificate if the responsible ministers decides to approve a project;
- (Environmental Assessment Office, 2010, p. 11)

List of Factors that Influence the Degree of Impact on Aboriginal Interests

- the permanence of impact on the land or resources;
- the geographic extent of impact on the land or resources;
- the potential for interfering with a known sensitive area or place with specific values;
- the potential for interfering with First Nation uses or activities on the land in a manner that would lead to undue hardship for that First Nation in being able to carry on those uses or activities;
- the degree to which the First Nation will continue to have the ability to use the affected land or resources in their preferred manner;
- the extent of existing development in the area;
- the extent of impacts on fish and wildlife and their habitat; and,
- the nature of the decision – administrative or operational.
(Province of British Columbia, 2010, p.11).

List of Information Included in Initial Contact Letter with First Nations

- information about the proposed decision or activity and, where feasible, provide maps indicating where the activity may be, and identify who the provincial decision-makers are likely to be;
- generally indicate what information the Province already has about known aboriginal interests and potential impacts and if appropriate suggest an anticipated level of consultation;
- seek clarification and input regarding the information provided;
- where appropriate, invite First Nations to meet to further discuss respective interests and possible solutions to any concerns;
- identify reasonable timeline goals for responses and the overall consultation process; and,
- identify who will be leading engagements with First Nations.
(Province of British Columbia, 2010, p.15).

APPENDIX 3: REVIEWABLE AND NON-REVIEWABLE RESOURCE PROJECTS

Reviewable versus Non-Reviewable Projects

The EA process has two stages, the ‘pre-application’ and the ‘application review’ (Environmental Assessment Office, 2010, p. 18). Although this is a linear process it is possible for some of the steps to occur at the same time (Environmental Assessment Office, 2010). In the pre-application stage it is determined whether a project is reviewable - 95% of all projects are (Environmental Assessment Office, 2010).

An example of a few projects that are generally reviewable through Environmental Assessment include the following: industrial projects, energy projects, water management projects; waste disposal projects, mine projects, transportation projects, tourist destination resort projects (EAO, 2013).

There are three ways that a project is determined to be reviewable or non-reviewable.

- 1) The most common way for a project to be reviewable is through the reviewable projects regulation (RPR) outlined in detail in the ‘legal context’ section of this paper. Generally speaking it is projects with higher environmental impacts that fall into this category since this is when the project is likely to equal or exceed the relevant and measurable thresholds that have been set out in this regulation (EAO, 2013).
- 2) The Minister of the Environment can designate a project as reviewable even if they are not under the RPR (EAO, 2013). This would be done for two reasons:
 1. The Minister believes the project may have a significant adverse environmental, economic, social, heritage or health effect, and that the designation is in the public interest; or
 2. If the project has not been substantially started at the time of designation (EAO, 2013).
- 3) A proponent may also opt-in if they see an advantage to going through a formal review process (EAO, 2013).

Projects that do fall outside of these options are deemed non-reviewable and the proponent then goes on to apply for the permits that must be gained from all of the relevant government ministries in order for the project to move forward.

Designation as Reviewable

Projects determined reviewable are assigned a project lead who are designated, under the EAA, certain authorities within the EA process and act as the main point of contact for proponents, First Nations, the public, stakeholders, and proponents (Environmental Assessment Office, 2010). An order under section 10 of the EAA is issued which accepts the project into the process (Environmental Assessment Office, 2010). The EAO notifies First Nations, government agencies, and local governments then posts the project description on e-PIC (Environmental Assessment Office, 2010).

It is with the section 10 order that the review process begins, often within a few days (Environmental Assessment Office, 2011). It is the project lead that contacts First Nations to discuss their participation and also form a working group that consists of representatives of local government, the Canadian Environmental Assessment Agency, federal and provincial government agencies, as well as affected First Nations (Environmental Assessment Office, 2011). The project proponent is not a group

member although they do attend meetings in order to provide information or explain components of the project (Environmental Assessment Office, 2011). It is through this working group that issues related to the project assessment are reported back to the EAO and through which, later in the process, the adequacy of the measures to mitigate issues is proposed (Environmental Assessment Office, 2011).

It is the responsibility of the proponent to collect all of the application's required information and to use the working group for guidance and advice in relation to the information to be collected and to help develop strategies to mitigate any impacts (Environmental Assessment Office, 2011). The EAO encourages the proponent to independently engage First Nations prior to it entering the EA process and help the proponent identify the correct First Nations to contact (Environmental Assessment Office, 2011). It is encouraged that all consultations be documented and that this documentation includes the "date, time, location, participants, issues and concerns, commitments in response to concerns, sharing of information, changes in project design, or any other relevant information" (Environmental Assessment Office, 2011, p. 23).

APPENDIX 3: SAMPLE INTERVIEW QUESTIONS-INDUSTRY PROPONENTS

Aside from understanding the practical components of this process, the interest in undertaking this project is to develop an awareness of the individual experience and conceptualizations of the people in the review process. Rather than be evaluative of those views, the goal is to be able to understand and present the areas of commonality, as well as underlying differences in opinion and perspective that are pervasive in this system.

For this reason, the questions fall into two general categories. Some are process related and others are perspective related.

At any point please feel free to add in anything you feel is relevant, important, or that you feel I may be conceptualizing incorrectly or overlooking.

- 1) Can you give me a brief overview of your job experience as it relates to first nations consultation?
- 2) What do you think are the greatest challenges for industry proponents when they make decisions about how to engage with First Nations?
 - a. Do you feel that there are adequate resources to clarify how, and to what extent, this consultation should take place?
 - b. Can you name some of the most valuable resources provided by government that help with this issue?
- 3) What do you see the role of the EAO being and how connected to you believe them to be to what is happening on the ground?
 - a. Do you feel they are accomplishing their objective accurately?
 - b. Are they sufficiently keeping pace with changes in the industry?
 - c. How do you think they conceptualize themselves in this industry?
 - d. What is the relationship between industry and the EAO like?
- 4) What do you consider to be the main challenges for First Nations in regards to engaging with the consultation process?
 - a. For those within the EAO, what do you think their chief concerns are with the current process? What direction do you think they see the review process moving in?
 - b. Do you feel the EAO's concerns are similar or comparable with those of First Nations, proponents, the public?
 - c. What do you see as being the cause of any similarities or differences?
- 5) What do you think the prevailing attitude is of First Nations in relation to resource development?
 - a. What do you think the primary motivating factors are in whether the development is welcomed or whether it is met with resistance?
- 6) *Under section 11 a proponent is assigned certain responsibilities for undertaking procedural aspects of the Crown's Duty to Consult First Nations, including information regarding the potential affect on Aboriginal rights and title. The financial and time commitments required for the education, relationship-building, and capacity-building necessary to effectively undertake the actual consultation is significant. This is particularly true of a more complex or controversial project.*

- a. What would you say is industry's pervasive attitude toward this responsibility?
 - b. How readily has industry taken on this assigned process?
 - c. If yes, what are their motivations for undertaking it?
 - d. How successful have they been?
- 7) *That the courts have defined aboriginal rights and title as stemming from a distinctive culture, and a consequent unique interest in the land (practices customs, traditions such as fishing, hunting, gathering etc) This has provided for, and given shape to, a legal and political landscape in which practices such as consultation and –where appropriate- accommodation can take place. The development of a cross-cultural awareness has been crucial to the development of this understanding.*
- a. Cross-cultural awareness seems to be one major consideration when looking at the ability to have highly functional working relationships in the EAO's working groups, during consultation processes, and beyond. What would you consider to be the biggest challenges in this regard?
 - b. How do you feel the EA process has been shaped, challenged, or enhanced by the existence of cultural differences?
 - c. How quick do you feel industry has been to develop cultural sensitivity? Has the onus for this come from them, or has it been shaped by the policy and practices outlined by government?
 - d. What are the major challenges for First Nations in navigating through the EA process and how have cultural differences played a role in this?
 - e. Have cultural differences affected the readiness of First nations to engage in the EA process?
- 8) It is my understanding a number of years working in this industry. What are the major turning points, landmarks, and changes that you have perceived in regards to aboriginal relations and how have these changed the overall perspective of First Nations consultation and accommodation?
- a. First Nations engagement has been an evolving process. In which direction do you see it moving given where we see it today?

IF TIME: Ask

- 9) *Right now there is a lot of attention being put on the EA process and how we, as Canadians, manage our resources and our relations with First Nations.*
- a. How would you describe the current political climate, and do you feel that this affects in any way the approach of the EAO and how it internally views its review process?
 - b. Do you feel there is a greater pressure to more clearly define and regulate policy and practice in what seems to be a fast evolving field?
- 10) Would you say that, as a general rule, First Nations see the benefits of coming to an arrangement with industry or they do not? Are economic benefit sharing agreements something that helps make these arrangements more feasible?

Nuts and Bolts Questions

- 11) What are the considerations that you believe to be most crucial when evaluating the extent which one should accommodate First Nations? Ie. strength of claim.

- 12) Can you talk a bit about the differences in consultation for the purposes of gaining the EA certificate and consultation for the purposes of permitting?
- 13) *It is my understanding that MOU's are, at times, written by industry in conjunction with non-treaty First Nations to outline the dialogue process, framework, and available funding. This is most commonly done with non-reviewable projects or for early engagement with first nations prior to an EA assessment.*
- a. How has this changed or formalized the process of consultation?
 - b. Are these frameworks formalized in some way?
 - c. Can you talk a bit about the circumstances when these agreements would be used?
- 14) Section 32 of the EAA would lead one to believe that the cost of the EA process is/ or can be put over to the industry proponent. What has the reaction by industry to the heavy bill for consultation and/or accommodation?
- A. In order for First Nations to be able to actively participate in the consultation process, First Nations are often offered capacity and/ or traditional knowledge funding. How does industry ensure that this funding is utilized correctly, is adequate to ensure engagement, and that it manages to enable the right information to be attained?

In Conclusion

- a) Is there any information that you feel I should consider that we have not covered here?
- b) Can you recommend any resources that I should consider looking over?
- c) Is there anyone that you feel I should speak with in relation to this project?

APPENDIX 4: SAMPLE INTERVIEW QUESTIONS- EAO

Aside from understanding the practical components of this process, the interest in undertaking this project is to develop an awareness of the individual experience and conceptualizations of the people in the review process. Rather than be evaluative of those views, the goal is to be able to understand and present the areas of commonality, as well as underlying differences in opinion and perspective that are pervasive in this system.

For this reason, the questions fall into two general categories. Some are process related and others are perspective related.

At any point please feel free to add in anything you feel is relevant, important, or that you feel I may be conceptualizing incorrectly or overlooking.

Interview questions

- 1) What do you think are the greatest challenges for industry proponents when they make decisions about how to engage with First Nations?
 - a. Do you feel that there are adequate resources to clarify how, and to what extent, this consultation should take place?
 - b. Can you name some of the most valuable resources provided by government that help with this issue?

- 2) What do you consider to be the main challenges for First Nations in regards to engaging with the consultation process?

- 3) For those within the EAO, what are the concerns currently under consideration with the idea that addressing these may further improve the review process?
 - a. Do you feel the EAO's concerns compare with those of First Nations, proponents, the public?
 - b. What do you see as being the cause of any similarities or differences?

- 4) *Under section 11 a proponent is assigned certain responsibilities for undertaking procedural aspects of the Crown's Duty to Consult First Nations, including information regarding the potential affect on aboriginal rights and title. The financial and time commitments required for the education, relationship-building, and capacity-building necessary to effectively undertake the actual consultation is significant. This is particularly true of a more complex or controversial project.*
 - a. What would you say is industry's pervasive attitude toward this responsibility?
 - b. How readily has industry taken on this assigned process?

- 5) How involved do First Nations typically become in the working group that forms as part of the review process?
 - a. Are there significant limitations related to capacity and, if so, how is this accommodated and accounted for in order to ensure adequate input?

- 6) *That the courts have defined aboriginal rights and title as stemming from a distinctive culture, and a consequent unique interest in the land (practices customs, traditions such as*

fishing, hunting, gathering etc) This has provided for, and given shape to, a legal and political landscape in which practices such as consultation and –where appropriate-accommodation can take place. The development of a cross-cultural awareness has been crucial to the development of this understanding.

- a. Cross-cultural awareness seems to be one major consideration when looking at the ability to have highly functional working relationships in the EAO's working groups, during consultation processes, and beyond. What would you consider to be the biggest challenges in this regard?
 - b. How do you feel the EA process has been shaped, challenged, or enhanced by the existence of cultural differences?
 - c. How quick do you feel industry has been to develop cultural sensitivity? Has the onus for this come from them, or has it been shaped by the policy and practices outlined by government?
 - d. What are the major challenges for First Nations in navigating through the EA process and how have cultural differences played a role in this?
 - e. Have cultural differences affected the readiness of First nations to engage in the EA process?
- 7) It is my understanding that you have been in this industry for some time and spent a significant number of years working in government. What are the major turning points, landmarks, and changes that you have perceived in regards to aboriginal relations and how have these changed the overall perspective of First Nations consultation and accommodation?
- a. In particular, First Nations engagement has been an evolving process. In which direction do you see it moving given where we see it today?

IF TIME: Ask

- 8) *Right now there is a lot of attention being put on the EA process and how we, as Canadians, manage our resources and our relations with First Nations.*
- a. How would you describe the current political climate, and do you feel that this affects in any way the approach of the EAO and how it internally views its review process?
 - b. Do you feel there is a greater pressure to more clearly define and regulate policy and practice in what seems to be a fast evolving field?
- 9) Would you say that, as a general rule, First Nations see the benefits of coming to an arrangement with industry or they do not? Are economic benefit sharing agreements something that helps make these arrangements more feasible?

Nuts and Bolts Questions

- 10) How is it decided when, and to what extent, to accommodate First Nations? Is this based mostly on strength of claim for instance?
- 11) Can you talk a bit about the differences in consultation for the purposes of gaining the EA certificate and consultation for the purposes of permitting?
- 12) *It is my understanding that MOU's are, at times, written by industry in conjunction with non-treaty First Nations to outline the dialogue process, framework, and available funding. This*

is most commonly done with non-reviewable projects or for early engagement with first nations prior to an EA assessment.

- a. How involved is the EAO in creating a framework within which the required consultation will take place when projects are within the review process?
 - b. Are these frameworks formalized in some way?
- 13) Can you speak a bit about the new enhanced compliance strategy, why this was developed, and what purpose is it fulfilling?
- a. Who primarily assumes the responsibility for ensuring compliance with the EA certificate?
- 14) Section 32 of the EAA would lead one to believe that the cost of the EA process is/ or can be put over to the industry proponent. Which costs –if any- are typically given over to industry, and which are costs are assumed by government?
- 15) In which circumstances is concurrent permitting typically used?
- 16) In order for First Nations to be able to actively participate in the consultation process, First Nations are often offered capacity and/ or traditional knowledge funding. I am just curious about who generally supplies the funding for which parts of this process. Is it that government pay for engagement in the working groups and industry with the outside consultation?

In Conclusion

- 17) Is there any information that you feel I should consider that we have not covered here?
- 18) Can you recommend any resources that I should consider looking over?
- 19) Is there anyone that you feel I should speak with in relation to this project?

APPENDIX 5: SAMPLE INTRODUCTION LETTER

The establishment of a de jure 'Duty to Consult' First Nations created a new paradigm for relations within BC. It is through the establishment of new legal precedent that First Nations came to be afforded official stakeholder status in land and resource use issues. New processes and perspectives for community consultation developed as a result. But, although this duty has come to be outlined in case law, many ambiguities were left in regards to the scope and depth of this duty in real 'on the ground' terms. Various policy initiatives, interim papers, best practices guidelines, as well as the ongoing procedures developed through the actual practice of consultation, have all come to shape a 'de facto' reality of this duty.

The Question

The focus of my research is to look specifically at the consultants that work in the Environmental Assessment Process on behalf of industry. What I hope to accomplish is the development of a comprehensive understanding of the overall Environmental Assessment Process, but specifically the encapsulated consultation process that takes place with First Nations.

At the end of the research I hope to be able to:

- 1) Describe accurately the Environmental Assessment Process;
- 2) Understand what the expectations for consultants are in relation to carrying out this consultation;
- 3) Understand how consultants integrate the legal conception of the 'Duty to Consult' First Nations in a manner that meets both the Crown's responsibility for consultation, as well as any other industry goals in the development of a relationship with the First Nations groups.
- 4) Understand both the nature and the formulation of the practice of First Nations consultation that has developed as a result of legal considerations and government policy.

The courts have left some ambiguities in relation to the scope and depth of what constitutes 'meaningful' consultation with First Nations. It is this lack of shared understandings and the prospective need for clarification in relation to the notion of 'meaningful', that inspires my interest in understanding how consultants that work within the assessment process interpret, conceptualize, and approach this responsibility for consultation as a result. I hope to also clarify what affects their decision to engage in a specific level of consultation with a particular First Nations group on a case-by-case basis.

The Research Process

My qualitative research approach utilizes the in-depth interview to gain a clear understanding of the perspectives of consultants practicing in this area. To gain the topical understanding required to formulate the interview questions and design I surveyed relevant legal considerations to give me a sense of the legal rulings produced in this area of study. As well, I have used document analysis as a method to review legal and government documents related to the Consultation Process.