Beyond Consultation: First Nations and the Governance of Shale Gas in British Columbia

by

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B.A., Trent University, 2009

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of the Requirements for the Degree of

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Abstract

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As the province of British Columbia seeks to rapidly develop an extensive natural gas industry, it faces a number of challenges. One of these is that of ensuring that development does not disproportionately impact some of the province's most marginalized communities: the First Nations on whose land extraction will take place. This is particularly crucial given that environmental problems are often caused by unjust and inequitable social conditions that must be rectified before sustainable development can be advanced. This research investigates how the BC Oil and Gas Commission's consultation process addresses, and could be improved to better address Treaty 8 First Nations' concerns regarding shale gas development within their traditional territories. Interviews were conducted with four Treaty 8 First Nations, the Treaty 8 Tribal Association, and provincial government and industry staff. Additionally, participant observation was conducted with the Fort Nelson First Nation Lands and Resources Department. Findings indicate that like many other resource consultation processes in British Columbia, the oil and gas consultation process is unable to meaningfully address First Nations' concerns and values due to fundamental procedural problems, including the permit-by-permit approach and the exclusion of First Nations from the point of decision-making. Considering the government's failure to regulate the shale gas industry in a way that protects ecological, social and cultural resilience, we argue that new governance mechanisms are needed that reallocate authority to First Nations and incorporate proposals for early engagement, long-term planning and cumulative impact assessment and monitoring. Additionally, considering the exceptional power differential between government, industry and First Nations, we argue that challenging industry's social license to operate is an important strategy for First Nations working to gain greater influence over development within their territories, and to ensure a more sustainable shale gas industry.

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List of Acronyms

AIA - Archaeology Impact Assessment

BC MEM - Ministry of Energy and Mines

BC MEMNG - Ministry of Energy and Mines & Natural Gas

CPA - Consultation Process Agreement

EA – Environmental Assessment

EBA – Economic Benefit Agreement

FLNRO - Ministry of Forest, Lands and Natural Resource Operations

FNFN - Fort Nelson First Nation

FNLO - First Nations Liaison Officer

FRPA - Forest and Range Practices Act

GHG - Greenhouse Gases

GIS - Geographic Information Systems

HRB - Horn River Basin

HRBLI - Horn River Basin Leadership Initiative

IEA - International Energy Agency

IHRC - International Human Rights Clinic

LNG - Liquified natural gas

MARR - Ministry of Aboriginal Relations and Reconciliation

NEB - National Energy Board

NGO - Non-Governmental Organization

OGC - Oil and Gas Commission

OGCA – Oil and Gas Consultation Agreement

WCEL - West Coast Environmental Law

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Dedication

In memory of:

Mary Watson
1924-2013

Chapter 1
Introduction

1. Research Purpose

A society attempting to address climate change in part through the development of less carbon-intensive energy systems is confronted with an opportunity: any transformation of energy systems will also transform society, raising the possibility that through the transformation society could be made more equitable, just, and/or sustainable (Shaw, 2011). One aspect of this would be to ensure that the costs of energy developments do not continue to be disproportionately borne by the most vulnerable groups (O'Rourke & Connolly, 2003). This opportunity also presents several challenges, not least: a more fair, just and equitable outcome is by no means assured: ensuring a just distribution of the benefits and impacts of the transformation will require political struggle. This struggle is made more difficult by the fact that this transformation is taking place in the context of a global political economy—and accompanying ideology (neoliberalism)—that rewards states that increase the competitiveness of their industries, in part through diminishing the regulatory requirements that are one way of ensuring a just distribution of costs and benefits (Hay, 1996). This is of particular concern where energy system development is occurring in close proximity to communities who have been the victims of past injustices, such as Indigenous Nations. In British Columbia the tensions between these two challenges are being played out through the development of the shale gas industry in the northeast corner of the province, home to Treaty 8 First Nations. [1]

British Columbia is rapidly growing its shale gas industry to meet projected increases in global natural gas demand (Ministry of Energy & Mines [BC MEM], 2012a). If successful, this will bring substantial benefits in the form of revenues for the province (Ministry of Energy Mines & Natural Gas [BC MEMNG], 2013), but there will also be significant costs, including elevated greenhouse gas emissions (Stephenson, Doukas & Shaw, 2012), habitat fragmentation and

[1] A note on terminology: Throughout this thesis the term First Nation is used to describe Indigenous groups in British Columbia, while the term Indigenous is used when referring more broadly to Indigenous peoples at a national or international scale. The terms Aboriginal and Indian are only used where necessary to respect original usage or to adhere to legal terminology.

degradation (Campbell & Horne, 2011), and unprecedented water use in the region (Parfitt, 2011). The immediate costs (aside from GHG emissions) will be borne by the local communities, including Treaty 8 First Nations in the areas where the development will occur. First Nations in northeast BC have been subject to historical and ongoing injustices that have resulted in the dispossession of their lands and cultural practices (Booth & Skelton, 2011a, Muir & Booth, 2011; Roe & Students of Northern Lights College, 2003). Therefore, a fundamental question is how the shale gas industry can develop such that it does not replicate, and indeed reinforce, these injustices? In this thesis, I investigate the shale gas industry from an environmental justice perspective, based on the understanding that environmental problems are created by unfair, unjust and inequitable social, political and economic conditions that must be eliminated before environmental problems can be resolved (Bullard & Johnson, 2000).

1.1 The British Columbian Context

Unconventional gas[2] development is on the rise around the world as conventional sources dwindle and demands for 'clean energy' grow.[3] As we shift to unconventional sources Canada is expected to remain a global leader in natural gas production (International Energy Agency [IEA], 2011). The U.S. Energy Information Administration (2011) estimates that there are 388 trillion cubic feet (tcf) of unconventional gas in Canada, over 50% of which are found in the Montney and Horn River plays in northeastern British Columbia (Figure 1). Unconventional gas deposits in Canada are predominantly found in deep shale formations. Other major Canadian shale gas deposits are located in the southern Northwest Territories, southeastern Alberta, southwestern Saskatchewan, southern Ontario, the St. Lawrence lowlands in Quebec, and throughout New Brunswick. These previously inaccessible gas deposits have been opened up through the combined use of two extraction processes: horizontal drilling and hydraulic fracturing (fracking). In hydraulic fracturing, wells are drilled down into the gaseous layer and then branch off

[2] Unconventional gas is natural gas that is accessed using unconventional extraction techniques. There are three types of unconventional gas in BC: shale gas, tight gas, and coal bed methane.

[3] Claims that unconventional natural gas is a clean fuel are highly contested, especially considering inadequate regulation in British Columbia. See Stephenson, Doukas & Shaw, 2012 and Stephenson & Shaw, 2013 for details.

horizontally for up to three kilometers. Enormous volumes of water, sand and chemicals are then forced down the well at high pressures to fracture the shale, releasing the gas trapped inside.

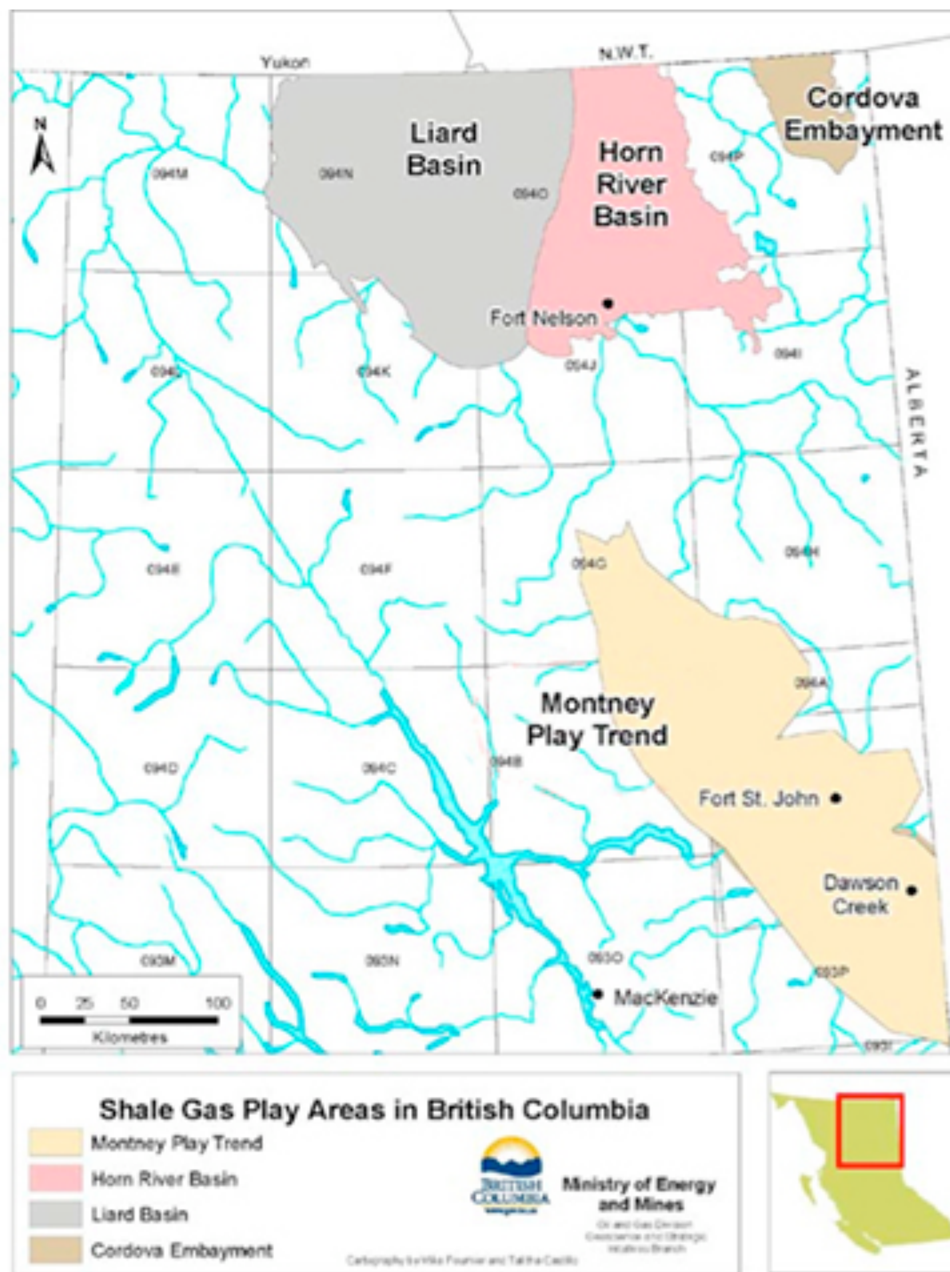

Figure 1: Major shale gas plays in British Columbia.
Source: Adams, 2012

Shale gas in BC has been called a “game changer” by the provincial government and likened to the Klondike gold rush by local residents. Between 2005 and 2009 oil and gas companies swiftly

bought up huge swaths of tenure in the northeast corner of the province. Encana, one of the largest producers in the region, purchased the rights to more than 2 million acres (Parfitt, 2010). Crown petroleum and natural gas rights sales peaked in 2008 at $2.7 billion (Adams, 2012). Once tenure was sold there was an initial rush to get the gas out of the ground while prices remained high. In the Montney play, where infrastructure was already in place from conventional oil and gas development, 1,367 wells were drilled between 2005 and 2012 (BC OGC, personal communication, June 28th, 2012). In the Horn River Basin, production was held up while roads and pipelines were built into previously inaccessible areas, but 285 wells were still drilled between 2008 and 2011 (Adams, 2012).

Oil and gas companies were originally projecting that thousands of new wells would be drilled in northeastern BC by 2020. However, the discovery of prolific unconventional gas reserves throughout North America, coupled with the 2008 recession, has resulted in depressed natural gas prices. Unless new markets are opened up the price of gas in the United States is anticipated to stay below $5 per thousand cubic feet until at least 2023 (Boersma and Johnson, 2012). To take advantage of the potential revenue held in BC's shale, the government is working towards the development of at least three liquefied natural gas (LNG) facilities by 2020 in order to access higher prices in Asia (BC MEM, 2012a). While there are a dozen proposed LNG facilities at various stages of approval, final investments have not been committed and construction has yet to begin. As time passes, BC faces growing international competition from other countries (Sandborn, Stahl & Clark, 2013, July 17; Reuters, 2013, September 5). Other significant barriers to the realization of a viable shale gas industry include capital costs, labour shortages and public support (Pembina Institute, 2012). In 2012, the IEA identified the shale gas industry's social license to operate as the principal determinant of its future success. In other words, public opposition to shale gas development is shaping how the industry will be able to advance in jurisdictions around the world. In the next section I investigate the unique characteristics of resistance emerging in British Columbia.

1.2 Fracking controversy

Images of homeowners lighting their taps on fire in the documentary *Gasland*

(Fox, 2010) brought the environmental and health effects of fracking into the international spotlight. Unconventional oil and gas companies have met with opposition and controversy wherever they have touched down (Parfitt, 2010). Resistance in Canadian jurisdictions has varied significantly. For example, public forums in Quebec during the fall of 2010 led the provincial government to declare a moratorium on shale gas exploration in the St. Lawrence lowlands until a strategic environmental assessment could be completed. The Quebec government is now proposing an indefinite ban as a result of popular pressure, "until a full environmental assessment can be completed on whether shale gas can be safely developed without posing a threat to residents" (Seguin, 2013, February 6). New Brunswick has also taken a precautionary approach with the introduction of regulations claimed to be the strictest in North America (despite concern regarding their enforceability) (CBC News, 2013, February 15). However, the adequacy of consultative processes with First Nations and the public has been criticized. A protest camp lead by the Elsipogtog First Nation has been established close to shale gas exploration activities in northern New Brunswick (Fontaine & Barrera, 2013, June 25). As of June 25th, 2013 over 30 people had been arrested, including elders and youth (Fontaine & Barrera, 2013, June 25). In contrast to responses in Quebec and New Brunswick, the vast territory, small population and history of resource exploitation in northeastern British Columbia have allowed development to proceed with limited overt resistance to date. Activities are taking place out of sight and mind of the majority of British Columbians. This may be in part because the general public has been left out of decision-making processes as development has hurtled ahead. Treaty 8 First Nations are the only citizens of BC being consulted on general development, since they must be in order to fulfill the Crown's duty to consult and accommodate on any activities that have the potential to infringe on Aboriginal and treaty rights.

Treaty 8 territory in British Columbia is home to eight First Nations. Five ethno-linguistic groupings are found within these communities: Sikanni, Dene (Slavey), Beaver (Dunne-za), Saulteau and Cree (Treaty 8 Tribal Association, n.d.). Prior to the communities being established, small family groups traveled throughout their traditional territories staying at seasonal village sites to hunt, trap, fish and gather (Fumoleau, 2004). Treaty 8 First Nations' cultures are inextricably linked to the health of the natural environment (Booth & Skelton, 2011a). Thus, resource development that negatively impacts the ecological integrity of the

Northeast poses a serious threat to Treaty 8 First Nations' traditional ways of life. This is particularly disturbing given that numerous NGOs in BC perceive current shale gas development practices to be threatening the ecological integrity of the region (Campbell & Horne, 2011; Campbell & Hume, 2012; Parfitt, 2011).[4] Additionally, in some areas of the Northeast, shale gas development is occurring in combination with mining, conventional oil and gas, forestry, wind and hydro-electric developments, dramatically increasing the cumulative impacts on the landscape.

Despite the challenges opponents face trying to create the political will needed to contest the BC shale gas industry's current practices, including the remote geography, a low population density and the promise of economic returns, development has not occurred without opposition. Focal points of resistance that have emerged in the Northeast include but are not limited to: six bombings targeting Encana gas pipelines in the Dawson Creek area between 2008 and 2009 (Parfitt, 2010); the unsuccessful call for a public inquiry into shale gas by independent MLAs Bob Simpson and Vicki Huntington; and most recently a petition by Fort Nelson First Nation to stop the giveaway of fresh water to oil and gas companies for fracking, which had gathered 30,519 signatures as of August 30, 2013. These focal points speak to a growing number of actions being taken by diverse groups to demonstrate their opposition to current shale gas development practices. In addition, Non-Governmental Organizations (NGOs) from southern BC and across Canada are speaking out against hydraulic fracturing in general, and BC's shale gas industry in particular. These include but are not limited to: the Council of Canadians (2013), the Pembina Institute (Horne, 2011), the Canadian Centre for Policy Alternatives (Parfitt, 2011, Parfitt, 2012), the Wilderness Committee (2011) and Forest Ethics (2013).

Resistance being mounted by Fort Nelson First Nation, and other Treaty 8 communities, has attracted significant media attention, in part because it activates a different set of concerns that are reflective of larger issues that BC and Canada are faced with surrounding natural resource extraction. Headlines in the provincial and national news over the past year include: "Fracking water license process angers BC First Nation" (CBC News, 2012, November 14); "Native band

[4] For the purposes of this thesis, ecological integrity refers to "the maintenance of structure, species composition, and the rate of ecological processes" (Kimmins, 2004, in Nitschke, 2008, p.1716).

in northeast B.C. pushes for water licensing reform," (Hume, 2012, November 14); "Showdown looms over BC's gas exports," (Vanderklippe, 2013, February 5). Resistance has been shaped by provincial and international discourses on the environmental impacts of shale gas development. But more importantly, First Nations' resistance also raises questions about the efficacy of provincial consultative processes, colonial natural resource decision-making frameworks, and the right to self-determination for all peoples. With respect to Treaty 8 First Nations, this means questioning whether all legal requirements to consult and accommodate are met, but also investigating whether decision-making is responsive to histories of colonialism, inequality and dispossession. These are the crucial issues that must be addressed if BC is to advance a just and sustainable shale gas industry.

In the rest of this chapter I situate the BC shale gas industry as an issue of environmental justice by providing a brief overview of environmental justice literature and relevant concepts. A short history of the making of Treaty 8 and resource extraction in the region since settler contact highlights evolving colonial relationships with state governments and global capital. Current shale gas developments are best understood as government supported acts of dispossession as the rights to natural gas in Treaty 8 territory are sold to multi-national corporations. The provincial government is in a tug of war for legitimacy, pulled between creating the optimal conditions for global capital and representing British Columbians' social values. I highlight this tension by discussing the potential environmental impacts of shale gas development in comparison to BC's current oil and gas regulations. How these conflicting responsibilities balance out will in part determine whether a more just and sustainable shale gas industry can be advanced. Oil and gas consultation processes with Treaty 8 First Nations provide a focal point to investigate the shale gas industry's impacts on the ground and how they inform governance challenges at the local and provincial scales. More generally, consultation on shale gas development exposes how the Government of BC is engaging the challenge of sustainability, and illustrates the need for a new approach that incorporates concepts of environmental justice. The chapter ends with a description of the research that I have undertaken to investigate what is happening on the ground and the necessary conditions for a more sustainable and just shale gas industry to be advanced based on the perspectives of those most immediately impacted.

2. Environmental justice

Widespread social awareness surrounding issues of environmental injustice emerged in the United States during the civil rights movement and were first formally articulated in the 1983 report: *Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status Surrounding Communities*, by the US General Accounting Office. The term environmental racism was first used to explain the distribution of environmental injustices in 1987 when the United Church of Christ's Commission for Racial Justice reported that race was the most significant variable determining a community's proximity to unwanted land use. The disproportionate siting of toxic waste dumps in low income, racialized communities in the United States sparked a movement that has evolved over the past three decades to include issues of public health, worker safety, land use, exclusionary decision-making processes, and much more (Bullard & Johnson, 2000). The most frequently cited definition of environmental justice is from the US Environmental Protection Agency:

> Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work (US Environmental Protection Agency, n.d.)

As Page (2007) and others have noted, the EPA's definition continues to emphasize two interrelated forms of injustice: procedural injustice, where decision-making processes privilege certain groups, ideas or values; and distributional injustice, whereby a group of people are disproportionately impacted by 'environmental bads.' While environmental justice research and policy-making has proliferated in the United States, the uptake in Canada has been relatively slow. Gosine and Teelucksingh (2008; p. viii) argue that the lack of environmental justice research and activism in Canada is "not a consequence of the irrelevance of these questions to the Canadian context, but of the structured resistance to speaking about and interrogating racism

in Canada." Canada's "multicultural" identity creates more complicated patterns of environmental injustice that are not centered in urban settings as they are in the United States (Haluza-Delay, 2007). However, the growing trend in environmental justice research of moving away from "documenting the distributional injustices of unequal exposure toward demonstration of procedural injustices of uneven democratic participation and ecological citizenship"(Haluza-Delay, 2007 p. 559), is opening up new Canadian applications. [5]

First theorized by Schlosberg in 2004, newer conceptions of environmental justice have introduced 'recognition' as a third, interrelated form of injustice. In an environmental justice analysis on the impacts of salmon aquaculture on coastal First Nations, Page states that this added dimension "draws attention to the ways in which alterations to local ecosystems, food systems and knowledge systems can sever a local culture's ties to the land and, by extension, its significant place-based meanings, traditions, identities and, ultimately, its way of life. 'Recognition', in its application here, requires that unique cultural connections to the environment are taken into account in issues of environmental justice" (Page, 2007, p.617). In order to fully recognize the importance of recognition in indigenous environmental justice struggles, Schlosberg and Carruthers call for a broader definition of justice that "address[es] the fundamental capacity of indigenous communities to sustain the lives and livelihoods they value (2010, p.31)." Broader definitions of justice that incorporate cultural recognition as a part of the environmental justice discourse are particularly relevant in Canadian contexts where First Nations have fought to have cultural injustices acknowledged by colonial governments and academic researchers alike (Haluza-Delay et al. (2009).

A small but growing collection of Canadian environmental justice literature has documented injustices perpetrated by colonial governments and corporations against First Nations during resource development and extraction (For example see: Booth and Skelton, 2011a; Haluza-Delay et al., 2009; International Human Rights Clinic [IHRC], 2010; Mascarenhas 2007; Muir and Booth, 2011; Page, 2007; Whiteman, 2004, 2009). The struggles that Treaty 8 First Nations are

[5] As Haluza-DeLay et al. (2009) note in the introduction to *Speaking for Ourselves*, it is important to recognize that just because the academic field of environmental justice in Canada remains relatively small does not mean that the values behind environmental justice have not held great importance for much longer in Canada, particularly for Indigenous people who have been contesting the destruction of their lands and cultures since colonization without acknowledgement.

faced with as the shale gas industry develops are reflective of provincial and national approaches to First Nations' participation in resource extraction and energy development across Canada. As such, other case studies provide valuable insights on the systemic challenges First Nations in Canada face in struggles for environmental justice. In 2010 Harvard Law School's International Human Rights Clinic released a report on the effects of mining on BC First Nations. The findings indicate that First Nations are bearing the greatest burden of mineral extraction and receiving the fewest benefits. The central issue is identified as the absence of a robust decision-making process that allows First Nations' interests and concerns to be heard and addressed (IHRC, 2010). First Nations face similar challenges in Alberta: In the Book *Speaking for Ourselves*, Chief Bernard Ominayak and Kevin Thomas write about the destruction of the Lubicon Lake people's unceded territories in northern Alberta by oil and gas development. The absence of consultation, in conjunction with procedurally unjust decision-making and inadequate regulation has resulted in the extinguishment of the community's rights in large areas of their territory. The Nation's attempts to fill the provincial government's regulatory gap were impeded and ignored. Chief Ominayak states: "These massive resource exploitation activities have decimated the traditional Lubicon hunting and trapping economy and way of life and threaten the very existence of the Lubicon Lake people as a distinct indigenous society" (Ominayak & Thomas, 2009, p.111). These examples highlight the systemic challenges Canadian Indigenous communities' face, while also stressing the inextricable link between procedural justice, distributive justice, and cultural recognition when investigating issues of environmental injustice in Canada. Otherwise, arguably the most devastating impacts of industrial resource development –those related to cultural resilience - remain invisible in decision-making processes (Turner et al. 2008).

In Canada, legally mandated consultation is the principal mechanism meant to protect First Nations' cultural practices from being negatively impacted by resource developments. Thus, the consultation process is a nexus for understanding the impacts of industrial development on local communities and government-First Nations relations, but also reveals how power relations between the state and multi-national capital play out on the ground. In the following section I discuss the making of Treaty 8 in order to situate the shale gas industry within the ongoing colonial histories of Canada and British Columbia that are shaping contemporary environmental

injustices. This provides key context for understanding power dynamics around consultation processes, as will be explored below.

2.1 The making of Treaty 8 – creating certainty (and inequality)

During initial colonial expansion across Canada, both the federal and provincial governments ignored the inland Northwest (Fumoleau, 2004). Numbered Treaties 1 through 7 were entered into in order to expand agricultural development, but present day Treaty 8 territory was not considered to have significant agricultural potential. By the mid 1880's some northern First Nations had begun requesting a treaty in order to access help during times of hardship but the Canadian government's policy was to only negotiate treaties if the land was needed for immediate development, so requests were disregarded (Fumoleau, 2004; Ray, 1999). In the 1890's, conflicts between First Nations and settlers began to escalate as more prospectors passed through northeast BC on their way to the Klondike gold fields. These conflicts, in combination with the discovery of vast reserves of precious metals during the Crown Land Surveys of 1892 prompted the government to finally seek treaty (Madill, 1986; Ray, 1999). [6] Initial interest on the part of the BC First Nations was varied. Only 46 Beaver (Dunne-za) Indians signed onto Treaty 8 on May 30th, 1899 (McKee, 2009). There was hesitation on the part of several groups who shared the belief that the size of their traditional territories was worth far more than the amount of money being offered, and that they could survive without the federal government's assistance (McKee, 2009).[7] Despite hesitation on the part of a number of First Nations, all BC adhesions were signed by 1914 (besides McLeod Lake Indian Band, which joined in 1999). Figure 2 depicts the boundaries of Treaty 8.

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[6] There is extensive correspondence between the Northwest Mounted Police, and government officials negotiating the boundaries and parameters of Treaty 8. See Ray (1999) for a detailed account.

[7] The Government of BC did not participate in the development of the original treaty because at the time they denied the existence of Aboriginal title, and as such all lands and resources were believed to be theirs for the taking (McKee, 2009).

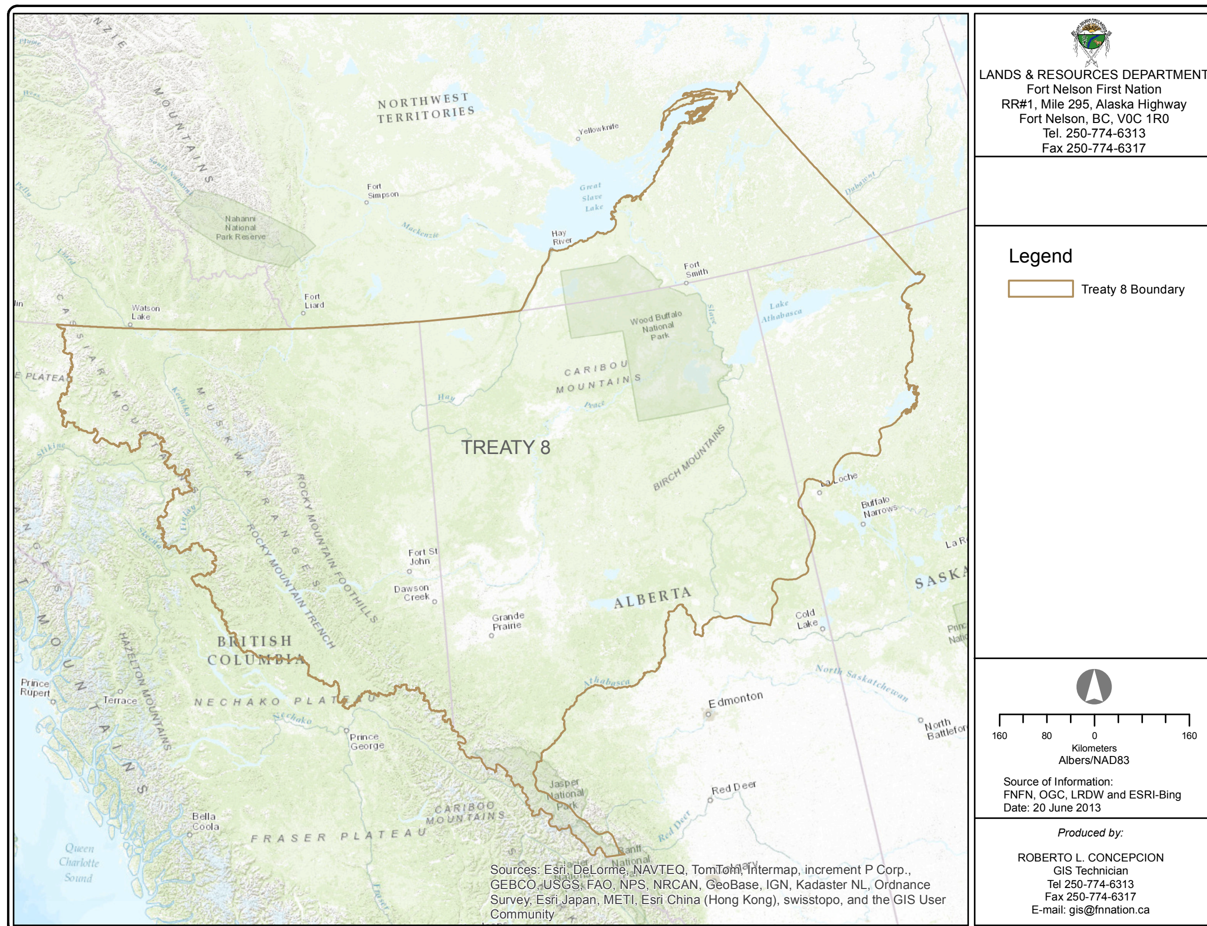

Figure 2: Boundaries of Treaty 8
Source: Fort Nelson First Nation Lands Department

Despite the federal government's singular focus on access to resources, Treaty 8 (1899) promised First Nations that they would:

> have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes

In addition to the written treaty, commitments were made during its negotiation that were documented in the Treaty 8 Commissioners' Report:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. …we

> had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that **they would be as free to hunt and fish after the treaty as they would be if they never entered into it**.
>
> **We assured them that the treaty would not lead to any forced interference with their mode of life**, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. (Laird, Ross & McKenna, 1899, emphasis added)

As delineated in Delgamuukw v. BC (1997), written commitments (such as those above), as well as oral histories, all fall within the scope of treaty rights. Aboriginal and treaty rights were first recognized and affirmed in 1982, under section 35(1) of the *Constitution Act*. Subsequently, R. v. Sparrow (1990) identified the Crown's duty to consult on any potential infringements to Aboriginal and treaty rights. The duty to consult emerges from the Crown's fiduciary relationship with Indigenous peoples in Canada, first recognized in the *Royal Proclamation* of 1763. The Crown's fiduciary obligations require that federal and provincial governments act honourably, in part by engaging in good faith consultation with First Nations for the purposes of substantively addressing their concerns (Morellato, 2008, p.69). However, how this has played out in practice has resulted in significant disagreement. First Nations have successfully called into question the honour of the Crown, and held provincial and federal governments legally accountable in specific circumstances. The courts have laid out criteria on what may be considered adequate consultation. However, legal victories have not translated into changes on the ground. The federal and provincial governments' failure to keep pace with changing law has resulted in a "wide chasm between those time honoured principles affirmed in our case law and the stark reality of life for Canada's Aboriginal peoples" (Morellato, 2008, p.5).

In addition, the responsibility to consult is increasingly being deflected to industry, despite case law maintaining that the duty to consult remains with governments, not industry (Natcher, 2001). The result is significant variation in consultative processes, and mounting discord. Research has documented the ongoing implementation of procedurally and substantively unjust consultation and decision-making processes during environmental assessments with Treaty 8 First Nations (Booth & Skelton, 2011a, 2011b; Muir & Booth, 2011). Consequently, conversations in certain areas of Treaty 8 territory are not whether treaty rights are being adequately protected, but

whether it is possible for treaty rights to be practiced on the industrialized landscape. With the continual streamlining of regulation, the number of projects that trigger an environmental assessment is shrinking. In turn, development is increasingly only triggering consultation at the time of regulatory review. This research specifically investigates the efficacy of regulatory consultative processes being implemented by the BC Oil and Gas Commission, from the perspective of those participating in the processes. The specific focus on oil and gas consultation allows us to assess its implications for shale gas development in the province, but limits our ability to speak to the potential of consultation more generally. However, many concerns raised by interviewees are indicative of issues that any consultative process must negotiate, including the relationship between First Nations and the Crown.

2.2 Accumulation by Dispossession – the contemporary role of the state

David Harvey's (2003) theory of accumulation by dispossession is a compelling explanation of contemporary mechanisms used to remove people from lands used for subsistence and traditional practices, in turn further entrenching them in the global economy. Since the 1970's neoliberal governments have been opening up previously public lands and assets for over accumulated capital to seize upon through the privatization of state assets and the forcing open of non-capitalist territories for major capital investment (Harvey, 2003). The state continues to play a principal role, but is driven by external factors exacerbated by globalization and the rolling back of regulatory frameworks over the last four decades. Neoliberal policies that increase global capital's access to lands and resources, while simultaneously reducing government oversight, act as a legitimating veil for what has been called a recolonization of Canada (Green, 2003). While not overtly violent, the potential impacts to northeastern BC's ecological integrity, and in turn cultural resilience are no less destructive. This configuration of the problem allows us to understand the implications of the provincial government's current approach to oil and gas consultation with Treaty 8 First Nations within the broader contexts of global economic and political forces.

In this case, the provincial government has opened Treaty 8 territory to large-scale capital accumulation through the sale of subsurface tenure rights. The Peace region in northeastern BC has been experiencing industrial development for over half a century, but it has occurred at an

unprecedented pace and scale since the streamlining of oil and gas regulation under Premier Gordon Campbell. Starting in 2001 the Liberal government adopted sweeping neoliberal reforms moving the province towards a 'competition state' that created optimal conditions for global capital[8] (McBride & McNutt, 2007). As discussed by McBride and McNutt (2007), the BC Heartlands Economic Strategy - unveiled in 2003 - promised to make "[a]mendments to the Coal Act, the Mineral Tenure Act, the Mines Act and the Petroleum and Natural Gas Act to streamline administration and stimulate investment" (BC Ministry of Competition, Science and Enterprise, 2003, February 11). The implementation of the "streamlined" *Oil and Gas Activities Act* in 2010 assigned responsibilities to the Oil and Gas Commission to be a "one stop shop" for industry regulation and enforcement. Oil and gas is the only resource sector in BC to have an arms length government body dedicated to its growth and development (Parfitt, 2010). Additionally, the BC Energy Plan Report on Progress boasted that $316 million had been given to industry in infrastructure royalty credits between 2007 and 2009, as well as hundreds of millions of dollars spent on rural road improvements and capital projects (BC MEM, 2009). These government actions have opened up the Northeast to private development at exceptional rates. The province is now poised to triple annual production from 2011 levels by 2020 in order to create a viable LNG industry on the Northwest coast (BC MEM, 2012a).

2.2.1 Legitimizing dispossession

All of this indicates that the government of BC is advancing a shale gas industry that prioritizes capital accumulation over social and ecological considerations. But as Hay (1996, p.426) argues, democratic capitalist states play two conflicting roles: they must facilitate capital accumulation, while also legitimizing themselves in the eyes of their citizens in order to maintain support for re-election. All natural resource extraction inevitably has negative environmental and social consequences that if voters consider too great, result in discontent with the government's ability to protect its citizens, causing a loss of legitimacy for the government and potentially a party turnover in the next election. The government of BC is currently seeking societal legitimization for shale gas development using 'clean energy' rhetoric, as well as over estimating the jobs and

[8] A competition state provides a stable environment for accumulation by pursuing financial stability, providing infrastructure, an educated workforce, and a favourable tax system (Arnold, 2002 cited in McBride & McNutt, 2007).

economic prosperity that will be produced by LNG. For example, in the BC Natural Gas Strategy, Minister of Energy and Mines, Rich Coleman states: "Export of B.C. LNG could also significantly lower global greenhouse gas production by replacing coal-fired power plants and oil-based transportation fuels with a much cleaner alternative. In the BC Jobs Plan, the province has committed to having B.C.'s first clean energy-powered LNG plant in operation by 2015 and three LNG facilities running by 2020" (BC MEM, 2012b, p.1). This statement omits two important facts: First, the government is also increasing coal mining in the province for export to the same countries importing natural gas. Secondly, it was the current government that initiated the re-labeling of natural gas as a "clean energy" so that natural gas rather than renewable energies could be used in the production of LNG.

The legitimacy of government and industry claims that shale gas is a 'clean energy' or 'transition fuel' have been challenged by numerous researchers, some placing shale gas life cycle emissions as high as coal (Howarth, Santoro & Ingraffea, 2011). In addition, inadequate regulation in BC, which does not require that best practices are employed, is destroying any chance of BC meeting its Climate Action Plan goals (Jaccard & Griffin, 2010; Stephenson et al. 2012). From this perspective, the government's sustainability rhetoric appears to be a smokescreen for large-scale capital accumulation at the expense of local communities, and arguably all British Columbians.

3. Potential impacts of shale gas development in BC

The localized impacts of shale gas development in northeastern BC are not fully understood by the majority of British Columbians due to a lack of scientific research, monitoring and reporting (Office of the Auditor General of BC, 2010a, 2010b, 2013; West Coast Environmental Law [WCEL], 2004). However, shale gas extraction has the potential to have significant upstream impacts on wildlife habitat, water and air quality (locally and globally).[9] In the following section I briefly outline the potential impacts that Treaty 8 First Nations and local residents are faced

[9] For robust discussions of provincial regulation and the impacts of shale gas development see Ben Parfitt's *Fracking Up Our Water, Hydro Power and Climate* (2011), and *Fracture Lines: Will Canada's Water be Protected in the Rush to Develop Shale Gas* (2010), the Pembina Institute's *Towards Responsible Shale Gas Development in Canada: Opportunities and Challenges* (2012) and *Shale Gas in British Columbia: Risks to BC's water resources* (Campbell and Horne, 2011).

with based on current development practices in British Columbia. While there is significant research from other jurisdictions to support the need for better regulation in British Columbia, without BC specific research that documents the scale of impacts that have occurred (and may occur based on the industry's current trajectory) evidence-based decision-making cannot take place.

3.1 Habitat fragmentation and degradation

The impacts of unconventional gas development on wildlife habitat are similar to those associated with conventional oil and gas development and the construction of well pads, seismic lines, roads, and pipelines.[10] In northern Alberta large-scale oil and gas development has led to a 20-50% decline in migratory bird populations, a crash in grizzly bear populations in certain areas, and the near extinction of several woodland caribou herds (WCEL, 2003). Northeastern BC shares many of the same species, and shale gas (in conjunction with other industries) poses similar risks to them due to infrastructure expansion. In order to maximize production of shale gas reserves, reduced well spacing is often required. However, proponents argue that habitat fragmentation can be mitigated through the use of horizontal drilling on multi-well pads (BC OGC, 2011a). There are a number of arguments that contradict this: first, the lifespan of shale gas wells is often far shorter than conventional, thus more wells are needed to extract the same volume of gas. Second, the size of multi-well pads is larger since a staging and storage area is needed for the frack fluids – potentially leading to the creation of habitat islands (Pembina Institute, 2012). Lastly, water and frack fluids are often trucked in and out which increases traffic and requires major road development into previously remote areas (particularly in the Horn River Basin) (Parfitt, 2011).

Extensive research has documented that when occurring in combination, habitat fragmentation and habitat loss inevitably lead to species decline (Fahrig, 2003). In northern BC this is particularly detrimental to the large ungulate populations. Mountain caribou, found in southern Treaty 8 territory, are on the endangered species list and First Nations are reporting greater difficulty finding moose during the hunting season. Aside from increased traffic fatalities, altered

[10] See West Coast Environmental Law's publication *Pump It Out: Environmental costs of the oil and gas industry in BC* (2003) for an overview of the impacts of conventional oil and gas development.

predator-prey relationships were identified as a concern in the Peace region even prior to widespread shale gas development (Nitschke, 2008). Roads, seismic lines and pipeline right of ways create hunting corridors for predators such as wolves (Latham, Latham, Boyce & Boutin, 2011). Increased access to remote areas also fosters recreational hunting and fishing by non-indigenous populations.

3.2 Water Use

The most significant difference between conventional and unconventional gas development is the millions of litres of water needed to extract gas from the shale rock. The volume of water required per frack can fluctuate wildly depending on the geological formation. In the Montney play some wells require just five to ten million liters, while some companies predict wells in the Horn River Basin will require up to 90 million liters to get the gas flowing (Campbell & Horne, 2011). The world's largest frack job took place in the Horn River Basin in 2010, lasted 111 days and consisted of 274 consecutive fracks on 16 wells, on one well pad (Parfitt, 2010). In total, 980 million liters of surface water were used (Campbell & Horne, 2011). Surface water continues to be the most commonly used source of water for the oil and gas industry, despite a government partnership with Geoscience BC that mapped the aquifers of the Northeast (presentation by OGC hydrologist Allan Chapman, cited by Campbell & Horne, 2011). Additionally, the OGC estimates that only 20% of the water being used by industry is recycled (Campbell & Horne, 2011). More companies are beginning to voluntarily use flowback, as concerns from local communities grow in the absence of regulation.

Water regulation is split between two governing bodies: the OGC and the Ministry of Forest, Lands and Natural Resource Operations (FLNRO). The OGC is able to distribute short-term section 8 water permits for up to one year (but in practice they can be for much longer since there is no cap on the number of times section 8s can be issued). In 2012 up to 285 section 8 water permits were active at one time, with a total of 20.4 million cubic meters permitted for removal by the OGC by the end of the year, and 3.8 million cubic meters reported used (BC OGC, 2013). Section 8s accounted for 54% of the total volume of water used for hydraulic fracturing, while long-term water licenses accounted for just 21% and the rest came from water source wells (7%) or Other (18%) (BC OGC, 2013). Since 2011, the OGC has been publicly

reporting on water allocations, but the industry self reports on actual water use volumes. Ben Parfitt (2011) warns that use volumes may be deceptively low since there are high rates of non-compliance. During research I heard numerous first hand accounts of water being diverted around water meters or being withdrawn during OGC withdrawal bans. Additionally, the OGC's reporting in their annual water reports (BC OGC, 2013) is deceptive in that it calculates withdrawal percentages based on the mean annual runoff, ignoring the important fact that the Northeast experiences seasonal runoff periods. Thus the timing of water withdrawals is likely to influence the scale of environmental and cultural impacts. For example withdrawals during the spring freshet are likely to have fewer impacts than those during the late summer and fall when water levels are low and rivers are being used for hunting.

Long-term water licenses are granted by FLNRO and require a more rigorous assessment process. There are 18 pending long-term water licenses in the Horn River Basin. If approved they will grant the licensees billions of cubic meters of water over the coming decades. Groundwater is the other major water source in the Northeast, however as BC is the only jurisdiction in Canada that does not regulate groundwater withdrawals it is impossible to estimate total withdrawal volumes (Parfitt, 2010). A report by the Office of the Auditor General of BC (2010a) highlights BC's lack of knowledge about its groundwater resources as a significant barrier to ensuring their protection.

3.3 Water contamination

Water contamination concerns can be broken into two categories: contamination from the frack fluids used during extraction, and the contamination of surface and groundwater through the migration of naturally occurring gases and heavy metals that are released during fracking. Frack fluids contain highly water soluble chemicals that are carcinogenic at very low concentrations (e.g. benzene) (Parfitt, 2010). It is estimated that 50 to 90% of frack fluids return to the surface (BC OGC, 2011b). The company must then dispose of the fluids according to jurisdictional regulation. In BC, companies must dispose of frack fluids in deep disposal wells (BC OGC, 2011b). Theoretically this means that all water used in fracturing operations is forever removed from the hydrologic cycle. However, independent hydrologists are concerned about the movement of injected frack fluids over decades and centuries up into drinking water aquifers in

northeastern BC (Welding, 2012, September 27). In Sublette County, Wyoming, a drinking water well near a fracking operation was found to contain benzene in concentrations 1,500 times the levels considered safe for humans (Lustgarten, 2008, November 13th). Due to public concern, as of January 1st, 2012, all companies in BC have been required to disclose the chemicals used in their frack fluids on the website fracfocus.ca.

The secondary contamination concern is the migration of gases and heavy metals into surface water or shallow aquifers through fissures created during fracking (Osborn, Vengosh, Warner & Jackson, 2011). In extreme cases homeowners from across North America have reported flammable tap water from methane migration after fracking has occurred in their area. One leak in the United States resulted in a home explosion (Lustgarten, November 13th, 2008). Homeowner Jessica Ernst has taken Encana and Alberta regulators to court for contaminating her drinking water during the fracking of shallow coal bed methane deposits near Rosebud, Alberta (Nikiforuk, 2013, March 29). According to the National Energy Board (2009), the contamination of shallow drinking water sources in BC is less likely since shale deposits in the Northeast are at a greater depth. However, a high degree of uncertainty remains in BC due to a lack of baseline data (Office of the Auditor General of BC, 2010a), and limited knowledge on the interaction of surface and groundwater in muskeg environments (Welding, 2012, September 27).

3.3 Greenhouse gas emissions and air quality

Potential air quality impacts vary significantly depending on the shale gas play. Conventional gas contains 1-2% carbon dioxide, which must be stripped from the gas before it is put into a pipeline. The Montney play contains similar amounts in its shale, but gas from the Horn River Basin contains approximately 12% carbon dioxide (National Energy Board [NEB], 2009). The projected production levels for the Horn River Basin of 42 million cubic meters of gas per day would result in 3.3 million metric tons of carbon dioxide annually (NEB, 2009). In order to mitigate carbon outputs, a few oil and gas companies are considering carbon capture and sequestration projects, however without regulation most carbon dioxide continues to be vented or flared (burned off).

The GHG emissions from shale gas development will have global effects, but there are also local air quality concerns. Gas with high concentrations of hydrogen sulphide, also known as sour gas, can have serious health implications for local residents (Campbell & Hume, 2013). Both carbon dioxide and hydrogen sulphide are corrosive so must be removed from the gas before it is piped long distances (BC OGC, 2011c). This is often achieved by flaring at the well site or at processing plants that can be located close to communities or hunting cabins and trap lines. Blueberry First Nation, a Treaty 8 community, started experiencing adverse health effects from sour gas as early as 1976 (Ridington, 1982). Today, Treaty 8 communities continue to report concerns. According to Campbell & Hume (2013) a study conducted in 2010 found that "emissions of nitrogen oxide, sulphur oxide and volatile organic compounds were double what government reported," presenting serious health concerns for local residents. In addition, increased truck traffic transporting water, sand and frack fluids is releasing carbon dioxide and volatile organic compounds that are impacting local air quality (Pembina Institute, 2012).

3.4 Is the land protected?

Cumulatively, the potential impacts discussed above present a challenging regulatory terrain for British Columbia. The OGC currently regulates oil and gas development by issuing individual permits for each activity undertaken. There are separate permits for access roads, borrow pits, temporary water withdrawals etc., that make up each larger development project. Industry proponents submit permits for approval only once they have purchased subsurface tenure rights and developed their annual budget and production plans. The dispersed nature of oil and gas development results in environmental assessments rarely being triggered—generally only for gas plants and pipelines. When they are, it is on a project-by-project basis. The problem is that "cumulative effects assessment is often beyond the capabilities of an individual project proponent, and the management of cumulative effects goes beyond the impacts and capabilities of individual industry sectors to span numerous government authorities" (Pembina Institute, 2012). Numerous studies have called for landscape scale cumulative effects assessments in order to facilitate fact-based decision-making (Forest Practices Board, 2011; Office of the Auditor General of BC, 2013; Parfitt, 2011).

In addition to a limited understanding of the cumulative effects of industrial development in BC, the ability of regulators to adequately oversee development at the current pace and scale has been drawn into question (Campbell & Horne, 2011). In 2010(b) the Office of the Auditor General released a report stating that the OGC is falling short of protecting the environment. There is concern that the OGC faces a conflict of interest with a mandate to both facilitate development and protect the environment. In 2010/2011 the OGC received 101 notifications of occurrences of non-compliance, which resulted in 181 enforcement actions. While this sounds reasonable, out of the 101 notifications of occurrences only "16 occurrences led to prosecutions in the form of tickets and convictions" (BC OGC, 2012, p. 14). More often than not, enforcement actions do not include prosecution. As Campbell and Horne (2011) argue: "The relatively high rate of sites with "serious" or "major" deficiencies overdue in combination with a very low rate of prosecution (less than one per cent) raises serious concern that the full range of tools is not being adequately deployed to deter and penalize violations" (p. 27). Additionally, the OGC did not divulge how many operators were not in compliance with regulation at the time of field inspections in their *Compliance and Enforcement Activity Report for 2010/2011* (BC OGC, 2012). Therefore, if the operator rectified the deficiency in an allotted timeframe their inspection was marked as "compliant." In 2004, WCEL recommended that the province "[r]estore monitoring and enforcement staff to pre-2001 levels, and index increases in staff to wells drilled; implement meaningful fines for infractions; maintain oversight roles of agencies other than the Oil and Gas Commission" (p.12). These recommendations have yet to be fulfilled and continue to be voiced by a myriad of environmental and social justice organizations.

The government is in part able to ignore recommendations for improved oil and gas governance because development is taking place in a remote corner of the province. A policy post by Ben Parfitt from the Canadian Centre for Policy Alternatives highlights the government's different responses to toxic spills in the highly populated South versus the Northeast, firmly situating it as an issue of distributional injustice. In 2011, 20 cubic meters of produced water[11] spilled from a

[11] Produced water is water that comes up to, or returns to the surface while oil and gas is being extracted from the ground. Due to contamination concerns, produced water must be disposed of in deep injection wells (Canadian Association of Petroleum Producers, 2010). Produced water from hydraulic fracturing is commonly referred to as frack fluid.

pipeline onto private property killing at least one cow in the Fort St. John area (Parfitt, 2012). The Oil and Gas Commission did not notify the public and had not released any information more than six months after the fact while they conducted an investigation. In contrast, when a spill of gasoline from a tipped truck in the Capital Region District occurred, "provincial Ministry of Environment and Ministry of Transportation officials had no qualms about speaking to the media and about disclosing what enforcement actions they were taking and that they contemplated" (Parfitt, 2012). The spill in the Northeast was easily swept under the rug, while the spill in a heavily populated area of the Capital Region required immediate action to demonstrate accountability to the public. Environmental justice literature has documented that governments will take the path of least political resistance, resulting in distributional inequities of environmental protection (Lazarus, 1992). In northeast BC this means that it is easier for spills and contamination concerns to be hidden rather than addressed. For Treaty 8 First Nations who are out hunting and gathering on the land, this has significant cultural, and health and safety implications.

4. Changing trajectory

Understanding the shale gas industry in northeast BC as a site where environmental injustices may emerge, or be exacerbated, highlights the need for the Province to adopt a more robust approach to sustainability. An approach is needed that acknowledges and attempts to combat the three forms of injustice previously discussed (distributional, procedural, and cultural recognition) and addresses environmental concerns at the local, provincial and global scales. The concept of a 'just sustainability' offers a compelling alternative. Agyeman, Bullard & Evans (2002, p.78), define a just sustainability as "the need to ensure a better quality of life for all, in a just and equitable manner, whilst living within the limits of supporting ecosystems." In environmental justice theory, environmental quality and human equality are considered mutually dependent. Therefore, when the idea of a more sustainable shale gas industry is discussed in this thesis, it is in reference to the creation of an industry that is just and equitable for local communities, and operates in a way that protects regional ecological integrity.[12]

[12] It must be noted that as a fossil fuel, shale gas is fundamentally unsustainable. However, the way that it is regulated and governed will determine the scale of its impact on both the environment and local communities.

Agyeman and Evans (2004) go on to argue that the concept of 'just sustainability', which brings together the environmental justice and sustainability movements, provides a discourse that is useful at both the activist and policy-maker levels. An injustice vocabulary mobilizes activists while also providing government with a 'policy principle' that "no public action will disproportionately disadvantage any particular social group." (Agyeman & Evans, 2004, p.156). Adopting such an approach to sustainability would create a benchmark to ensure that the best interests of all British Columbians are considered in the development of the shale gas industry, while also acknowledging the roles procedural injustice and lack of recognition continue to play in (post)colonial policy-making and natural resource development in British Columbia. Mobilizing government, industry and activist allies is critical as shale gas development rapidly advances, risking the continued unjust distribution of costs and benefits.

Determining how to move forward with the BC shale gas and LNG industries is far from simple. There is much at stake for Treaty 8 First Nations and all British Columbians. The shale gas industry has emerged at a time when employment opportunities are decreasing in parts of the Northeast, and provincial coffers desperately need the royalty revenues. However, the environmental and cultural impacts of development must be weighed against the economic benefits. The shale gas industry's current trajectory means that BC will fail to reach its carbon reduction targets, and the ecological integrity of a world renowned biodiversity hotspot is being threatened. To date, Treaty 8 First Nations have been some of the most active groups pushing for a more sustainable shale gas industry for a number reasons: Firstly, Treaty 8 First Nations' land-based cultural practices are reliant on healthy ecosystems. As Booth and Skelton (2011c) state, "[a]ny activity that irreparably damages the land irreparably damages First Nations culture" (p.370). Secondly, Treaty 8 First Nations are the only local residents being consulted on shale gas development (in addition to other resource activities) and are therefore more aware of the pace and scale of development that is occurring, and thus the potential scale of impacts. Thirdly, Treaty 8 First Nations and the provincial and federal governments continue to struggle to establish government-to-government relationships that satisfactorily address issues of authority and the right to self-determination in relation to industrial resource extraction in northeast BC.[13]

[13] The UN International Covenant on Civil and Political Rights recognizes the right to self-determination, including the right to determine how natural resources are used within traditional territories. However BC natural resource laws fall far short of ensuring this (IHRC, 2010).

Just decision-making processes are essential to ensuring that Treaty 8 First Nations are able to guide how, when and where development takes place within their traditional territories. In theory, consultation - as a component of natural resource governance - is the mechanism meant to ensure that treaty rights are protected. Research conducted by Booth & Skelton (2011b) on Treaty 8 First Nations' perceptions of their engagement in environmental assessment processes identified fundamental procedural and relational failures, and philosophical differences resulting in a "meaningless" process. However, the dispersed nature of shale gas activities means that environmental assessments are rarely triggered and so First Nations are consulted through a different process with the BC OGC. In turn, an investigation of the OGC-led consultation process with Treaty 8 First Nations is an important starting point for considering how a sustainable shale gas industry could be developed in British Columbia.

In this thesis I set out to examine two research questions:

How are Treaty 8 First Nations concerns and values being addressed by the oil and gas consultation process?

How could the consultation process better address Treaty 8 First Nations concerns and values?

In the field and during interview analysis it became clear that oil and gas consultation processes are not and cannot be adapted to adequately accommodate the responsibilities that Treaty 8 First Nations have taken on in the absence of robust provincial regulatory frameworks that ensure that the ecological integrity of the region is protected. Therefore, rather than asking how the consultation process could better address concerns and values, I ask: How can the conditions for a more sustainable shale gas industry be created?

These research questions emerged from a desire to explore relations of power from the perspective of local communities experiencing shale gas development by multi-national corporations. A critical social research methodology was adopted based on the understanding that "in a socially unjust world, knowledge of the social that does not challenge injustice is likely to play a role in reproducing it" (Carroll, 2003). Broadly, critical social research seeks to critique and transform social relations (Brown & Strega, 2005). Semi-structured interviews, participant observation, and document analysis were chosen to identify and make explicit current power

relations through the comparison of perceptions and assumptions made by the different groups involved in shale gas development: Government, industry, and Treaty 8 First Nations.

I conducted 15 interviews with 17 individuals over a period of six weeks in the Northeast and two weeks in Victoria, BC. Interviewees were selected based on their intimate knowledge of the shale gas industry and relationship to the consultation process. Participating Lands Departments included Fort Nelson First Nation, Prophet River First Nation, Doig River First Nation, Saulteau First Nation, and the Treaty 8 Tribal Association. Saulteau First Nation and Doig River First Nation are located in the Peace region where significant industrial development has been occurring for decades. Prophet River First Nation and Fort Nelson First Nation are located further north along the Alaska Highway and have not historically experienced the same scale of development as the other Nations. The Oil and Gas Commission declined to participate in the formal interview process and submitted responses to the interview questions in writing. A copy of the interview questions can be found in Appendix A. This research was approved by the University of Victoria's Human Research Ethics Board (Protocol #12-131, see Appendix B) and agreed to by all participating First Nations' lands offices through a letter of support from their Chief and Council and/or an information sharing agreement.

I spent six weeks with the Fort Nelson First Nation Lands Department, observing and participating in shale gas related consultation activities in order to understand the consultation process in more depth. I was fortunate enough to work alongside department staff and participate in meetings with government agencies and industry proponents. Since significant diversity exists between Treaty 8 communities the results of the FNFN case study do not necessarily apply to all communities in the same way. Thus, a distinction is made throughout the thesis between the results from the FNFN case study and the general interviews. As a settler Canadian from Ontario my time spent in northeast BC was invaluable for contextualizing information shared by interviewees. However, my experiences are only a small snapshot in time and are far from comprehensive. As often as possible I use direct quotes to ensure that the intent of what was shared during interviews is upheld. I have attempted to balance specific insights from interviewees with my interpretation of the overall situation. Therefore all conclusions are my

own and may not be shared by interviewees, participating communities, organizations, or companies.

The background research and fieldwork summarized above are synthesized in Chapters 2 and 3 of this thesis. In Chapter 2 I argue that in order for Treaty 8 First Nations' concerns to be adequately addressed, the overall framework for oil and gas decision-making must be reconfigured. Since the government of BC is not fulfilling its responsibilities to regulate industrial development at a pace and scale that protects the ecological and cultural resilience of local landscapes and communities, Treaty 8 First Nations are attempting to take on greater monitoring, planning and enforcement responsibility without adequate decision-making power. Without the authority to protect the landscape, Treaty 8 First Nations are concerned that the ability to meaningfully practice treaty rights will be lost. Only when oil and gas governance operates at a scale comparable to treaty rights will it be possible to advance a sustainable shale gas industry. In Chapter 3 I argue that considering all of the institutional and ideological barriers inhibiting meaningful governance reform, taking away industry's social license to operate is an important strategy for First Nations pursuing a redistribution of power and authority that will enable them to protect their treaty rights. Case studies of Fort Nelson First Nation (FNFN) in both chapters provide detailed examples of why a redistribution of power and authority must occur if a just shale gas industry is to be advanced, and why threatening industry's social license to operate is a key strategic approach for achieving meaningful decision-making power. In Chapter 4 I bring together the conclusions from each chapter to understand the broader implications for the BC shale gas industry, Treaty 8 First Nations and all British Columbians.

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Chapter 2

"Death by a thousand cuts": Oil and gas consultation and shale gas development in Treaty 8 territory, British Columbia

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Abstract

As northeast BC undergoes rapid change with the development of a globally competitive shale gas industry, the Government of BC has a duty to consult with First Nations on any developments that have the potential to infringe on their Aboriginal and treaty rights. This research investigates how the oil and gas consultation process is addressing, and might be improved to better address Treaty 8 First Nations concerns regarding shale gas development within their traditional territories. Interviews were conducted with four Treaty 8 First Nations, the Treaty 8 Tribal Association, oil and gas companies and the government of BC. In addition, participant observation was conducted with the Fort Nelson First Nation Lands Department during the summer of 2012. Research indicates that there are two overarching problems with the consultation process: the permit-by-permit approach, and the exclusion of First Nations from the point of decision-making. First Nations' Lands Departments are using their limited capacity to participate in a "rubber-stamp" consultation process that is unable to protect treaty rights. In the absence of adequate environmental regulation Lands Departments are trying to fill the governance gap, but lack the authority and capacity to do so. This is resulting in increasing frustration and mistrust between all parties. We conclude that the only way to resolve emerging conflict over the social and environmental impacts of the BC shale gas industry is through a

restructuring of the governance system that recognizes First Nations' authority and meaningfully incorporates proposals for early engagement, long-term planning, and cumulative impact assessment and monitoring.

1. Introduction

As global demand for natural gas increases, the International Energy Agency (2012) anticipates that Canada will be one of the top exporters of unconventional natural gas in the coming decades.[14] With more than 50% of the 388 trillion cubic feet (tcf) of recoverable shale gas in Canada located in northeast BC, the province is eager to take advantage of this resource (Energy Information Administration, 2011). However, the discovery of major unconventional reserves throughout North America has resulted in depressed natural gas prices, which are unlikely to rise until new markets are opened up (BC MEM, 2012; Boersma & Johnson, 2012). In order to benefit from the price differential between North American and Asian markets, the province is aggressively pursuing the development of at least a half dozen Liquefied Natural Gas (LNG) facilities on the west coast. Ambitious LNG export goals laid out in BC's LNG strategy will require overall annual production to increase from 1.1Tcf to 3Tcf by 2020 (BC MEM, 2012). This will entail large-scale infrastructure development throughout northeast BC, a region covered by the traditional territories of Treaty 8 First Nations.

Industrial resource extraction is not a new phenomenon in northeast BC. In 1899 the federal government began the process of treaty-making with northeast BC First Nations to enable the extraction of newly surveyed minerals (Fumoleau, 2004; Ray, 1999). Despite the fact that resource extraction was the primary focus, the Crown's commissioners assured Treaty 8 First Nations that "the treaty would not lead to any forced interference with their mode of life," stating that: "that they would be as free to hunt and fish after the treaty as they would be if they never entered into it" (Laird, Ross & McKenna, 1899). In 1982 Aboriginal and treaty rights were recognized and affirmed under section 35(1) of the *Constitution Act* and subsequent case law has

[14] Unconventional natural gas is found in rock formations that require non-traditional extraction techniques. The most common techniques are hydraulic fracturing and directional drilling. Hydraulic fracturing (or fracking) injects large volumes of water mixed with sand and chemicals underground at high pressures to create fissures in the rock, releasing the gas to flow into the well. The three types of unconventional gas are shale gas, tight gas, and coal bed methane. Shale and tight gas formations are being developed in northeastern BC.

laid out the Government's duty to consult on any activities that have the potential to infringe upon Aboriginal and treaty rights.[15]

Since Treaty 8 was entered into the federal and provincial governments have continuously fallen short of ensuring adequate protection of Aboriginal and treaty rights; Booth & Skelton (2011a, p.698), call the consultative process for environmental assessments (EA) in the Northeast an "institutionalized and inevitable failure" that is impeding the advancement of new relationships with First Nations. Problems with the EA process include but are not limited to: capacity issues, poor relationships, late engagement, a lack of data, and the government's failure to recognize cumulative impacts, treaty and aboriginal rights, and First Nations cultures (Booth & Skelton, 2011b). Indeed, there is a growing body of literature documenting the systematic marginalization and exclusion of First Nations from meaningfully participating in natural resource decision-making within their territories (See: Baker & McLelland, 2003; Booth & Skelton, 2011a, 2011b, 2011c; Muir & Booth, 2011; Page, 2007; Ominayak & Thomas, 2009). This has resulted in First Nations bearing a disproportionate burden of the impacts of industrial development (IHRC, 2010).

In Northeast BC, industrial resource activities have already altered how many Treaty 8 First Nations are able to practice their land-based rights (Booth & Skelton, 2011a; Muir & Booth, 2011). Projected developments are expected to worsen habitat fragmentation and degradation and substantively alter predator–prey relationships (Nitschke, 2008). Accelerated unconventional gas development also presents novel environmental concerns, including excessive water consumption and contamination, and significantly higher greenhouse gas emissions in comparison to conventional gas developments[16] (Campbell & Horne, 2011; Howarth, Santoro & Ingraffea, 2011; Osborn, Vengosh, Warner & Jackson, 2011; Parfitt, 2011; Stephenson, Doukas & Shaw, 2012). These impacts pose a serious risk to Treaty 8 First Nations, whose land-based cultures are inextricably linked to the health of the environment.

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[15] British Columbia and Treaty 8 First Nations have differing positions regarding the interpretation of Treaty 8, section 35(1) of the *Constitution Act*, 1982, and subsequent case law on consultation and infringements to aboriginal and treaty rights. See Morellato (2008) for an in depth analysis of the Crown's duty to consult.

[16] The lifecycle emissions of shale gas are hotly debated. See Stephenson et al. (2012) for an analysis of the best available research and the implications for the BC shale gas industry.

A history of inadequate consultation, coupled with a dramatic rise in industrial activities in the Northeast, presents the potential for significant social and political friction as natural, cultural and social landscapes are transformed. As resource extraction spreads, questions of sustainability and justice become increasingly urgent.[17] Building opportunities for effective dialogue across sectors and scales will be critical to address these challenges. This situation is not unique to northeast BC. Indigenous communities around the world are struggling to reconcile globally driven resource extraction with their needs and legally protected rights as they risk disproportionately bearing the impacts of development (Gedicks, 2001; O'Rourke & Connolly, 2003). Shale gas in northeast BC provides a case study of whether and how governments can adequately engage First Nations' concerns and equitably distribute the costs and benefits of new energy systems. In this paper we investigate the efficacy of existing mechanisms for consultation and explore how First Nations' concerns could be better addressed.

Our inquiry focuses on provincial oil and gas consultation agreements with Treaty 8 First Nations and the perceived efficacy of their implementation. Consultation is one component of a multi-faceted governance system that includes provincial legislation and regulation, monitoring and enforcement. Understanding the broader context within which oil and gas consultation operates raises important questions regarding the appropriate scale of governance, who holds the responsibility to advance a sustainable shale gas industry, and who has the authority to do so? The issues that participating Treaty 8 First Nations' Lands Departments are faced with in relation to unconventional gas development are complex and highly variable. We identify overarching concerns with oil and gas consultation and governance, while grounding our research in a case study of the Fort Nelson First Nation, located in the Horn River Basin.

2. Methods

Our research was pursued using a critical social research methodology that included semi-structured interviews, participant observation, and document analysis. Interviews allowed for

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[17] See Mark Nuttall's *Pipeline Dreams: People, environment, and the arctic energy frontier* (2010) for a comprehensive discussion of the history and contemporary issues faced by indigenous peoples in relation to oil and gas development in the arctic.

perceptions of relationships, power, and injustice to be articulated by the individuals experiencing them, and participant observation and document review allowed for a better understanding of the impacts of these perceptions on interactions and collaborations between groups.

In total, 15 semi-structured interviews were conducted with 17 people in June and July, 2012. Interviewees included five First Nations' Lands Managers (Fort Nelson First Nation, Saulteau First Nation, Doig River First Nation, Prophet River First Nation, and the Treaty 8 Tribal Association); Fort Nelson First Nations (FNFN) lands staff, elders, and community members; past and present BC government employees, and industry representatives. The BC OGC responded to the interview questions in writing. Fieldwork was conducted while most participating Treaty 8 First Nations were negotiating new consultation agreements.[18]

For practical reasons, semi-structured interviews with key informants were chosen as the principal method since they are able to provide rich, descriptive data when there is limited existing information available on a topic (Wengraf, 2001). The depth of each interview also limits the number that can be conducted. Therefore we do not claim to cover all perceptions held by Treaty 8 First Nations, industry proponents, or BC government personnel about shale gas development and First Nations' oil and gas consultation processes in BC. The interviewees were selected based on their proximity to, and knowledge of the consultation process and its implementation. For this reason we have left perceptions in interviewees' own words as often as possible to ensure that emotions and contexts remain intact.

Participant observation and document analysis were used to contextualize and supplement interview data. Six weeks were spent working in the Fort Nelson First Nation Lands Department, participating in and observing day-to-day activities related to consultation and shale gas development within FNFN territory (Figure 3). The computer program QSR NVIVO 8.0 was used as an organizational tool for the thematic analysis of transcripts and written responses from key informants. Field notes, pertinent documents, and correspondence with those directly

[18] FNFN signed their new Oil and Gas Consultation Agreement in June, 2012 (MARR, 2012). Conducting field research at the FNFN Lands department at the time of the transition provided a unique opportunity to understand and participate in both the old and new consultation processes.

involved in consultation were also incorporated in an iterative analytical process. The interpretation of data is our own and may not reflect the views of individual interviewees, or Treaty 8 communities, government or industry.

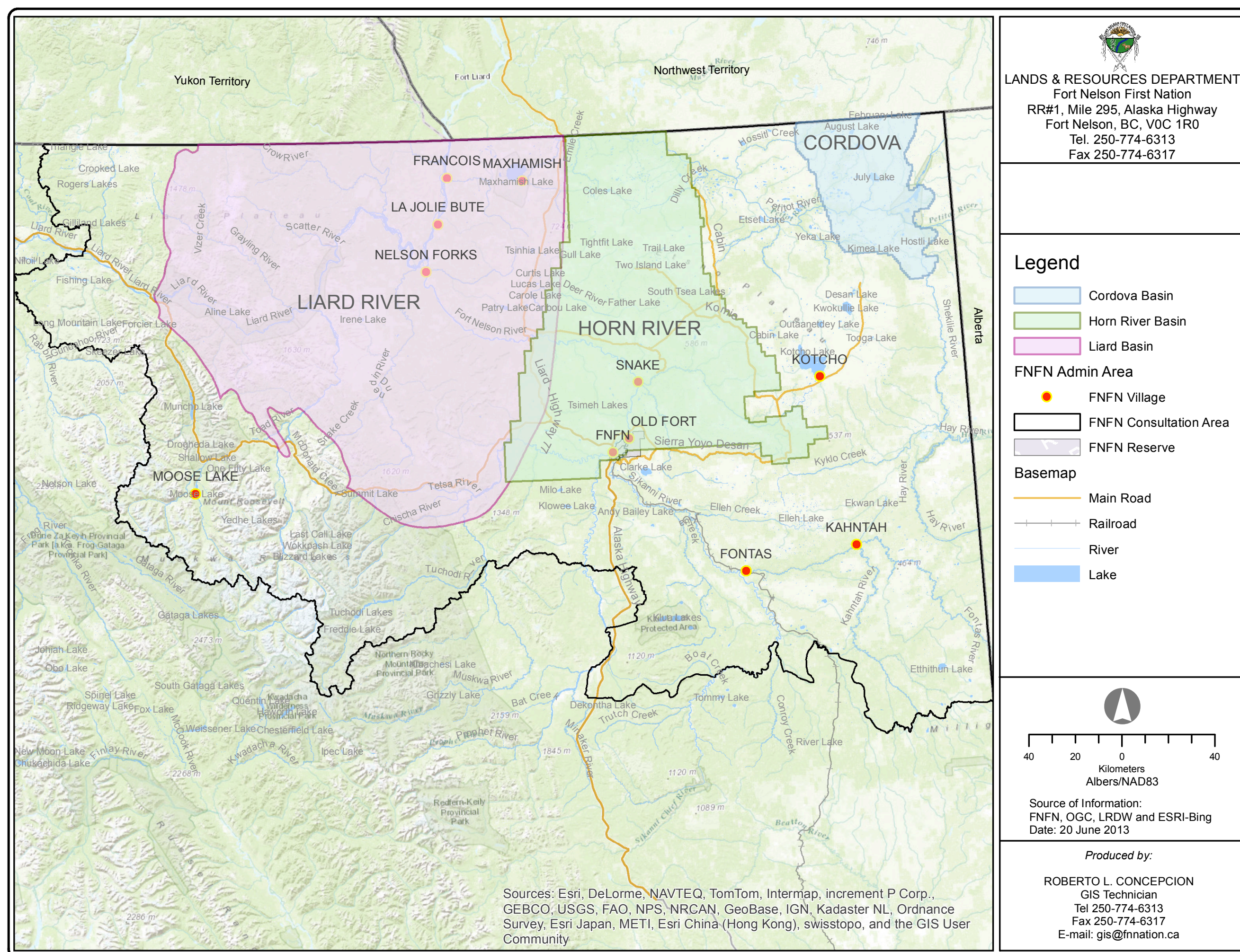

Figure 3: Shale gas plays within FNFN's consultation area, including the Liard River Basin, the Horn River Basin, and the Cordova Embayment.
Source: Fort Nelson First Nation Lands Department

In the next section we provide the critical context needed to understand what has shaped the oil and gas consultation process and industrial development in the Northeast. This is followed by our results on the consultation process, perceptions of the process' efficacy and implementation, a case study of the Fort Nelson First Nation, and finally proposals for the reform of oil and gas governance in British Columbia.

3. Critical context

Oil and gas governance in BC is occurring in the context of neoliberal reforms that are dismantling environmental regulation, streamlining natural resource regulatory processes, and reducing the government's presence in the Northeast (Markey, Halseth & Manson, 2008; McBride & McNutt, 2007). The government's role in infrastructure development and resource extraction in northern BC has changed dramatically since W.A.C Bennett's 20 years of leadership came to an end in 1972 (Halseth, 2010). Since the 1970's the adoption of public policy attractive to global industries has contributed to faster boom and bust cycles (Halseth, 2010). Simultaneously, northern resource wealth is being reinvested in southern cities, providing infrastructure development and social services to BC's urban populations (Markey, et al., 2008). Oil and gas development has brought much needed revenue to northern towns and First Nations, but it has come at a significant cost.

The streamlining of the oil and gas industry began in 1998 with the introduction of the BC Oil and Gas Commission (OGC).[19] Considered a "one stop shop" for industry, the OGC is responsible for "reviewing and assessing applications for industry activity, consulting with First Nations, cooperating with partner agencies, and ensuring that industry complies with provincial legislation and all regulatory requirements" (BC OGC, 2013, p.2). The *Oil and Gas Activities Act* (2008), redefined the roles and responsibilities of the BC OGC, providing it with "stronger compliance and enforcement powers" and greater authority over a growing number of oil and gas related activities more generally (BC MEM, 2010). At the same time, provincial ministries were downsized, stretching resources to their limits, resulting in greater reliance on the industry-funded OGC for expertise.[20] Oil and gas is governed far less strictly than other extractive industries in British Columbia. For example, the *Forest and Range Practices Act (FRPA)* (2002) requires five year Forest Stewardship Plans from proponents, while the *Oil and Gas Activities Act* (2008), is based on a permit-by-permit process, requiring proponents to submit activity permits just months before development is to occur.

[19] Funding for Treaty 8 First Nations' Lands Departments, responsible for monitoring and consulting on industrial activity within their traditional territories in order to protect treaty rights, was also initiated in 1998.

[20] This is a fact often criticized by those concerned about the adequacy of current regulation and enforcement (see: Campbell & Hume, 2012; Campbell & Horne, 2011; Parfitt, 2011; WCEL, 2004).

Oil and gas regulatory reforms are being reactively implemented as unconventional development rapidly evolves. Since 2008 when land sale revenues peaked at $1.1 billion in the Horn River Basin (Adams, 2012), development has boomed (Figure 4). Between 2008 and 2011, 285 new wells were drilled in the Horn River Basin (Adams, 2012). In areas of the Northeast where infrastructure was already in place, unconventional gas has grown even more rapidly; the Montney Trend had 1,367 wells drilled between 2005 and 2012 (OGC, personal communication, June 28th, 2012). On behalf of the BC OGC, Stefik and Paulson (2010) presented a paper acknowledging that regulatory reforms have not yet dealt with the new challenges posed by hydraulic fracturing, including unprecedented scales of water use in the oil and gas industry. The negative consequences of streamlined oil and gas regulation, and a reduced government presence are only now being fully realized as unconventional gas expansion accelerates.

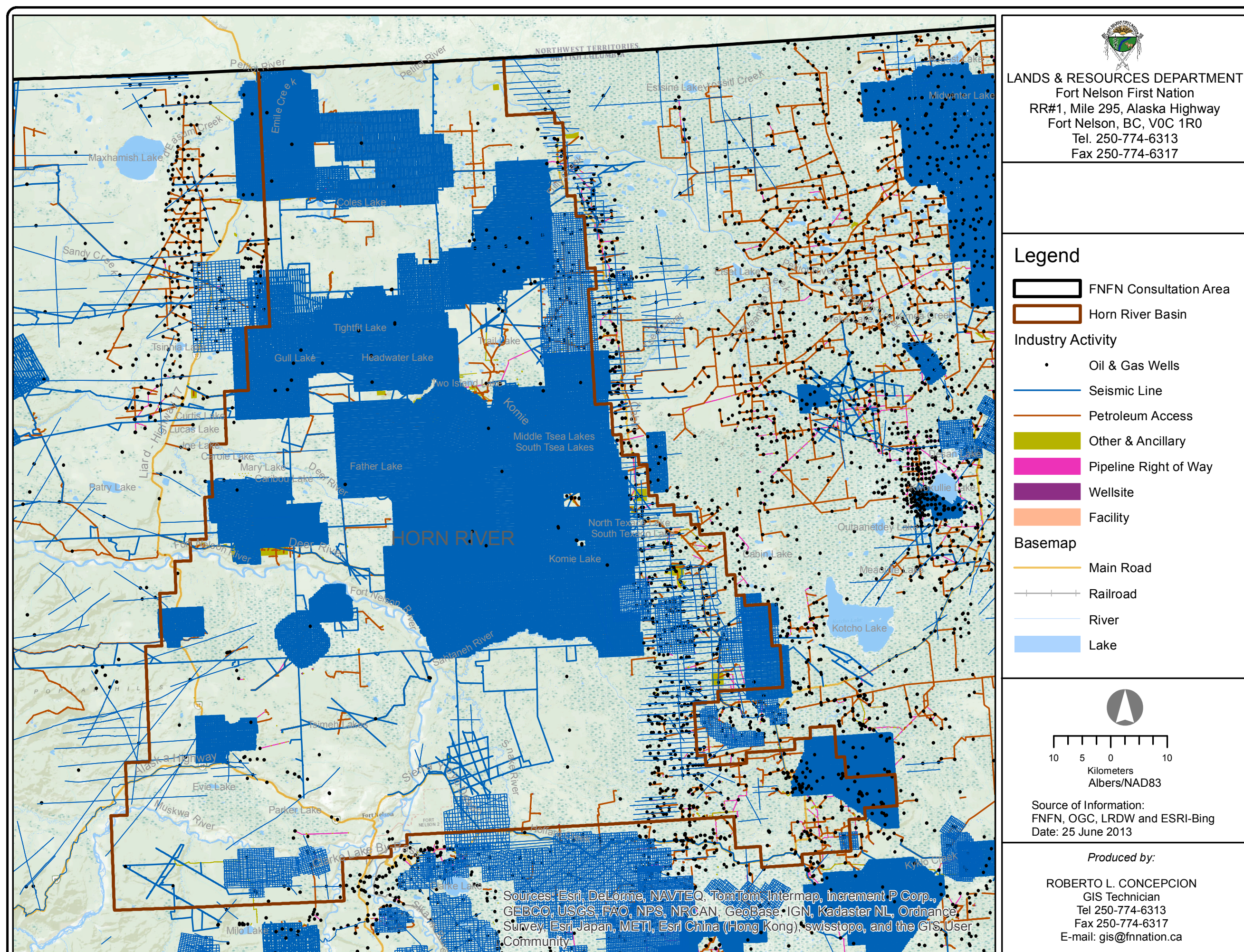

Figure 4: Oil and gas development in the Horn River Basin as of June 2013
Source: Fort Nelson First Nation Lands Department

Concerns about the lack of baseline scientific data, regional cumulative effects assessments and long-term planning in oil and gas governance have heightened as shale gas development has advanced. The Forest Practices Board (2011) has repeatedly called for regional, cross-sector cumulative effects assessments. In addition, the Office of the Auditor General of BC's (2010) report on groundwater cites serious concern for the protection of the province's groundwater resources if baseline studies are not conducted. At a federal scale, Environment Canada has contracted the Council of Canadian Academies (CCA) to conduct a study on the environmental impacts of shale gas extraction (CCA, 2012). In combination, these reports demonstrate increasing concern regarding the impacts of shale gas extraction in general, and the effects of poorly regulated shale gas development in northeast BC more specifically. Without adequate

knowledge of the region, or a robust regulatory and monitoring process, the ecological integrity of the Northeast is at risk. It is within these broader governance and development contexts that shale gas consultation is operating and Treaty 8 First Nations are working towards greater control over the development of resources within their traditional territories.

4. The Oil and Gas Consultation process on paper and in practice

The OGC is responsible for ensuring that the government's responsibility to consult and accommodate is met for all oil and gas related activities. OGC-led consultation with Treaty 8 First Nations is based on the implementation of Consultation Process Agreements (CPAs) negotiated by the BC Ministry of Aboriginal Relations and Reconciliation (MARR). Between 2006 and 2011, CPAs governed First Nations' participation in the OGC's permitting process. They provided the only opportunity for First Nations to comment on and monitor proposed and existing oil and gas activities within their traditional territories in order to ensure that their treaty rights were protected.[21] While new agreements have either come into effect or are still under negotiation, to date, the general process has remained essentially the same.

4.1 The consultation process framework

Provincial consultation agreements[22] outline how BC First Nations are consulted on all OGC-permitted oil and gas activities.[23] The First Nation's and government's respective roles and responsibilities are identified in each agreement. Figure 5 provides a flowchart of the consultation process as outlined in Fort Nelson First Nation's new Oil and Gas Consultation Agreement. Consultation begins when companies submit activity permit applications to the OGC. Each permit is specific to a single activity, which means that development for a single well can include upwards of 20 applications for roads, work camps, frack sand quarries, borrow pits,

[21] Provincial and federal environmental assessments also include consultation processes; however, the dispersed nature of natural gas development, and streamlining of regulation has resulted in few EAs being triggered for general development. Treaty 8 First Nations do participate in EAs for gas plants and trans boundary pipelines, but individual well pads, section 8 (temporary) water withdrawals, access roads, etc. fall below the EA threshold.

[22] The names of the agreements vary between Nations and the focus ranges from OGC specific to all ministry consultation depending on the interests of the First Nation. See: http://www.bcogc.ca/first-nations/consultation-process-agreements for the publicly available agreements.

[23] For a full description of OGC permitted activities see the *Oil and Gas Activities Act*, 2008.

etc. First Nations' Lands Departments receive referrals for the applications that fall within their designated consultation zones. Based on criteria laid out in the individual agreements, the applications are categorized by the applicant and the OGC as either 'notification only', 'standard', or 'complex'. Upon receipt of an application the First Nation has 5 to 20 days to submit a response, depending on its classification. Generally, a response consists of a letter to the OGC outlining any concerns and mitigation or accommodation proposals.

If the First Nation does not respond within the allotted timeframe, the OGC assumes that there are no potential impacts to treaty rights and proceeds to a decision.[24] If the First Nation identifies concerns, mitigation options are discussed (most often through email exchanges or phone calls) and are then forwarded to a statutory decision-maker by the First Nations Liaison Officer (FNLO).[25] If concerns are outstanding when the FNLO notifies the Lands Department that a consultation report will be submitted to the statutory decision-maker, the First Nation may request that the application go to issue resolution.

The issue resolution process extends timeframes and initiates a meeting between the First Nation's Lands Director and the OGC Area Director. If the issue is not resolved, the process culminates with a meeting between the Chief Councillor of the First Nation and OGC Commissioner. In the event that there are still outstanding concerns at the end of the issue resolution process, the FNLO will submit a written summary to the decision-maker and the First Nation outlining how the First Nation's concerns have been addressed. First Nations cannot communicate directly with the decision-maker and decision-making authority remains with the statutory decision-maker at all times. Consequently, judicial review is the only option once an application is approved.

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[24] Northeast BC First Nations responded to 50.3% of all applications received between May 2011 and April 2012, indicating an extremely high rate of response considering 49.8% of applications were labeled 'notification only' (OGC, personal communication, June 11th, 2012).

[25] The First Nations Liaison Officer is an OGC employee responsible for conducting consultation and conveying information between the Nation and the OGC. The statutory decision-maker is a BC government employee responsible for ensuring that the decision to approve or deny a permit is based on all relevant laws and policies.

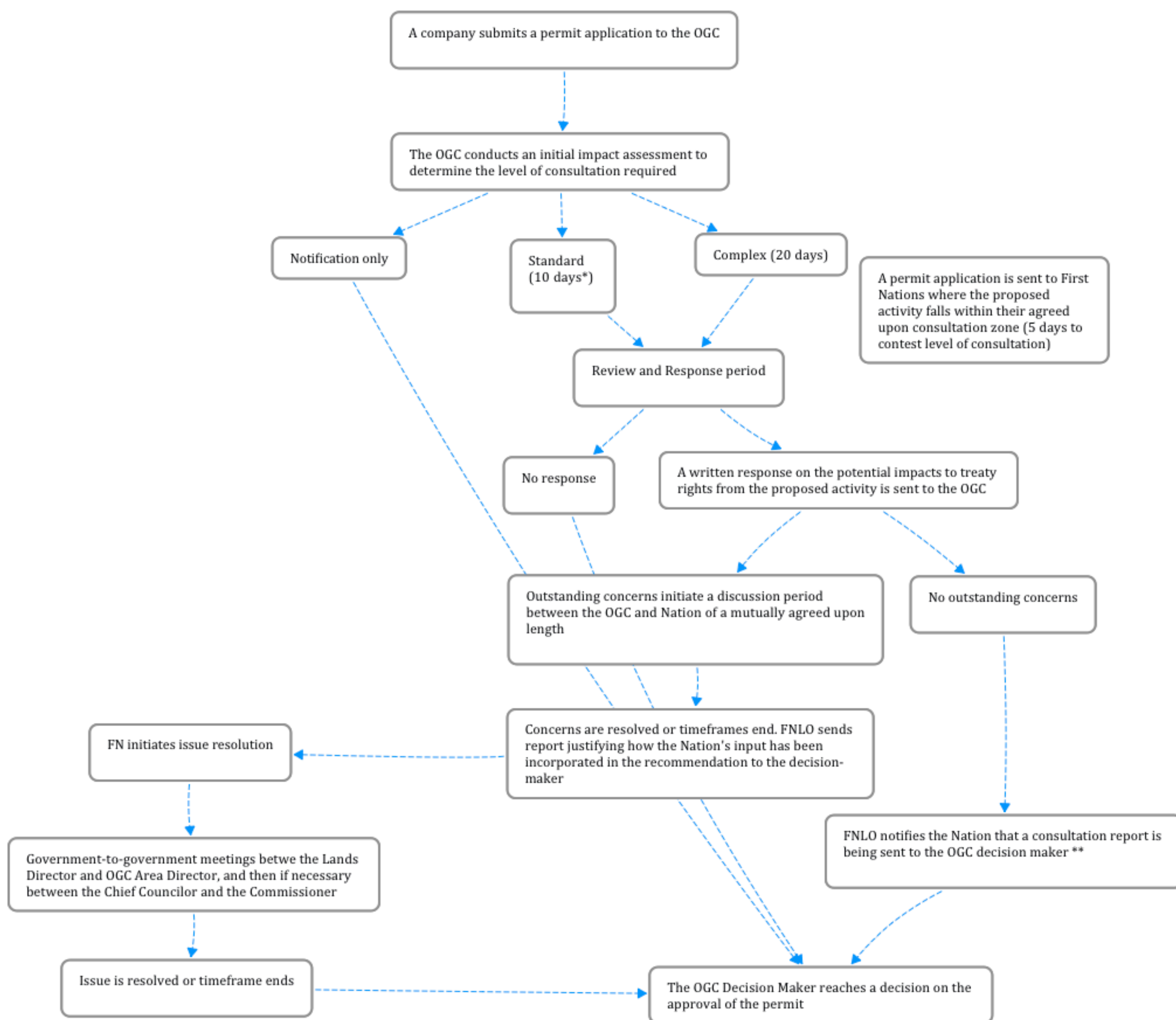

Figure 5: A diagram of oil and gas consultation as outlined in FNFN's Oil and Gas Consultation Agreement (MARR, 2012), signed June 2012.

4.2 Capacity allocation and referral response practices

The government of BC provides funding to Lands Departments to participate in the government mandated consultation process. In the CPAs that were effective from 2006 to 2011, First Nations

received $700 for each wellhead permit referral, in addition to base departmental funding. Funding was not provided to assess any other OGC issued permit, including permits for roads, borrow pits, and short-term water withdrawals. In total, northeast BC First Nations received 3,882 oil and gas referrals between May 2011 and April 2012 (OGC, personal communication, June 11th, 2012). In addition to participating in OGC-led consultation, Lands Departments and band councils may also be consulting with government ministries, participating in environmental assessments or project reviews, meeting with individual oil and gas companies, and developing and participating in other planning initiatives and resource extraction activities. Lands Managers described deciding where to allocate their department's limited capacity as a constant struggle. Despite capacity constraints, Doig River First Nation has developed a robust review process for each application:

> [W]hen we get a referral in, our land officer does an initial review of it. We do a GIS review of it. Then we have an elder or monitor go out on every single application, out to the site. They have an 8 page assessment that they need to do. They bring it back and we bring those three components together and do an analysis, what the level of impact is, and then we send in a response accordingly.

Dedicating this level of attention for each application requires a highly standardized process that took the Doig River Lands Department more than six years to develop during a conventional gas boom.[26] Several other Treaty 8 First Nations have a single staff person that handles all oil and gas applications. Often there is no staff person able to conduct site visits or provide GIS expertise. Response letters are generally prepared without seeing the proposed site and without a map of other developments in the area. This dramatically limits a First Nation's ability to identify impacts to their treaty rights. Due to the lack of government capacity support and the volume of referrals, some Lands Departments have turned to industry to provide funding for project or industry specific positions in their departments. Two Lands Managers discussed how challenging it is to weigh the benefits of industry funding against the company's expectation that the Nation will support a certain level of development in return.

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[26] A case study of Doig River First Nation by Gosine and Teelucksingh (2008) highlights the importance of GIS capacity in the consultation process, stating that "[m]aps, in a way, have become the de facto language to negotiate local indigenous interests" (p.83).

Irrespective of funding levels and its origins, all Lands Managers cited capacity as a major barrier to participating in OGC-led consultation to a level that they felt was adequate. This is widely recognized as a problem in environmental assessment consultative processes as well (See: Baker & McLelland, 2003; Booth & Skelton, 2011b; Carrier Sekani Tribal Council, 2007). In departments with greater capacity, interviewees' descriptions of what constituted meaningful participation in the consultation process were more rigorous and expectations for engagement grew. Despite significant variation in departmental capacity, response processes, and engagement expectations, all Lands Managers shared the same principal frustrations with the OGC-led consultation process.

5. Perceptions of the consultation process

Interviews and document analysis identified two overarching problems with the consultation process: the permit-by-permit approach and the exclusion of First Nations from the point of decision-making. These two problems are associated with a number of different challenges that were identified by interviewees.

5.1 Problem 1: the permit-by-permit approach

The permit-by-permit consultation process mirrors the regulatory process and therefore shares many of the same shortcomings, including no long-term or landscape-scale planning practices. When a First Nation receives a permit application from the OGC it is often the first time they are hearing about the proposed activity. The application referral contains: the location of the proposed activity, an Archaeology Impact Assessment (AIA) determining the likelihood of archaeology sites being located at the location of the proposed activity, any wildlife studies or other studies that have been previously conducted, and—depending on the Lands Departments' GIS capacity—paper maps or access to the GIS data.[27] The decision-maker reviews each permit application as an individual project so all concerns raised during consultation must be site-

[27] See page 9 of the FNFN Oil and Gas Consultation Agreement (MARR, 2012) for a complete list of what is included in an application.

specific and are restricted to the point of activity. Treaty 8 Lands Managers identified numerous intersecting issues with the permit-by-permit approach. The most frequently cited challenges are discussed below.

5.1.1 Time restrictions

All lands managers voiced frustration with the restrictive response timeframes imposed by the consultation process. Within the 5 to 20 day response period, Lands Departments are attempting to conduct site visits, notify potentially impacted community members, and compile traditional use information and ecological data to make an informed assessment of the potential impact of the proposed activity.[28] The restrictive timeframes are particularly challenging due to the volume of referrals being received. In order to handle the volume of permits some Lands Departments choose to prioritize certain culturally significant areas of their territory, or focus on particular types of permits (e.g. section 8 water permits). However, as many permits as possible must be responded to since no response is interpreted as consent:

> …if we don't respond within that timeframe they decide there are no impacts to our rights. So to them lack of information means lack of impact. Rather than, we don't know the information so maybe there is. We don't know the impacts so maybe we shouldn't say yes at this point. They assume there won't be impacts, which is backwards I think. Convenient.

At times Lands Departments are forced to "just respond trying to gain additional information in order to extend the time period to be able to have the time to properly oversee, or look over the application." Contacting community members can take weeks if they are working in a camp or are out on the land hunting and trapping.

The challenge of operating within restrictive timeframes is exacerbated by the separate arrival of permits that are connected to one another. In other words, the numerous permits required for a single project may arrive across a number of weeks. One Lands Department employee explained the challenge this presents:

> So it makes it hard because you have to go back, and I've had to do that a few times where I go, okay well it's one well site, 400 by 400 meters, I can accept that. It's in an area that there's no arc [archeological sites], nothing like that, no TUS, okay. And then I get a file next that's the 25 kilometer road to the one well site and then you go, okay well now hold up, now it's become a concern, where as if you would have just outright, straight been like, we're building a 25 km road for one well then we could have tackled it way differently and requested information at that time too.

Simply piecing together permits to determine the true scale of a project can consume the response timeframe before Lands Departments are able to assess potential infringements to treaty rights. Despite ongoing frustration with the restrictive timeframes, negotiations with the Government of BC to extend them in the new consultation agreements have been unsuccessful. This has served to increase Lands Managers' frustration and scepticism of the government's intention to meaningfully address their concerns.

5.1.2 Information deficits

The second most frequently cited challenge was the lack of available data to make an informed decision during consultation. Four of the Lands Managers interviewed stressed that there continues to be pertinent information missing when deciding how to respond to permit applications. One Lands Manager did not want more information solely because it would be overwhelming considering the limited amount of time there is to review each application. Specific information requests from Lands Managers and staff included better paper maps that incorporated surrounding permits and activities for those who did not have GIS capacity, completed archaeology reports before permit approval (not just preliminary AIAs), reports on water quality and quantity monitoring, and wildlife studies and timber utilization plans where applicable. More generally, they also sought information regarding surrounding developments and approved permits. Lands Managers are able to request more information during the review and response period, but often it is not a matter of accessing the data, but having the research conducted to generate the information.

This information deficit speaks to the more fundamental issue of what information is considered relevant to the permit-by-permit decision-making process. Industry is not required to conduct

cumulative impact assessments or landscape scale studies because it is beyond the scope of the single-permit regulatory process. Thus requests for information generated by landscape scale studies and assessments are typically denied and the information deficit is perpetuated. Without adequate data, Lands Managers and staff spoke of community concerns frequently being rejected by the OGC and industry as anecdotal.

5.1.3 Site specificity

Four Lands Managers identified the third challenge, site specificity, as a continual frustration when trying to adequately protect their community's treaty rights. Under the current regulatory system, an individual permit must have the potential to infringe on a treaty right at the point of activity, otherwise the concern is beyond the scope of the single application, and therefore outside of the decision-makers mandate. As one Lands Manager explained, it's always the same response:

> [I]t's frustrating because they have their mandate and their message and I hear it over and over and over again. And bottom line is, 'we know you have concerns […] and we know you have treaty rights in the area but we believe this shale gas development is not going to have any impact on your rights.'

However, while a single permit may not directly infringe on treaty rights, the cumulative impacts of 285 active water permits, and 384 new unconventional wells in 2012 alone, clearly have the potential to transform the landscape in a manner that threatens the ability to practice First Nations' land-based rights. Figure 6 shows all of the activity that has occurred in the area of Two Island Lake, a culturally significant area for FNFN, as of June 2013.

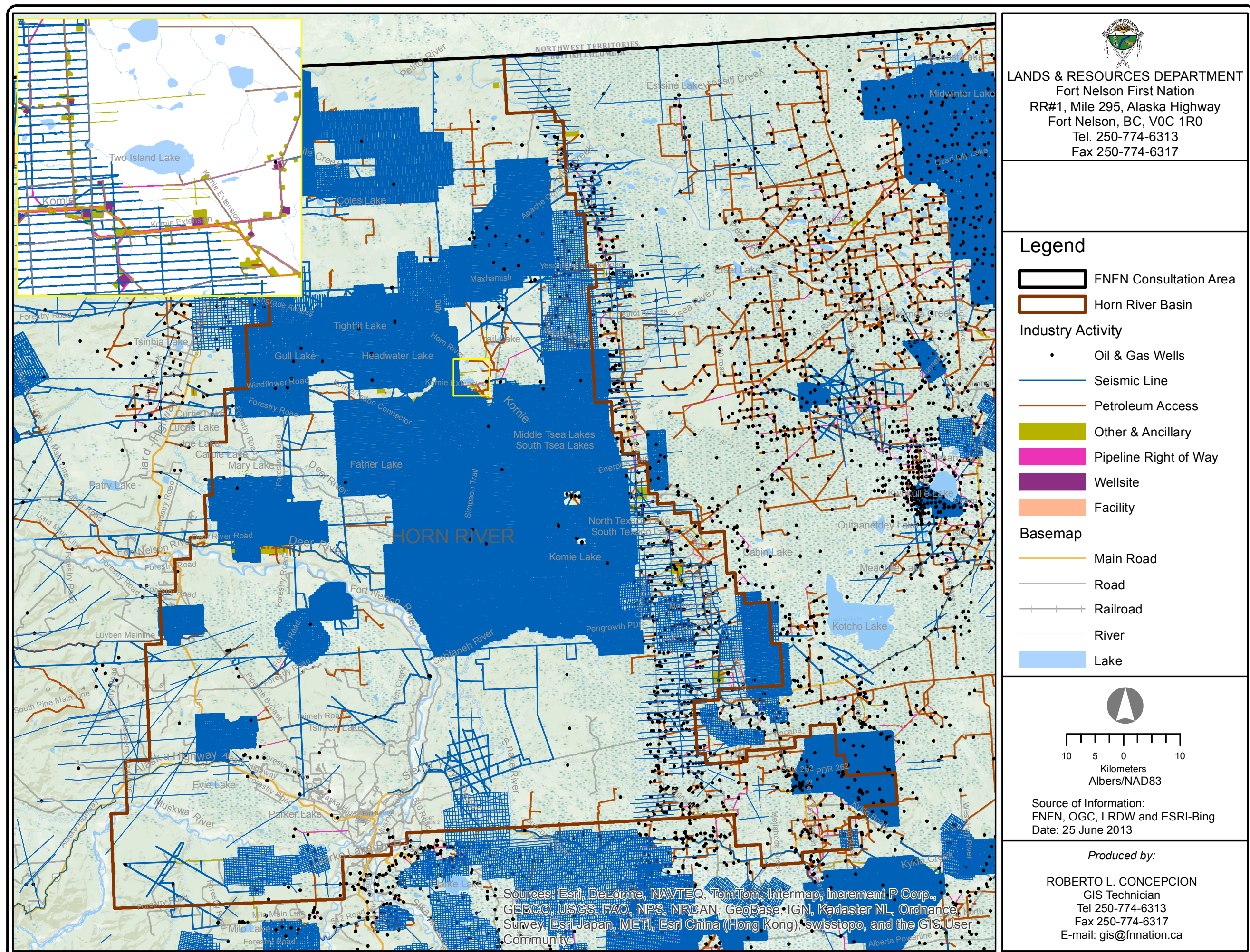

Figure 6: Shale gas activity near Two Island Lake as of June 2013
Source: Fort Nelson First Nation Lands Department

Assessing permits on an individual basis that account only for impacts at the point of activity has profound implications for protecting treaty rights that operate at a landscape scale. To date, the government has been trying to protect treaty rights solely with site-specific mitigations. As a previous government employee explained:

> [The government does] things like highlighting the importance of beavers to the community by putting in beaver stops at culverts or ensuring that seed mixes are clean and not bringing in invasive plants that could damage the ecosystem. Those kinds of concerns are being met through one process, but I have yet to see how the process is fully supporting or fully understanding of traditional and cultural practices, as well as ecological concerns.

The narrow focus on site specific, technical solutions to address cultural concerns leads to treaty rights being addressed at an inappropriate scale. In turn, the provincial government's efforts are considered inadequate. As one Lands Manager explained:

> Culturally significant areas such as spiritual sites, gravesites, mineral licks, trails, etc. Those areas haven't been addressed. Now the OGC may think they have been because if there's a mineral lick they'll buffer, they'll say they can go around that say with a fifty meter buffer, but it's not adequate from the community's perspective.

One First Nations' Chief and Council described the discrepancy between the provincial government's approach and the Nation's approach to environmental protection (site-specific vs. landscape scale) as an issue of fundamentally different worldviews. The consequence is that before Lands Departments can begin identifying potential infringements by specific permits, they must change the government's perception of what it is they are working to protect. One Lands Manager explained:

> Part of it is defending even the definition of our treaty rights because BC has a very narrow definition of what our treaty rights are. And we hold to the ideas that were expressed by the elders when they negotiated the treaty and that were outlined in some of the treaty commissioner's reports; and that talks about mode of life and a desire to not be interfered with. But the BC government views our treaty rights simply as the right to hunt, fish and trap in our territory. So part of the defense of our treaty rights is to actually have the treaty interpreted in a way that's just, and that was in the spirit in which it was intended when the treaty was signed.

5.1.4 Implications of a permit-by-permit process

All of the challenges identified by Lands Managers and staff are interrelated, and are rooted in the fact that consultation occurs permit-by-permit. The overarching implication is that the focus of consultation is not where it needs to be in order to meaningfully protect treaty rights. The continual engagement of Treaty 8 First Nations at the site-specific, permit level inhibits landscape level discussions from taking place that would reflect the scale of treaty rights. Without a sense of what development has occurred across the landscape and what the short-term and long-term plans are, lands managers are often unable to make informed judgments on which

permits are of real concern. Without adequate data it is impossible for Nations to create culturally and environmentally appropriate thresholds for development within their territories. This is drastically different from the forestry industry, where First Nations and the public have an opportunity to comment on broad-scale and long-term regional forestry plans (FRPA, 2002). One Lands Manager expressed the perception that "government doesn't seem too interested in seeing the big picture. They're happy to deal with the permit-by-permit thing. That way they don't really have to do any planning, or regulating or management, cause it's just one permit." The challenges of permit-by-permit consultation speak to fundamental flaws in oil and gas governance as a whole, rendering it ineffective at protecting the ecological integrity of the region.

The continual struggle to keep pace with the OGC-led permit-by-permit process leaves Lands Departments with little time to work towards governance changes that would meaningfully engage their communities' concerns. Despite Lands Managers' commitment to returning robust responses, all of them perceive permit approvals to be inevitable. "[C]urrently everything is just getting approved. Everything. Everything that comes through the door, cause basically as soon as it hits referral stage, you know that it's something that can't be undone[.]" Throughout field research and during interviews, the consultation process was continually referred to as a "rubber stamp" or a "check box" on the way to approval. As one employee stated, "They just need to talk to us to show that, yeah we talked to those Indians over there, and well they had some concerns like normal. They need to build it anyways so let's do it…" These perceptions speak to the inability of the permit-by-permit process to engage community concerns, and also highlight the second overarching problem: exclusion from the point of decision-making.

5.2 Problem 2: Exclusion from the point of decision-making

The second problem continuously discussed by Lands Department interviewees was the lack of influence the consultation process has on permit outcomes. As previously discussed, once oil and gas consultation is complete the statutory decision-maker must determine whether or not to issue a permit based on all available data and regulatory requirements. Requests for an explanation from the OGC on how the information collected during consultation is incorporated at the point of decision-making provided the following response: "Each application is evaluated based on the

Commission's legal obligations, which are set out in the consultation agreements" (OGC, personal communication, October 4th, 2012). However, the consultation agreements do not detail the process or tools used by the decision-maker once the OGC's First Nation Liaison Officer has submitted a consultation report. One government employee described the decision-maker's role strictly in terms of meeting legal requirements:

> [T]hey're going to have to look at the consultation report, they're going to have to decide if the interests have been, you know, are legitimate and have been addressed properly, and if it can stand the test of a judicial review.

A narrow focus on the legality of consultation obfuscates the intended purpose of the duty to consult: to ensure that Treaty 8 First Nations' concerns and choices are meaningfully addressed, based on the Crown's fiduciary duties. In the absence of a transparent, publicly available decision-making framework that explains *how* the statutory decision maker reaches decisions, Lands Managers are unable to determine whether or not their concerns have been diligently considered. As one Lands Manager stated, "[T]hey're supposed to be giving a higher weight to First Nations concerns, but unfortunately up here the economic development piece, or the economics seems to weigh higher for some reason." Throughout fieldwork, numerous interviewees and acquaintances referenced a permit that was fought by Halfway River First Nation as the only example of a permit application "that has been denied or rejected" due to a First Nation's objections. Subsequent to the denial of the application, Hunt Oil successfully sued the Government of BC for not consulting with the First Nation prior to the sale of tenure and for not informing the company of the First Nation's adverse interests (Dagg, Campbell, & Simieritsch, 2011). This indicates that the government is failing to effectively implement even its own agreements.

The lack of transparency at the point of decision-making, in combination with First Nations' lack of success influencing permit outcomes, has left all interviewed Lands Managers questioning the legitimacy of the consultation process. One Lands Manager voiced this frustration:

> Our decisions weren't being figured into any of the development decisions. I know that. We would say something and they would just come back with an excuse why we're wrong, or why they went ahead with

> the permit anyways. So a lot of their work has been justifying decisions that they made regarding our rights that we disagreed with.

5.3 The broader implications of a 'checkbox' approach to consultation

The perceived inadequacy of the consultation process has significant ramifications for industry, as First Nations are unable to trust that their rights are being protected. In turn, industry development risks being slowed down, not by regulatory requirements that would protect the ecological integrity of the region, but by ineffectual consultation between the Government of BC and Treaty 8 First Nations.

Industry is cognizant of the mounting frustration and several companies are attempting to conduct their own community engagement. However, industry's goals for this consultation are—not surprisingly—constrained to the protection of their industrial interests (or maintaining their social license to operate):

> [I]n terms of the outcomes, on the one hand, yeah, we want to make sure we've met our legal and regulatory requirements so that our applications get approved and we can proceed with our plans, but more importantly it's also having those relationships and support in the community so we have that social license to operate.

While industry engagement can provide benefits to First Nations, the legal duty to consult and accommodate Aboriginal and treaty rights remains with the Crown. It is up to individual proponents to decide if they wish to engage with First Nations beyond procedural regulatory requirements. Therefore participating in OGC-led consultation is the only way to ensure that a Nation's concerns have been officially recorded on a particular activity. One Lands Manager explained the importance of continuing to participate in the ineffectual process:

> [W]hen we talk to community members about certain projects, they're already cynical. They're like, why am I talking to you there's nothing we can do about it anyways. So it's about telling them that we're trying to gather this information so that we can make some informed recommendations so that if the project goes through and in the end we don't want it to go through we have some sort of redress, some sort of record saying look we told you guys this is not okay.

Increasing capacity is essential for ensuring that Treaty 8 communities are able to raise and document their concerns within the existing process. But it is evident that an increase in capacity alone will not solve the challenges of a permit-by-permit approach, and a consultation process external to the point of decision-making. Indeed, frustration with the consultation process is in some ways intensified in Lands Departments that have higher capacity because it becomes evident that it is the process itself that is inhibiting concerns from being adequately addressed. FNFN provides a case study of a Treaty 8 community that has dramatically increased their capacity, and in turn ability to participate in the OGC's consultation process, over the past five years.

6. Case study: The FNFN's consultation experience

The Fort Nelson First Nation is the only BC Treaty 8 First Nation with traditional territory overlaying the Horn River Basin [HRB]. Between 2005 and 2008, tenures were purchased throughout the HRB without consultation. FNFN was unaware that unconventional gas development was going to occur on their lands until industry representatives started showing up in their offices. As the Lands Director explained:

> [It was] like a bit of a gold rush on our land. 95% of our core territory was under tenure within three years. They came in 2008 and started talking about what they were going to do. You know giving us coffee mugs and baseballs hats, shaking our hands, telling us what good guys they were.

The pace and scale of infrastructure development and unconventional gas production in the Horn River Basin resulted in a delay between the onset of development and the FNFN Lands Department's ability to respond in a manner with which they were satisfied. When industry began submitting a high volume of permit applications in 2008/2009 the FNFN Lands Department had four employees, all focused on reviewing permits. Over the last five years the scope of the Lands Department has been transformed:

> [I]t's gone from that reactive approach to proactive, bigger picture, long-term vision. Instead of just looking at this one 100 by 100 well site, now you're looking at how does that 100 by 100 well site fit in within the whole territory, within the 5, 10, 15 year period. So it's just a piece of the bigger puzzle now, so that's what the Lands Department is doing now, they're looking at the bigger comprehensive potential impacts to the

> land.

This high-level, territorial perspective, coupled with increased capacity has changed the way the Lands Department is able to participate in the consultation process. As one employee explained:

> we actually now have time to be involved in the process, and start the consultation early, do things like join in for environmental assessments, get [the environmental technician] out in the field, community consultation, so it has changed quite a bit since 1998.

Today, the Lands Department has GIS expertise, an environmental field technician, a growing field monitoring program, a major projects coordinator, multiple community outreach initiatives, and a large number of consultants working on a variety of projects. However, despite FNFN's new level of participation in the consultation process, permit outcomes continue to be at odds with the concerns voiced by the FNFN. While permits have been delayed or retracted by industry, none has ever been formally denied by the OGC in FNFN territory. Lands Department employees are frustrated by the effort exerted relative to the number of positive outcomes:

> Sometimes it feels a little bit like your job doesn't actually do anything. Like you are spending all this time stressing out like crazy, running around, working late, just bugging the community for constant comments and things like that, and pulling this information together and in the end nothing really gets included in the decision.

6.1 The effects of ineffective consultation on FNFN

Frustration and dismay with the consultation process has a severe impact on relationships between the FNFN Lands Department and community members, as well as perceptions of future social and ecological resilience. As development progresses, community members are witnessing profound changes on the land, which to a great extent the Lands Department has been unable to mitigate. One staff member described issues that are dealt with by the Lands Department on a daily basis:

> It's hard because some people's whole trap lines have been written off technically, like there's no way they could go out and make a viable living off of hunting and trapping because there's no animals, there's no land, and you know, some of those trap lines up there, they don't even want to go out there because it's

> dangerous and it smells and it's ugly and what's the point because all the moose and animals are disease ridden and full of cancer and tumors. They don't want to go on the lakes and stuff because the lakes are polluted, you can't eat the fish, you know there's a really big issue with the groundwater. They're scared to drink muskeg water and that's you know, a healthy functioning muskeg will have the best water around, people are too afraid to drink it now.

The impacts on individual community members are overwhelming; as land-based livelihoods and cultural practices are stripped away tensions and emotions are running high throughout the community. There is a growing sense of inevitability and dread of what the future holds. One Elder stated, "…I'm concerned about the young people. What's going to happen is, you know, see a way of life destroyed." For some community members this sense of inevitability translates into a growing acceptance of the industry and its impacts. An interviewee explained, many FNFN community members "think the development is going to go ahead anyways, nothing they can do about it, might as well get a job. They just feel powerless to make change." Increasing reliance on industry employment, and the resulting loss of land-based livelihoods, skills and knowledge, is further dividing the community.

Community frustration is also articulated in conflicts with the Lands Department and their perceived failure to protect the landscape. Independent of whether or not Treaty 8 First Nations' governments hold legislated authority or decision-making power, Lands Departments are mandated by their communities to protect treaty rights for past, present and future generations. As one employee explained:

> [T]here's a lot of anger towards the Lands Department, there's a lot of anger towards Chief and Council that you know, FNFN isn't doing what they're supposed to be doing and they're not stopping the development. And we're stuck a little bit too because …we can't stop the development, we can only express what we want mitigated, what we want to change from the development but in the end it's the government who gives the permit and allows the land to be developed and the infrastructure go into place.

In the absence of a robust regulatory process, the responsibility to protect the ecological integrity of the region is falling to the Lands Department. However, the scale of responsibility that the FNFN's Lands Department is working to take on is disproportionate to both the weight fixed to consultation in the current oil and gas governance framework, and the authority First Nations

hold in development decision-making. Community frustration with the ineffectual consultation process, and in turn with the Lands Department, is impeding a balanced, community supported territorial strategy from being formulated.

6.2 Thinking outside the consultation box

> [A]s long as [consultation is] focused solely on permitting and determining at a micro-level that our rights aren't impacted then there's no way our interests will ever be addressed. It's not the way they do things. They're all looking for excuses to not address our rights.

Based on the understanding that the FNFN Lands Department is unable able to meet community expectations for ecologically and culturally sound shale gas development through the existing consultation and decision-making processes, new tactics are being considered. The Nation's capacity is being redirected towards industry engagement, internal community planning and mobilization, and public outreach. Each strategy exerts a different type of pressure on the government and/or industry to adequately engage. A principal focus is on challenging industry's social license to operate. This strategy is based on the understanding that industry will only agree to better practices if it makes economic sense, and if FNFN can get industry to agree to better practices, the government will follow suit.

The FNFN Lands Director believes that the ecological resilience of the region, and in turn treaty rights, will only be protected when the FNFN has recognized decision-making authority that includes landscape planning and cumulative effects assessment. As she explained:

> I think the tripartite approach is the only way to do it. Cause now everybody's pointing fingers at each other, industry says it's government's job and government's saying it's industry's job. I think if everybody just sat down at the table and said, okay, we all play a part, a role in this. We all have our strengths so let's figure out some - we know what needs to be done - just come to some priorities of where to start.

In 2012, a side letter to FNFN's Economic Benefit Agreement with the province initiated a pilot project called the Horn River Basin Leadership Initiative (HRBLI). The HRBLI was developed to bring together the top Horn River Basin producers, government and FNFN. The pilot project was prompted by FNFN's proposals for high-level discussions that would address the big picture

issues that couldn't be dealt with at the permit level. The HRBLI was a compromise since the government would not diverge from the permit-by-permit approach in the consultation process. Moving beyond consultation to shared decision-making requires transformational changes to the oil and gas governance structure as a whole. The FNFN is working to create the space for these broader changes to occur, but a lack of recognized authority is holding them back. The HRBLI is not a solution but an incremental step that has the potential to open up new opportunities for collaboration and effective dialogue.[29]

Other participating Treaty 8 First Nations are working towards equally transformative changes to the consultation process and overall governance configurations in their territories. The specifics of these efforts are beyond the scope of this research since in depth fieldwork was only conducted with Fort Nelson First Nation. However, the following section discusses Lands Managers' overarching expectations for the consultation process, and decision-making more generally, as the industry develops. These proposals provide a basis from which Nation specific agreements and structures can be developed.

7. Proposals for consultation reform and governance transformation

A number of recurring proposals emerged from interviews with Lands Managers and Lands Department staff. These proposals indicate a shared vision for a governance framework that moves beyond consultation to meaningfully address Treaty 8 First Nations' shale gas-related concerns and values. The proposals fall into three broad, interrelated categories: early engagement, regional landscape planning, and cumulative impact assessment and monitoring.

7.1 Early Engagement

Four Lands Managers, as well as several staff members, voiced a desire for early engagement. Early engagement would ensure industry and government approach First Nations before tenure is sold, so that potential land use conflicts and treaty right infringements can be identified before

[29] According to FNFN's Lands Department the HRBLI never got off the ground and has been abandoned. However, a publicity campaign by FNFN in the fall of 2012 led to the development of a water governance table with the Government of BC to discuss long-term water licenses in FNFN territory.

the proponent has made a significant expenditure. One Lands Department staff person explained the need for government involvement in this process:

> I think there needs to be more early engagement, and I don't think it should just be with industry, although like I said you usually get more success with industry because you can really just sit across the table from them and say, look this is a problem, how are we going to figure this out? They have the authority to change it if it works within their plan but nobody's sitting behind them and making them change it. So I think early engagement with government being more heavily involved instead of the always sloughing off that duty would really help make this a more positive process for everybody.

Early engagement would reduce the pressure during the permit response timeframe because the Lands Department would have a better understanding of the proponent's plans and conflicts could be dealt with before the permitting stage. Additionally, by discussing plans at the conceptual stages, there is likely to be greater flexibility and opportunity for innovative solutions. This has the potential to benefit everyone; as one industry representative working with the FNFN explained:

> [I]t works good for us too because we don't want to submit something without talking to them or including them in the planning and then find out that there's a culturally significant area there or an environmentally sensitive area and we can't have the project there. So if we do all that planning with the idea that we're going to do something in this particular site and then all of a sudden we find out we can't we've wasted a lot of time and resources planning for that so it just makes sense, the earlier that we engage and work with the Fort Nelson First Nations the better it is for everyone.

Despite the fact that all industry interviewees' acknowledged that early engagement could be beneficial, without regulation that mandates early engagement it takes place at the proponent's discretion. According to Lands Managers many companies continue to have no direct contact with their departments, which results in an incomplete picture of the potential impacts of development.

7.2 Regional Landscape Planning

Regional landscape planning would address a number of challenges previously identified, including the staggered arrival of permits for a single project and inadequate maps for Lands

Departments without GIS capacity by providing communities with a long-term vision of how their territories will be impacted before referrals arrive. Landscape planning that effectively incorporated traditional knowledge would facilitate the collection and incorporation of traditional use site information so that permits wouldn't be submitted for culturally significant areas, thus negating the challenge of archaeology reports not being submitted prior to permit approval.

7.3 Cumulative impact assessment and monitoring

Finally, and most frequently cited by Lands Managers, staff, consultants, and community members was the need for cumulative effects assessment and monitoring. Assessing and monitoring cumulative effects would allow thresholds to be established that could cap development at ecologically and culturally sound levels. As one Lands Manager explained, it requires being out on the land:

> So it's a matter of going beyond paper, it's a matter of going out on the land and really observing what will be lost because the main issue we see is water and then cumulative impacts. So if you get a visual of what you're impacting out there I think it's better for the Nation.

Most importantly, cumulative impact assessment and monitoring would mean the government would need to "work with Treaty 8 First Nations to develop a cumulative effects model, say that addresses First Nation indicators, values and thresholds. I think that would be a start…." explained one Lands Manager. The importance of cumulative impact assessments in determining impacts to Aboriginal and treaty rights has been well documented in research on environmental assessment processes (Booth & Skelton, 2011b; Carrier Sekani Tribal Council, 2007; IHRC, 2010; Tollefson & Wipond, 1998). Not surprisingly, the issues with the oil and gas consultation process identified in this research mirror those identified by Treaty 8 First Nations in relation to environmental impact assessments (Booth & Skelton, 2011b). This highlights the need for new governance processes to be developed that do not perpetuate well-documented failures.

A collaborative cumulative effects assessment and monitoring program would allow for the collection of data needed to fill the existing information deficit, thus providing Lands Departments with the information they need to make informed decisions during landscape

planning, as well as at the permit level. The BC Forest Practices Board (2011) identified inadequate decision-making frameworks as the principal reason why cumulative impact assessment and monitoring has not been successfully introduced into management plans across BC. Collaborative programs developed from inception with each community to include appropriate decision-making frameworks would help to overcome this barrier that has plagued effective management planning in BC. In addition, industry's inclusion would help to alleviate the cost of additional data collection, which has been identified by the provincial government as an obstacle to protecting BC's biodiversity (Office of the Auditor General of BC, 2013).

Overall, these proposals would restructure oil and gas governance so that reviewing permits shifts from being the first and only opportunity to understand and influence shale gas development, to the last of multiple stages of First Nations' participation in decision-making. In the long run this would streamline the permit process and free-up Lands Department capacity to work at a more strategic level. All of these proposals speak to the basic desire to have a say in where, how, and when development takes place within Treaty 8 territory. The question is not whether the land will be impacted. It already has been. It is a question of ensuring that the costs and benefits are not unjustly distributed, and injustices are not perpetuated. Without procedurally just consultation and decision-making processes it is impossible to make certain this doesn't occur as development advances. Despite mounting resistance to current shale gas development, all Lands Managers cited the shale gas industry as potentially beneficial to their communities. It is a matter of realizing this potential through the development of sustainable and just governance frameworks.

8. Shifting focus: Agreement making to relationship building

The Lands Managers that I interviewed articulated a shared understanding of the problems that they are currently faced with: a consultation process that is unable to operate at a scale that can protect their treaty rights, and a government unwilling to substantively change it. Underlying this problem is the fact that Treaty 8 First Nations are trying to use the consultation process for more than it is intended. The current regulatory framework provides an inadequate governance system for oil and gas development in the province. To date, proposed reforms fundamental to the effectiveness of the consultation process have not been adopted. Fort Nelson First Nation's hard-

fought successes have occurred outside the consultation process at the governance level, but are not legally mandated. For example, rather than incorporating early engagement and cumulative effects into the consultation agreement, the government agreed to the HRBLI pilot project. Lands Managers perceive these actions to mean that the provincial government is unwilling to provide Treaty 8 First Nations with greater authority. As one Lands Manager stated:

> The First Nation needs to take responsibility, be able to take responsibility for some of the stuff that's happening here, which means getting out on the land and monitoring, doing the studies, but we also need the authority and government's not willing to give that up. I don't know what their so afraid of, god [laughs]… they don't seem interested in doing it. So why don't they let us do it?

The ongoing consultation agreement negotiations highlight the government's reticence to provide First Nations with any level of authority that might grant them the ability to influence the pace and scale of development within their traditional territories. However, there is the realization within government that better relationships are necessary; as one MARR employee stated:

> [W]e need to develop a relationship, an engagement where by the First Nation feels that they're an equal partner or else they're going to be pulling out of these things all the time right? We're just going to be renegotiating. It's a lot of wasted energy. […] but you know it is dependent on the people on the ground to implement, which is what it boils down to in the end and our past experience hasn't been that good.

Agreement-making is irrelevant if it doesn't translate into changes on the ground. As demonstrated by recent publicity campaigns by FNFN, new permit-by-permit agreements have only served to exacerbate existing tensions between the Government of BC and Treaty 8 First Nations (Hume, 2012, November 14; Vanderklippe, 2013, February 5). Indeed, industry, government and First Nations' interviewees unanimously acknowledged the lack of trust and respect in current interactions. One Lands Manager stated:

> [H]opefully there's a future where we can respect each others' concerns because we know what they want. We know they want development, we know, we see that, but we just want to be taken into account, okay, water consumption and cumulative impacts.

The shale gas industry becomes a focal point for First Nation-government relations because the implications of a poorly regulated industry are so profound. As one of the most immediate threats to Treaty 8 First Nations' territories, and in turn culture, meaningful oil and gas consultation is an integral part of building any sort of 'new relationship.' A first step is implementing Lands Managers' proposals discussed above - proposals that are not unrealistic. Indeed, they are arguably simply asking the government to fulfill their existing responsibilities to protect the natural environment of British Columbia and to meet fiduciary obligations to consult and accommodate. In the absence of robust provincial oil and gas governance that includes cumulative effects assessments and landscape planning there is a governance gap that threatens the natural environment and communities in the Northeast. As documented in the FNFN case study, some First Nations are working to fill this gap because of the fundamental link between the health of their territories and their ability to practice their treaty rights in a meaningful way. Ultimately, if the government will not fulfill its responsibilities, First Nations' authority to regulate development within their territories must be recognized. Otherwise the inequitable and unjust relationship between Treaty 8 First Nations and the Government of BC will continue to translate into the unequal and unjust distribution of costs and benefits.

While the protection of Treaty 8 First Nations' rights is deserving of action in its own right, there is the self-serving argument that the unjust distribution of impacts will stimulate resistance that will threaten the economic viability of the BC shale gas industry. The government of BC is relying on shale gas development to eliminate provincial debt and provide jobs and social services for British Columbians (BC MEMNG, 2013). Therefore it is in all British Columbians best interest for the government to meaningfully engage Treaty 8 First Nations.

9. Conclusions

The Government of BC is implementing consultation agreements that cannot adequately address Treaty 8 First Nations concerns regarding the rapid development of the BC shale gas industry. As Treaty 8 First Nations have worked to build their capacity to better participate in OGC-led consultation, it has become evident that no level of capacity can make up for a permit-by-permit approach that operates external to the point of decision-making. The scale of permit-by-permit governance is incompatible with the scale of development planning and management necessary

to protect treaty rights. In the absence of adequate provincial governance, Treaty 8 communities are attempting to take on additional responsibilities to protect the ecological integrity of the region. But, without authority within the existing governance framework it is a struggle that is resulting in growing frustration and resistance. Lands Managers provided a number of proposals on how to begin to advance an industry that meaningfully addresses and incorporates First Nations' concerns and values, in turn protecting cultural and ecological resilience. However, the absence of a trusting and respectful relationship is inhibiting both the provincial government and First Nations from working towards this goal.

Just as the intent of Treaty 8 was to facilitate access to resources, contemporary consultation agreements appear to be a means of superficially fulfilling the government's duty to consult while streamlining regulation and industry costs. If the Government of BC chooses to continue on their current trajectory, they risk increased political friction. FNFN has already begun media and public awareness campaigns that have successfully weakened industry's social license to operate (see: Hume, 2012, November 14; Vanderklippe, 2013, February 5). The scale of the impact associated with shale gas has created a pivotal moment in the relationship between the Government of BC and FNFN. Decisions today will have long-term, potentially irreversible ramifications.

First Nations' Lands Departments in northeast BC are navigating difficult terrain in order to balance their community's concerns for the environment and treaty rights with the desire for the economic benefits of shale gas extraction. Neoliberal arguments of economic prosperity do not adequately acknowledge the importance of land and culture to a community's wellbeing. Previous research has drawn connections between low socio-economic indicators and the loss of land and culture in First Nations' communities (Booth & Skelton, 2011a). Citing Catherine James' work, Scott (2001, p.16) argues that "[c]ultural loss, or threats to cultural survival, occur not when cultures change but when the community is powerless to debate and control the changes occurring." As energy development extends into new and remote regions that are already struggling with the effects of climate change over which they have little control, maintaining cultural resilience through innovative governance frameworks is essential. Northeast BC serves as an ideal context for trying out new, collaborative frameworks, given that

some First Nations are supportive of development under certain conditions. This will require creating the space for meaningful collaboration to occur, and providing the capacity to Lands Departments to adequately meet the responsibilities communicated by their communities. While the question remains as to whether the conditions for an environmentally just shale gas industry can be created within the context of a globalized industry driven by competitive international markets, our research indicates that if new governance frameworks do not evolve government and industry will face intensifying resistance.

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Chapter 3

Towards a just sustainability: Overcoming the power imbalance to transform shale gas governance in British Columbia

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Abstract

This research investigates how a more sustainable and just shale gas industry could be advanced in the context of British Columbia trying to access globally competitive LNG markets. Participant observation with the Fort Nelson First Nation's (FNFN) Lands Department and interviews with Treaty 8 First Nation's Lands Managers, provincial government and industry staff documented significant discrepancies in perceptions of what would constitute sustainable (or balanced) shale gas development and the industry's current trajectory. In the absence of the provincial government conducting robust baseline studies, environmental assessments, and meaningful consultation, the ecological integrity, and in turn the ability to meaningfully practice treaty rights in the Northeast is at risk. Considering the exceptional power differential between parties, creating greater economic uncertainty by challenging industry's social license to operate is an important tactic for Treaty 8 First Nations fighting for decision-making authority. A case study of the tactics being pursued by the FNFN to transform shale gas governance within their traditional territories documents the importance of challenging industry's social license to operate, while developing new institutions and capacity for local resource governance.

1. Introduction

British Columbia's economy has always been characterized by its reliance on resource exploitation to provide revenues for the growth of its urban centers (Carroll, Stephenson, & Shaw, 2012). In turn the brunt of the impacts of resource exploitation have been borne by rural and indigenous communities, out of sight and mind of urban populations sharing in the benefits. Over the past four decades this has become increasingly problematic, as neoliberal policies have prioritized optimal conditions for global capital over British Columbians' well-being and economic security (McBride & McNutt, 2007). Young (2008) describes the periphery of BC as a key front for neoliberal reforms that are transforming Canada's economies. The treatment of northern BC as a resource bank by successive governments has resulted in inadequate reinvestment in community infrastructure and development (Markey, Halseth & Manson, 2008). At the same time, rural communities are being faced with faster, un-buffered boom and bust cycles that are challenging their resilience (Halseth, 2010).

Recent policy reforms, coupled with the expansion of resource extraction activities, are disproportionately impacting indigenous communities, whose land-based cultures face unique challenges from such development. Historically, traditional subsistence economies were able to co-exist alongside wage labour economies in British Columbia (Lutz, 2008). Today, industrial development is changing the landscape at a pace and scale that threatens the environment's ability to sustain traditional practices (Booth and Skelton, 2011a; Muir & Booth, 2011). In turn, indigenous communities are increasingly reliant on environmentally and culturally destructive wage labour to meet their needs (Chapter 2, see also Waziyatawin, 2012). David Harvey (2003) describes the process whereby neoliberal policies dispossess rural communities and indigenous peoples of their lands and cultural practices as 'accumulation by dispossession.' States play a key role facilitating this process by opening up previously protected assets to global capital through free trade agreements, regulatory rollbacks, and the sale of state lands and assets (Harvey, 2003). This is resulting in a (re)colonization by global capital, as indigenous peoples are dispossessed of their resources and the possibility of sustaining land-based cultures. Waziyatawin (2012, p.72) asserts that, "the systematic disconnection (and dispossession) of Indigenous Peoples from our homelands is the defining characteristic of colonization."

As multi-national capital reaches into more remote locations to fulfill growing energy demands, there is increasing contact with indigenous communities and land-based cultures. Past research has documented that First Nations bear the greatest burden during resource development (IHRC, 2010) and are disproportionately affected by neoliberal reforms that are reinforcing First Nations' marginalization in regulatory and procedural processes (Mascarhenas, 2007). Indeed, oil and gas companies have a long history of oppressing vulnerable and indigenous communities around the world (Gedicks, 2001; O'Rourke & Connolly, 2003). To begin to repair this history new approaches to sustainability must be developed that incorporate conceptions of environmental justice. Otherwise, energy developments meant to address global challenges, including climate change, will also serve to perpetuate inequities. The concept of just sustainability brings together the objectives of the sustainability and environmental justice movements to form a framework for policy-makers and activists alike (Agyeman & Evans, 2004). Based on the understanding that environmental quality and human equality are mutually dependent, a sustainable society is defined as "one where wider questions of social needs and welfare, and economic opportunity, are integrally related to environmental limits imposed by supporting ecosystems" (Agyeman, 1989 in Agyeman, Bullard & Evans, 2002, p.78).

The BC shale gas industry provides a compelling case study of how formulations of just sustainability might be advanced.[30] Shale gas is being developed within Treaty 8 territory in northeast BC, and thus will fundamentally shape the conditions under which communities will be able to build their futures. Treaty 8 First Nations practice land-based cultures that are inextricably linked to the health of the environment. Therefore, "[a]ny activity that irreparably damages the land irreparably damages First Nations culture" (Booth & Skelton, 2011b, p.370). Treaty rights, including the ability to hunt, fish and trap as if treaty was never entered into (Laird, Ross & McKenna, 1899), are constitutionally recognized and affirmed under section 35(1) of the *Constitution Act* (1982); yet the provincial government has continuously failed to provide adequate protections from industrial development (Booth & Skelton, 2011a). Insofar as the

[30] Insofar as development is going to take place, it is necessary to ensure that the industry operates in a way that is as just and sustainable as possible. Whether British Columbia should be facilitating/allowing the development of a shale gas industry at all, considering that as a fossil fuel it is fundamentally unsustainable, is another question that must be addressed elsewhere.

government of BC is facilitating capital accumulation in ways that are (re)colonizing the Northeast, serious concerns regarding environmental and cultural sustainability emerge. In this paper we explore what conditions are necessary for First Nations' concerns to be effectively integrated into oil and gas development, such that a more just and sustainable shale gas industry would be possible, and how these conditions might be created. A case study of the Fort Nelson First Nation investigates how one local community is working to shift the shale gas industry's trajectory, towards that of a just sustainability.

2. Research Context

Treaty 8 First Nations in northeast BC have been dealing with industrial resource development for over half a century. In different parts of the region there are mining, hydro power, wind power, and conventional oil and gas developments, as well as forestry and agriculture. Research conducted by Nitschke has found that:

> Thirty-five years of observed land-use change has resulted in a significant transformation of landscape structure which in turn has caused additive, antagonistic, and synergistic cumulative effects within the Peace-Moberly landscape. The cumulative effects of resource development on landscape structure and the modeled response of forest biodiversity suggests that ecological integrity has been impacted (Nitschke, 2008, p.1733).

Nitschke's research was conducted just prior to the onset of the unconventional gas boom. Shale gas production must triple from 2011 levels in order to meet 2020 production targets laid out in the BC LNG Strategy (BC MEM, 2012). In 2011 alone, 426 new wells were drilled in the Montney Trend (Adams, 2012). Further north, Fort Nelson First Nation's territory was a forestry hub until 2006 when the mill shut down. Subsequently, oil and gas development has rapidly grown with the exploration of unconventional reserves in the Horn River Basin, the Cordova Embayment and the Liard Basin (Figure 7). The number of wells being drilled annually in the Horn River Basin jumped from 13 to 84 between 2003 and 2011 (Adams, 2012).

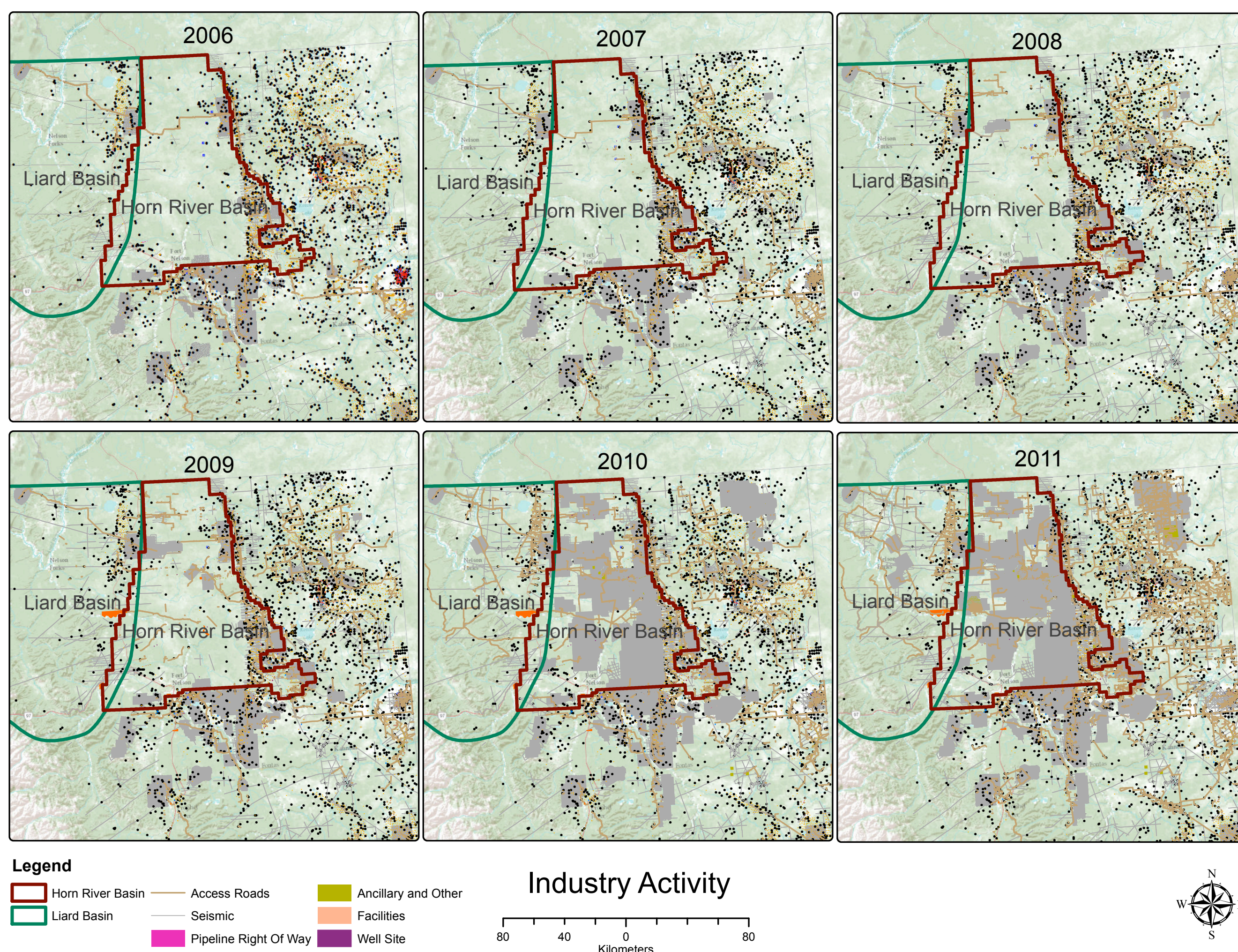

Figure 7: Oil and gas development in FNFN's traditional territories from 2006-2011
Source: Fort Nelson First Nation Lands Department

The rapid shift to unconventional gas development in the Northeast, coupled with an increase in the pace and scale of development in the Horn River Basin, has resulted in Treaty 8 communities and their Lands Departments struggling to determine how to best address the impacts.[31] While there is significant variation in the types and scales of industrial development occurring in Treaty 8 First Nations' territories, all Lands Managers cited a lack of capacity as a significant barrier to

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[31] The Fort Nelson First Nation (FNFN) processed 646 oil and gas activity permits in 2011. In addition to permit level consultation, in 2012 the lands department worked on six major project reviews that triggered an environmental assessment, two major project reviews that did not trigger an environmental assessment, and continues to work on getting two frack sand mines made reviewable projects by the BC Environmental Assessment Office (personal correspondence, March 6th, 2013).

meaningfully participating in consultation processes (Chapter 2; see also: Booth & Skelton, 2011c).

The principal body responsible for shale gas development in the Northeast, and the primary contact for Lands Departments, is the BC Oil and Gas Commission (OGC), an arms length government body responsible for oil and gas regulation, enforcement and consultation (BC OGC, 2013). The process that governs OGC-led consultation with Treaty 8 First Nations is laid out in the recently renegotiated consultation process agreements.[32] First Nations are either notified or consulted on each permit application that falls within their traditional territories.[33] The level of consultation depends on the likelihood of it infringing on treaty rights, as determined by industry and government. As discussed in Chapter 2 of this thesis, oil and gas consultation is inherently limited in its capacity to protect Treaty 8 First Nations' rights because it operates external to the point of decision-making. First Nations do not know how their concerns are weighted against those of industry and other stakeholders once forwarded to the statutory decision-maker. Additionally, the permit-by-permit regulatory process (upon which the consultation process is based), separately assesses the impacts of each well, borrow pit, and access road, in turn not triggering cumulative effects assessments or monitoring. However, treaty rights and cultural practices cannot be meaningfully protected without these landscape scale processes (see Chapter 2; Tollefson & Wipond, 1998). Despite repeated calls for improved regulatory protections for the environment, including long-term landscape planning, monitoring and enforcement, the OGC's responses have been reactionary and inadequate (Campbell & Horne, 2011; Campbell & Hume, 2012; Parfitt, 2011). Indeed Treaty 8 communities' Lands Managers perceive their treaty rights and way of life to be at risk from unsustainable shale gas development. This highlights the challenge that motivates this research: how can the shale gas industry be developed in a way that protects treaty rights, such that the impacts of development are not unjustly borne by First Nations, further perpetuating social and environmental injustices.

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[32] At the time of writing some Treaty 8 First Nations remain in negotiations and have only signed interim agreements with the government of BC.

[33] This consultation takes place within a broader consultation landscape of pre-tenure consultation with MEMPR, provincial and federal environmental assessments for major development projects, and workshops and meetings with the OGC and other ministries to discuss development, and consultation itself.

3. Methods

Our research is grounded in 15 interviews with 17 key informants intimately involved in the BC shale gas industry and/or OGC consultation process. Interviewees included First Nations' Lands Managers and staff, Fort Nelson First Nation (FNFN) council members and elders, industry representatives, and government employees. Participating Lands Departments included Fort Nelson First Nation, Prophet River First Nation, Doig River First Nation, Saulteau First Nation, and the Treaty 8 Tribal Association. Industry proponents requested to remain anonymous; however, it should be noted that they all maintain large tenure holdings in the Horn River Basin. The majority of interviews were conducted in person at interviewees' offices or communities. Time constraints did not allow us to visit all participating Treaty 8 communities and inhibited some Lands Departments from participating. While field research concluded in the summer of 2012, communication with participating First Nations has continued as industrial development, consultation, and alternative engagement tactics have evolved.

Participant observation with the Fort Nelson Lands Department facilitated a more detailed analysis of the oil and gas consultation process and investigation of the Nation's relationship with both industry and the Government of BC. A formal information sharing agreement was entered into with the Lands Department and supported by Chief and Council and the University of Victoria. In addition, the research has received approval from the University of Victoria's Human Research Ethics Board (Protocol# 12-131).

Interviews were audio recorded and transcribed by the interviewer. This analysis draws primarily from 300 pages of interview transcripts, but is also informed by field notes and document review. The interview analysis software NVIVO 8.0 was used to identify themes within and between groups. Extensive quotes are used, following Booth and Skelton's (2011a) finding that First Nations are often not allowed to speak for themselves in environmental justice literature. However, the interpretation of the data is our own and may not reflect the views of interviewees and participating First Nations.

4. Results

This section presents how First Nations, government and industry understand and characterize the shale gas industry, both as it is currently operating and how it should operate. We begin by outlining the type of industry Treaty 8 First Nations would support in comparison to what Lands Managers, the provincial government and industry proponents perceive to be happening on the ground. Next we identify existing barriers to achieving a more sustainable industry by discussing structural contexts and power relations. We then introduce a case study of Fort Nelson First Nation to document their efforts to transform the governance of the shale gas industry within their territory. We conclude that considering the exceptional power differential between industry, government and First Nations, the greatest promise for creating a more sustainable shale gas industry in BC is for First Nations and allies to simultaneously focus on challenging industry's social license to operate, while developing institutions and capacity for local resource governance.

4.1 Balanced development

The Fort Nelson First Nation is advancing a concept of balanced development (referred to as responsible or sustainable development by other interviewees) that is based on the belief that "there is a way to balance the traditional use, cultural values and economic benefits, while protecting the land and the water." A FNFN member's description of balanced development highlights the tensions in the Northeast between environmental protection and industrial resource extraction:

> [W]e signed Treaty 8 a hundred and two years ago and that treaty is one of peace and sharing, [where] we'd live together in peace and share the land. And the treaty is the ability to live off the land but also an ability to make a living off the land so you have to take a balanced approach in terms of preserving as much as we can so people can live off the land, but the reality in the world today is people need to make a living off the land. So that's always been our approach in terms of we're not against development, the reality is quite a few of our families, they're fed as a result of the oil and gas industry. That's how food gets put on their table […] I grew up in a time in this community where there was so much poverty and now people are able to provide for themselves and their families through the oil and gas industry. So we're not against

> development, but again it's a balanced approach. We realize we all have to make a living here, people from town they have to make a living here, provide for our families, but we still have treaty rights and we still have to be able to exercise our treaty rights.

This quote highlights the fact that balanced development is a compromise that attempts to address the community's economic needs while protecting cultural values. The link the interviewee draws between shale gas development and poverty speaks to the structural limitations imposed by a colonial state and global capitalist economy. The implications of global economic structures and provincial neoliberal policies become tangible at the community level, as evidenced in discussions of how to feed one's family.

Each Lands Department is working to advance their communities' individual definitions of balanced development under the guidance of their Chief and Councils. All Lands Managers discussed the concessions their communities are making in order to access the economic benefits. One Lands Manager explained:

> There's been hardly any activity in our area but now it's starting to pick up a little bit. It's starting to pick up to the point where we could cash in on some of this stuff so it's like, yes, let's do it. And in turn the environment and animals suffer, cause everybody needs to feed their kids, and you know, support whatever their businesses require.

The scale of development Lands Managers deemed acceptable varied significantly at the time interviews were conducted. Each community has experienced varying levels of industrial development within their territories and have different relationships with industry proponents and government bodies. There was a connection between a Lands Department's capacity to participate in consultation processes and their expectations for sustainable and just development practices. In other words, as departmental capacity increased, the willingness to accept business as usual decreased. This is not surprising considering greater capacity increases the options that can be pursued to advance community priorities.

All interviewees shared the perception that shale gas development is inevitable; it is a question of how it will progress. To varying degrees, all participating First Nations voiced a willingness to

support some level of shale gas development if able to meaningfully participate in the industry's governance to ensure that treaty rights are adequately protected. Many community members wish to share in the economic benefits. This ultimately requires that development proceed in a way that protects the ecological integrity of the region, and gives First Nations the ability to say where and how development takes place (Chapter 2). Therefore there is a need for governance mechanisms that ensure development is taking place at an ecologically sound pace and scale that protects cultural values on the landscape. This is what all Lands Managers are working towards.

4.2 What's happening on the ground

Lands Managers and staff consider the shale gas development that has occurred to date to be environmentally and culturally destructive. Fear for the future of Treaty 8 territory and their community's ability to practice treaty rights pervaded all discussions with Treaty 8 First Nations about the shale gas industry:

> I really wish Christy Clark wouldn't have come up with the natural gas strategy plan [laughs]. It's kind of sad. I guess I'm scared of the potential cause right now it seems so damaging as it is, so I can't imagine, I can't. It's hard for me or it's scary for me to imagine it getting worse than what it is now. Cause it seems bad right now.

> There's so many people with so much money coming here, bringing all this equipment and all these people and just givin'er. [laughs] It's awful. And there's no concern for the water, no concern for the animals, no concern for the people that still live here and will continue to live here and will want to go out on the land. Now some people don't even want to go out there, there's just too many trucks out there, can't go anywhere without running into an oil company, you know. So, I don't know.

> I think, what I've heard is there's a lot of fear and outrage. The significant cultural areas are being destroyed. In terms of rights, access is being opened up to allow more non-First Nations hunters into a lot of these areas, so with the development of roads and more access into these areas, so it's ah, everyone's kind of somewhat in the dark not knowing what to expect some of these areas to look like… Sort of a death by a thousand cuts.

Without recognized decision-making power, Treaty 8 First Nations must rely on government and industry to create adequate development thresholds that protect ecological processes and cultural

practices – a task they have yet to fulfill (see Chapter 2). Considering the impacts of oil and gas development that communities have experienced to date, Lands Managers do not perceive their rights to be weighted as highly as industry's, (if at all).

> [U]nder the Constitution… they're supposed to be taking the First Nations, giving a higher weight to First Nations concerns. But unfortunately up here… the economics seems to weigh higher for some reason.

Overall, the current development approach is perceived to be disproportionately impacting Treaty 8 First Nations without meaningful mitigation or compensation being provided by the provincial government. This serves to exacerbate existing distributional injustices and reinforces colonial relationships. As explained in the next section, this contradicts government and industry's claimed commitment to balanced development and equitable relationships with First Nations.

4.3 Industry and Government interpretations of balanced development

A comparison of industry and government perceptions of balanced development with those of Treaty 8 First Nations highlights contradictory views regarding what constitutes a sustainable shale gas industry. The OGC's mission is stated to be "to regulate oil and gas activities for the benefit of British Columbians;" they commit to do so by "protecting public safety, respecting those affected by oil and gas activities, conserving the environment, and supporting resource development" (BC OGC, 2013).[34] While the OGC declined a formal interview they did provide written answers to interview questions. In response to the questions: How are Treaty 8 First Nations involved in the current regulatory process? And, what processes allow First Nations to voice their opinions regarding development and the regulatory process itself? The OGC stated:

> Overall, the Commission maintains a close working relationship with First Nations in B.C. Beyond consultation processes there are venues by which information is shared on common values. These can include seminars, workshops and invitations to meet. Transparency is also a priority and some operations include processes by which appropriate information is shared proactively.

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[34] See the roles and responsibilities of the OGC laid out in the *Oil and Gas Activities Act* (2008)

The OGC's perception of their working relationship with Treaty 8 First Nations does not reflect the researcher's experiences while carrying out participant observation with the FNFN. For example, requests by the FNFN Lands Department for information regarding water use permits within their territories were evaded and ultimately ignored by the OGC. FNFN continues to request the information in order to understand the cumulative impacts of water withdrawals in their territory.

Industry echoed the OGC's commitments to collaboration and the advancement of a safe, respectful development approach that protects the environment. One interviewee outlined his company's vision for development in the Horn River Basin:

> I think you know ideally what we all want to try to do is we all want to work together so that there's that balance. And you know that's what we refer to in responsible development, we want to develop this resource in a responsible manner that protects the environment but also at the same time ensures that there's economic and business opportunities for local community members so I think that that's ideally what we're all trying to work together on and we're striving to do…. So we've done some training and workshops in that area. We've also worked really closely with the lands office, and our environmental group is really engaged in working with the producers group, with the government, with the First Nations on different environmental studies and monitoring. We want to make sure that we do this in a sustainable, responsible manner.

Industry representatives were confident that if balanced development is not already occurring the mechanisms are being put in place for it to begin.

> [W]e can start looking at well maybe there's certain areas that shouldn't be developed or certain areas that need to be protected, you know maybe there's an order of development in the various areas. And then prior to some of the development happening there's some studies that should be done, some baseline data that could be collected. So hopefully through that kind of leadership initiative, all the groups working together can identify what's important, what studies need to be done and everyone can be involved right from the early days in the planning.

Industry and government perspectives on the adequacy of current consultation and engagement efforts illustrate a significant discrepancy when compared with those of Treaty 8 First Nations.

While industry and government are optimistic that collaboration will have positive outcomes for all parties, First Nations' perceptions of future development are dominated by fear and frustration. This draws attention to the power disparity between groups, and indeed to the question of whose interests are being protected and advanced at the point of decision-making. To explore why industry and government rhetoric does not reflect Lands Managers' experiences we turn to a brief examination of the structural landscapes that inform and restrict shale gas development priorities and create existing power dynamics.

4.4 Structural context

Structural pressures imposed by current economic, political and social landscapes frame and restrict government and industry priorities and actions.[35] Natural gas is poised to take center stage in international energy markets as unconventional reserves become technologically and economically viable (IEA, 2012). While seemingly favourable for a jurisdiction with vast shale gas potential, the expansion of global reserves and markets has two implications: increased competition for access to higher priced markets as domestic markets are flooded; and difficulty maintaining social support while rapidly developing a globally competitive industry with novel environmental risks (Stephenson & Shaw, 2013). The BC shale gas industry has been in a state of flux since North American prices plummeted with the discovery of unconventional reserves across the continent. With North American prices anticipated to remain below $5 until at least 2023 if new markets are not opened up, the rapid development of an LNG industry to gain access to Asian markets is a necessity (Boersma & Johnson, 2012). But with other jurisdictions also in pursuit of these higher priced markets, the viability of BC's industry is threatened (Reuters, 2013, September 5).

This highly competitive global context creates uncertain conditions for industry investment. One industry representative described the economic insecurity that the BC shale gas industry is currently faced with:

[35] In this context structural refers to institutions and ideologies that shape and restrict how we think and act at both individual and societal scales.

> I think what's happened in the last year or so, looking at current market conditions, natural gas prices are really, have really declined, and just the general market conditions with you know, debt crisis in Europe and there's a number of economic factors involved, but just current market conditions have really led to a slow down with the shale gas development in the Horn River.

The slowdown is problematic for a government trying to rapidly increase production levels. The government is perceived by Lands Managers to be fearful that any increase in costs will result in further withdrawal and a significant loss in revenues for the province. In the *BC Budget and Fiscal Plan*, 2012-2013 natural gas royalties were forecast to fall $254 million short of the budgeted revenues (BC Ministry of Finance, 2013). For a cash-strapped province, mounting a viable LNG industry presents an alternative to raising taxes, and/or dramatically cutting social spending, which would result in the further erosion of social support. The sum of these short-term social and economic pressures shape provincial unwillingness to forgo short-term development wealth for long-term sustainability. Without long-term visioning, environmental and social concerns are being relegated to the sidelines.

The economic landscape that sets industry and government priorities also permeates down to the community and individual scales. Job opportunities in northeast BC are limited for individuals unwilling or unable to work in the industrial resource development sector. Interviewees noted that this often means that residents are less likely to question industry practices.

> Fort Nelson used to be British Columbia's Forestry Capital or something like that. And then the mill shut down about four years ago and everybody that was logging now either left Fort Nelson or they moved into oil and gas jobs. I think a lot of people live in Fort Nelson because they like being this far north and they like to be able to go out into the bush and have all this wildlife around but Fort Nelson is now an oil and gas town and I think that there's a lot of activity happening without questioning it.

The Fort Nelson town council has come out in full support of shale gas development in the region and has received significant industry investments for community infrastructure. The FNFN Council has come out in support of the shale gas industry as well, if the conditions for balanced development are met. With a mandate to protect treaty rights for future generations, it is the Lands Department's responsibility to ensure that these conditions are realized. However,

the Lands Department's limited success advancing balanced development has resulted in the belief that development as usual, and its impacts are inevitable. As the Lands Director explained:

> [A] lot of people feel that there's nothing they can do about it. Cause no matter what we say it's going to go ahead anyways. And that's a lot of thinking behind people working with oil and gas companies and working for them, is that they think the development is going to go ahead anyways, nothing they can do about it, might as well get a job. They just feel powerless to make change.

Communities and individual members are divided over how strongly to push back against destructive practices. The sense of inevitability felt by many impedes participation in community level response planning.

All Lands Managers discussed the struggle to strike a balance between current economic needs and obligations to future generations. As one Lands Manager expressed, it can be overwhelming:

> Economically we are involved because we do have a company … and they build roads, well sites, well pads. So economically we are receiving money in that development sector. And it's…. why not? Because it's happening, so I support that to a degree [sigh].

These local, provincial and global forces shape the approaches that the Government of BC, industry and First Nations are able and/or willing to advance. As the BC government tries to compete in a globally competitive market sacrifices are being made that disadvantage the most marginalized in society. The uncertainty at the global scale becomes tangible at the local scale as communities must decide how to participate in an ecologically destructive industry.

4.5 Power relations

The pressures of trying to infiltrate a highly competitive global industry create the perception that local environmental and social sustainability must be compromised to maintain a competitive edge. Lands Managers suggest that the provincial government views consultation and balanced development as a barrier, rather than a contribution to advancing an economically viable shale gas industry in northeast BC. This has serious consequences for all parties trying to create a meaningful consultation process. Several First Nations' employees noted that the

government is unwilling to look for innovative solutions that could work to foster a development approach that meaningfully addresses their concerns. Consultation agreements are perceived by Lands Managers to streamline consultation, and disproportionately benefit industry. A government employee noted:

> [The Horn River Basin] is an important area of the province and the development is important, so we need to develop a relationship, an engagement where by the First Nation feels that they're an equal partner, or else they're going to be pulling out of these things all the time.

This statement frames the agreements solely as a mechanism to increase certainty for industry. This is consistent with the experiences of Lands Managers. One Lands Manager explained the effect the consultation agreements are having on their ability to ensure that evidence-based decision-making is taking place:

> Government can't or won't tell industry to move [a well] 50m or 300m cause that's a cost to industry and government will never, it seems, be willing to ask industry to do things. I've sat in meetings with the newer CPAs [consultation process agreements] where in the past when we've asked for traditional use studies if there's a gap in our data we identify that, "look here you're in a culturally sensitive area, we don't have any information here, yes we have it here, here, but here we don't so we need to collect more data." Government will not support the First Nation in saying yes we believe the First Nation should do this study. They've sat in a room and said to industry, looked at them when we're in the room the three of us and said, we will not force you to fund this study. Well if we need to better understand how this effects the community we need to maybe have a TUS [Traditional Use Study], maybe we need a wildlife study, maybe we need some water quality work before and after, government will not force industry to do that because it's an extra cost to industry and they want to encourage, they don't want things to become too expensive for industry so things have actually gotten worse.

The outcomes of the most recent round of negotiations for new consultation agreements exemplify the government's unwillingness to work towards mutually beneficial solutions with First Nations if they have the potential to negatively affect industry. For example, Lands Managers' requests for government mandated early engagement with industry proponents so that community concerns and priorities could be incorporated during industry's pre-development planning were denied. A government employee explained the compromise reached in Fort Nelson First Nation's agreement:

> Under this [new] agreement industry has to provide their engagement log that they've carried out. They have to provide that to the OGC. Now, they can say they haven't done it. I mean there's no obligation to force them to engage. The First Nation wanted to have that built into the agreement. We wouldn't go that far but it certainly you know, it's very supportive of an application if the applicant does engage and has developed a relationship with the First Nation and submits that.

In other words, engagement continues to be at the discretion of industry, with no enforcement mechanisms embedded in regulation or consultation agreements. This is yet another example of industry's expectations being prioritized. As documented in Chapter 2, the government's reticence to ensure a balanced development approach through robust environmental regulation means that the responsibility is falling to Treaty 8 First Nations. Communities are turning to industry to develop protocols for baseline studies, monitoring and early engagement. But without the recognized authority to enforce a balanced development approach, industry has no obligation to participate. Proponent relationships with First Nations and local communities are complex and highly variable depending on the stage of development, the level of community involvement and the capacity of the Lands Departments. Certain proponents are recognized by Lands Managers as collaborative and willing to engage innovative solutions, while others are notoriously uncompromising. One Lands Manager's experience was that smaller proponents are less likely to engage than multinationals because "they have a role in society already so they know if they don't consult with us, that will be recognized. So, it's like their due diligence to society to consult with us." Not surprisingly, this is supported by one industry representative's explanation of why their company is motivated to consult:

> We do it because it streamlines the process… [Y]ou would not be able to work without a social license to operate, that's for sure. Cause we'd receive friction on every angle, I mean it would be a nightmare, so you have to incorporate feedback.

As frustration among Treaty 8 First Nations rises, the industry is stepping in to fill the governance gap left by government. But to industry, balanced development often means engaging Lands Managers' demands to a point that protects their social license to operate rather than meaningfully engaging concerns, particularly when solutions will impact revenue. At the

end of the day, companies have a mandate to maximize benefits for their shareholders. As one well intentioned industry representative stated:

> [Our company] isn't going to implement a 5 hundred million dollar carbon capture storage component in the project if it's not required by government. I mean the business case doesn't compute right. So we have to default to the government for that. We say, right now we are adhering to the rules and regulations as they are as of 2012.

As such, communities either need the government to begin to advance balanced development as defined in the OGC's mandate, or they need greater authority at the point of decision-making in order to ensure that their treaty rights are protected. Both options will continue to face significant opposition considering the structural contexts previously discussed. Various Treaty 8 First Nations' publicity campaigns and industry and government negotiations are working to create the conditions necessary to fill the governance gap that inadequate regulation and consultation has created.[36] This raises the question of how power dynamics can be shifted to allow communities to participate as equals in decision-making processes.

4.6 Increasing uncertainty to gain certainty

The BC shale gas industry is characterized by the high degree of uncertainty regarding its economic viability, as well as its environmental and social sustainability. Uncertainty surrounding the shale gas industry presents challenges for all parties and can therefore serve as an important leverage point to promote meaningful oil and gas governance reform that shifts the equilibrium of power. Challenging industry's social license to operate may be one way to disrupt the balance of power. This could provide First Nations that currently lack decision-making authority an opportunity to shape the future governance of the industry.

Economic uncertainty in BC's shale gas industry due to low gas prices in North America and the need for major LNG infrastructure development before alternative markets can be accessed, has

[36] For example, Doig River First Nation has created a Tribal Park and is collaborating with the David Suzuki Foundation to raise awareness about it during ongoing negotiations with the BC Government to have the park provincially designated as a protected area (Crites, 2013, May 29)

resulted in many companies taking what one industry representative called a "wait and see position." He went on to explain:

> If [there's] anything we've learned over the last four years or five years of what has happened with shale gas technology and those things, you just never know. You know the crystal ball is not so crystal. What happens with these LNG facilities and that type of thing… and maybe we'll ramp up and maybe we won't. So from an investment perspective we have an investment there that we'd like to capitalize on and certainly be part of the economic engine of British Columbia but we're not necessarily, we're not just going to do that willy nilly.

As previously discussed, industry uncertainty poses serious risks for the government of BC. Millions of dollars have been given to industry in royalty and development subsidies (BC Ministry of Finance, 2013). The most recent provincial budget anticipates royalty returns in 2015/2016 to be two and a half times greater than last year (2012/2013), necessitating rapid investment and expansion (BC Ministry of Finance, 2013). The rewards the LNG industry will hypothetically bring citizens in terms of jobs, low taxes and a 'prosperity fund' played a central role in the 2013 provincial election (Keller, 2013, April 19).

As the industry expands, uncertainty surrounding the ability to continue to practice treaty rights throughout Treaty 8 territory grows. The lack of scientific data available on the impacts of development intensifies the risks to Treaty 8 communities' land-based practices since Lands Departments are unable to make informed decisions (see Chapter 2). Mounting frustration in the Northeast, coupled with a blockade on one proposed pipeline route (Pacific Trails) and growing awareness in southern BC cities of the potential impacts of shale gas extraction has industry and the government of BC facing a growing public relations issue.[37] With a reduced social license to operate, development will potentially face significant resistance. In turn, this provides Treaty 8 First Nations with an opportunity to leverage more decision-making power. Reaching out to the public has been a last resort for some First Nations after decades of trying to work with industry and government. As one Lands Manager explained, "You try and work with government and

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[37] For coverage on some of the groups mounting resistance see: Pacific trails pipeline resistance, Unist'ot'en Camp: http://vancouver.mediacoop.ca/audio/interview-toghestiy-part-2/9828 (Vancouver Media Coop, 2012) and Fort Nelson First Nation press conference: http://www.youtube.com/watch?v=VnJPi2esH-c (FNFN, 2012)

industry and you're not treated like an equal partner, you're concerns are obviously not important to them[.]”

This being said, the challenge central to this approach is generating enough pressure to incentivize industry and government to meaningfully collaborate. Only once Treaty 8 First Nations hold decision-making power can their ideas for balanced development be realized. Determining the best combination of tactics to contest industry’s social license to operate is a significant challenge considering the immediacy and scale of the threat to Treaty 8 First Nations’ ways of life, and the conflicting need for industry’s economic benefits. The multiplicity of views within communities creates a divisive terrain that must be carefully traversed by Lands Departments. A case study of the Fort Nelson First Nation documents the tactics one community is pursuing as it attempts to reclaim control over the management of its lands.

4.7 Case study: Fort Nelson First Nation’s mobilization

The FNFN provides a unique case study, as it is the only Treaty 8 First Nation located in the Horn River Basin [HRB]. Development has grown exponentially in the HRB since tenure sales began in 2005. This expansion has necessitated rapid mobilization on the part of the Lands Department and band council. In June 2012 the FNFN Lands Director expressed a desire for a governance model that brought all parties together:

> I think the tripartite approach is the only way to do it. That way, cause now everybody's pointing fingers at each other, industry says it's government's job and government's saying it's industry's job. I think if everybody just sat down at the table and said, okay, we all play a part, a role in this. We all, you know, have our strengths so let's figure out… what needs to be done, just come to some priorities of where to start.

Since then FNFN has engaged numerous tactics in pursuit of co-management or tripartite arrangements. In June 2012 they signed an Oil and Gas Consultation Agreement (OGCA) (MARR, 2012), and an Economic Benefit Agreement (EBA) with the Government of BC. While the OGCA failed to address their concerns with the permit-by-permit process (see Chapter 2), a side letter to the EBA committed the government to a voluntary planning exercise between industry, government and FNFN, called the Horn River Basin Leadership Initiative (HRBLI).

This had the potential to open a formalized space for collaboration to occur.[38] Alternative tactics have stemmed from the failures of the formalized consultation process.

FNFN's tactics can be broadly separated into two types: internal planning, and external mobilization. Internal planning includes the *FNFN Strategic Land Use Plan* released in 2012, pending water governance and ecosystem restoration strategies, a community consultation framework and the ongoing development of a for-profit environmental monitoring program. As a FNFN consultant explained:

> [What] FNFN is doing, because the government is not doing it appropriately, is they're taking responsibility for managing and protecting the land base, where the provincial government and the crown is definitely... has no capacity or resources or the stewardship drive at this time to appropriately manage the land and the wildlife and the water resource, and air, basically everything that's not rubber stamping a permit or a license.

The Lands Department is working with their members, consultants, lawyers, universities, and not-for-profit research groups to cultivate development plans that are scientifically and legally sound, and grounded in traditional knowledge. Accessing a wider range of resources through formal agreements with university researchers and consultants expands the Lands Department's capacity and opens up opportunities for collaboration. This increases opportunities to develop a network of activists and communities working towards sustainable development without obscuring the distinctiveness of the particular situation in the Horn River Basin.

FNFN's external mobilization began in the Fall of 2012. A multifaceted publicity campaign gathered support from across Canada to 'protect northern waters' from shale gas development. Tactics included an online petition, press releases, and a media tour that culminated with an endorsement from the Assembly of First Nations in Ottawa. Articles in the Globe and Mail, The Tyee and on CBC News publicized the FNFN's demands for stricter water regulation, environmental monitoring and enforcement by an independent body, and long-term development planning (see: Hume, 2012, November 14; CBC News, 2012, November 14; Vanderklippe,

[38] According to FNFN's lands department, the HRBLI had not moved forward as of June, 2013.

2013, Februrary 5). This publicity has brought significant attention to the Nation's work, with the petition gathering nearly 30,000 signatures from all over North America. FNFN's external mobilization strategies are helping to redefine power relationships at the local and provincial levels by drawing support from concerned citizens and organizations alike. However, by raising the general public's awareness the FNFN runs a risk of losing control of the message. Environmentalists have historically essentialized First Nations as "protectors of the land", supporting conservationist land protection but not Indigenous land claims and economic development; in turn impeding social justice and maintaining settler hegemony (Haluza-DeLay, O'Riley, Cole, Agyeman, 2009, p.16). However, FNFN has worked to establish a network of supporters including, activists, academics and consultants that share FNFN's vision and support the Nation's right to determine what occurs within their territories. In explanation of why industry will come to the table now, the FNFN Lands Director stated: "They just want certainty, they just want to gett'er done. And [FNFN has] been a constant pain […] protesting everything, contesting everything."

Since this interview, FNFN's campaigns have gained even greater momentum. In turn, meaningfully including FNFN in development decisions is becoming a solution rather than a barrier to developing an economically sustainable shale gas industry in the HRB. The work of FNFN provides one example—however tenuous—of a small community trying to challenge a global industry's social license to operate in order to achieve community-specific demands.

5. Discussion

This research has documented FNFN's campaign for greater control over development within their territories, as well as the structural barriers holding them, and all participating First Nations, back from realizing development that balances economic benefits with cultural and ecological sustainability. The ideas for balanced development being advanced by Treaty 8 First Nations bring nuance to a divisive topic that has resulted in moratoriums in other jurisdictions. The question for Fort Nelson First Nation is not whether shale gas development should occur, but under what conditions? This presents industry and government with an opportunity to work towards collaborative governance frameworks that begin to rectify past injustices and reduce uncertainty with an increased social license to operate.

To date, the costs and benefits of unconventional gas developments in BC (and industrial development in general) have been unjustly distributed, imposing the greatest impacts on marginalized communities. Creating the space for collaborative governance frameworks in the context of increasingly neoliberal policy-making is a monumental task. Research on shared decision-making and co-management regimes in Canada has documented government and industry attempts to maintain existing unequal power relations by keeping consultation external to the point of decision-making and allowing only tokenistic participation to occur (see: Castro & Nielsen, 2001; Natcher, Davis & Hickey, 2005). As Scott (2001) explains, alternative management regimes are resisted because:

> [a]s Aboriginal societies elaborate strategies for autonomous development within myriad contexts, usually against daunting odds, they are actively challenging and revising commonplace theories about the necessities inherent in mass market economies and state monopolies of power (p.3).

This is particularly relevant in British Columbia where the state is actively working to advance a globally competitive LNG industry at the expense of ecological and cultural resilience. The streamlining of oil and gas regulation and cutting of red tape to access royalty revenues has allowed development to outpace regulation and planning (Boersma & Johnson, 2012; Stefik & Paulson, 2010). Neoliberal states have compromised themselves to a point where they “are now actively promoting economic globalization in ways that further undermine their own political autonomy and steering capacity” (Eckersley, 2004, p.14). Adopting development strategies such as the *FNFN Strategic Land Use Plan* will require the province to reprioritize its objectives and responsibilities. In this context, challenging industry’s social license to operate by going public is arguably one of the only remaining options for communities bearing the brunt of these developments.

The government’s failure to implement a governance framework that ensures the shale gas industry is environmentally and socially sustainable negatively impacts all British Columbians. Focused on attracting multi-national capital, the returns to British Columbians from unconventional gas development are relatively minimal (Parfitt, 2011;Sandborn, Stahl & Clark, 2013, July 17). The 2012/2013 natural gas royalty revenues were less than the total amount given

to oil and gas companies in provincial subsidies (BC Ministry of Finance, 2013). As a non-renewable resource, there is little value in exploiting shale gas at a time of depressed prices when waiting for higher prices could mean greater public returns (Parfitt, 2011). The provincial government is anticipating that future LNG revenues will justify exorbitant oil and gas subsidies (BC MEM, 2012), however the viability of a BC LNG industry continues to be drawn into question (see: Mair, 2012, November 26; Sandborn, Stahl & Clark, 2013, July 17).

By accepting the status quo not only do British Columbians risk inadequate monetary returns for a non-renewable industry, they support the ongoing dispossession of First Nations' lands and culture. The government of BC's natural resource laws fall far short of protecting First Nations' internationally recognized rights to free, prior and informed consent (IHRC, 2010). First Nations' rights have been further undermined by the federal government with the passing of omnibus Bill C-38, which made extensive changes to the *Environmental Assessment Act*, the *Fisheries Act* and the *National Energy Board Act*, seriously weakening environmental regulation and engagement processes (Assembly of First Nations, 2012). In this context, "[p]rocedural justice issues, then, are not just in the case of less educated or resourced citizens but are a facet of declining public access to political levers. The discussion of procedural justice scales up into the larger questions of the democratic deficit" (Haluza-DeLay et al. 2009, p.19). The impacts being borne by Treaty 8 First Nations, should be considered an indicator of the disappearing will of the government to represent the values of all British Columbians rather than a select few, highlighting the importance of working towards a sustainable shale gas industry at all scales, for all peoples.

6. Conclusion

Fort Nelson First Nation is advocating for a shale gas industry that balances their community's economic needs with their legally protected right to continue to practice treaty rights in a meaningful way. However, existing economic and political landscapes are undermining the advancement of a sustainable shale gas industry, as the provincial government seeks to rapidly develop a globally competitive LNG industry that will generate royalty revenues. While the necessary infrastructure is being developed, the industry is in a state of flux, creating significant uncertainty. With regulation streamlined to facilitate capital accumulation for oil and gas

companies, the environmental impacts of current extraction practices are perceived to pose a serious threat to treaty rights. This is resulting in mounting frustration and pushback from First Nations and the emergence of growing support from advocacy and environmental organizations. Increasing social uncertainty creates a leverage point that Treaty 8 First Nations can use to promote meaningful collaboration in the development of the industry. The Fort Nelson First Nation is challenging industry's social license to operate in order to leverage bargaining power with government and industry for control over development within their territories. Asserting rights to manage the land by challenging the industry's social license to operate is arguably one of the few remaining options for local communities confronting unsustainable development by state facilitated multi-national capital.

This case study is a single example of the thousands of marginalized communities fighting unsustainable oil and gas development around the world. As neoliberal states sacrifice land to multi-national capital, marginalized and indigenous communities are the most likely to suffer (Mascarhenas, 2007; O'Rourke & Connolly, 2003). In the context of globalization, connections can and must be drawn between struggles in northeastern BC and struggles in other localities against the same oil and gas companies. Indeed, some interviewees did draw these connections, effectively situating their work in a global environmental justice framework. As one Lands Manager stated: " 'Oh right on [a company] is meeting with us, right on.' But still we can't forget – 'How is [this company] internationally?' Not so good. So it's pretty, I don't know, it's really tough."

Making these global connections presents new opportunities for resistance against unregulated capital accumulation and unsustainable energy developments. Indeed, it is in the localities where global capital touches down that the power struggles are played out (Gezon, 2004). Gedicks, argues that "[i]f you are concerned about the mounting evidence of catastrophic climate change or the fate of the world's forests and the loss of global biodiversity, then you cannot afford to overlook the critical role of native peoples in defending their lands and culture from mining and oil corporations. Their success or failure is inextricably tied to the fate of the planet and the health of its people" (2001, p.12). Northeast BC is one of these localities where the success or failure to implement a sustainable shale gas industry will have effects that resonate not only for

Treaty 8 First Nations, but for all British Columbians. Advancing a sustainable shale gas industry – one that protects treaty rights and does not continue to unjustly distribute the costs and benefits of industrial resource extraction—should be a priority for industry, government, and citizens, as it is for affected First Nations.

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Chapter 4
Conclusion

1. Summary

In this thesis I set out to investigate how the oil and gas consultation process is addressing, and might be improved to enable it to better address, Treaty 8 First Nations' shale gas related concerns. This emerged from a desire to understand the social and ecological implications of BC's newest energy industry from the perspective of those experiencing the most immediate impacts, both positive and negative. Oil and gas development has brought significant wealth to a remote corner of the province, but as documented throughout this thesis, it comes with great environmental and social costs. The land-based cultures of Treaty 8 First Nations are reliant on healthy, functioning ecosystems, and therefore robust governance mechanisms are required to mitigate the environmental impacts of development. As discussed, BC's oil and gas regulation is widely recognized as inadequate to protect the environment or the best interests of British Columbians, particularly considering the new environmental challenges presented by shale gas (Campbell & Horne, 2011; Campbell & Hume, 2012; Office of the Auditor General of BC, 2010a; Parfitt, 2010, 2011; WCEL, 2003, 2004). Therefore, the task of protecting the environment and Aboriginal and treaty rights on the landscape has fallen to First Nations, who are seeking to do this through the consultation process, a process that is inadequate to that task (Chapter 2). This raises a broad set of questions around relations between the provincial government and First Nations, government priorities, and authority and resource decision-making in BC. In this chapter I summarize the conclusions reached in this thesis, propose a number of recommendations that are supported by previous research, discuss the broader goals of the research and conclude with some questions that deserve further investigation.

Chapter 2 documented First Nations' perceptions of the OGC-led consultation process, highlighting its inability to meaningfully address Treaty 8 First Nations shale gas concerns. Treaty 8 First Nations' frustrations with the process highlighted two overarching problems: the permit-by-permit approach, and the fact that consultation operates external to the point of decision-making, The latter constituting a fundamental procedural injustice. The site-specific consultation process is unable to protect treaty rights that require the preservation of landscape-

scale ecological integrity. In the absence of a functioning consultation process the relationship between First Nations and the OGC, and the provincial government more broadly, is conflict-driven and widely recognized to impede the emergence of innovative solutions.

Treaty 8 First Nations are working in a variety of ways towards regaining responsibility over the management of their lands to compensate for the inadequate provincial governance system, but a lack of recognized authority is holding them back. Lands managers' proposals for improved oil and gas governance include early engagement, long-term landscape planning, and cumulative impact assessment and monitoring. In order for these proposals to be implemented in a way that would effectively protect treaty rights we argue that there must be a reconfiguration of the overall oil and gas governance structure. First Nations must hold a principal decision-making position that allocates authority proportionate to the responsibilities Nations are taking on in terms of planning, management, and enforcement within their territories to fill the governance gap.

Chapter 3 then investigated how the conditions necessary for governance reform could be created in the context of a cash-strapped, neoliberal state through an examination of FNFN's work to redefine power relations with the provincial government and industry proponents. A case study of FNFN's work to build allies using external mobilization tactics and increase internal community capacity with territorial management strategies, illustrated how essential challenging industry's social license to operate is to creating the conditions necessary for governance reform. Using tactics that increased economic uncertainty allowed FNFN to begin to shift the balance of power, in turn gaining access to the decision-making table with industry and government.

Taking an environmental justice approach that introduces cultural recognition as a third, interrelated form of injustice is an important way to investigate oil and gas consultation processes with Treaty 8 First Nations because of the inextricable link between the environment and First Nations' cultures. Without such an approach, the devastating cultural losses felt by Treaty 8 First Nations as the natural environment is industrialized go unrecognized. Interviewees not only spoke of their ability to hunt and trap being diminished, but their ability to "be Dene." The government's failure to recognize this connection is an environmental injustice. Muir &

Booth's (2011) research with Treaty 8 First Nations has also made this assertion; the Government of BC is responsible for intentional acts of environmental injustice in relation to the approval of a coal mining development that will destroy the remaining core habitat of an endangered mountain caribou herd within West Moberly First Nation's territories.

In sum, oil and gas consultation is functioning as a legitimating tool for environmentally and culturally destructive development in northeastern BC. Demands for improved consultation have been effectively stonewalled in the most recent round of negotiations with the provincial government, further eroding government-First Nation relations. Upon returning to the Northeast in the summer of 2013 it was evident that a number of Lands Managers are so disillusioned by the government's inaction that the consultation process, and the government's role regulating the oil and gas industry more generally, is considered obsolete. The rolling back of the state over the last four decades, with the simultaneous cutting of red tape for multi-national capital has created an environmental and social crisis. With limited provincial support, and faster boom and bust cycles created by global resource industries (Halseth, 2010), there is a diminishing ability or will to say "no" to unsustainable development. This has left Treaty 8 First Nations' Lands Departments trying to build a culturally appropriate and environmentally sustainable industry with a procedurally flawed consultation process, and no government support for their constitutionally-protected treaty rights.

2. Recommendations

The conclusions emerging from this research on oil and gas consultation are not unique. Previous research has documented many of the same problems with other consultative processes (primarily regarding environmental assessments), and has made similar recommendations for how First Nations' concerns could be better addressed (see: Baker & Mclleland, 2003; Booth & Skelton, 2011b; Carrier Sekani Tribal Council, 2007; IHRC, 2010; Tollefson & Wipond, 1998). Based on research conducted with Treaty 8 First Nations, Booth and Skelton (2011b) provide six overarching recommendations to improve environmental assessment processes with First Nations, including: fix the government-First Nations relationship; respect First Nations' concerns; respect Aboriginal and treaty rights; mutual education; and prioritize fixing procedural

issues. These broad recommendations highlight the magnitude of the issues that must be rectified, but more importantly how foundational they are to any functional consultation process. Booth and Skelton's final recommendation for the environmental assessment process is for a reconsideration of the process itself. Harvard law school's report on mining in BC reached a similar conclusion, stating that the province lacks any sort of decision-making process that allows First Nations concerns to be heard, breaking the internationally recognized right to free, prior and informed consent (IHRC, 2010). This research leads us to the same conclusion: tinkering with the oil and gas consultation process is a waste of time. The role of First Nations in oil and gas decision-making must be re-imagined, and new institutions created. Only through respectful, and honest communication with individual First Nations can new, meaningful processes be developed. However, I will reiterate two overarching recommendations as the provincial government moves forward with shale gas development in northeastern BC:

1) First Nations participation in oil and gas governance must occur at the point of decision-making with both government and industry involvement throughout the entire process. Otherwise, consultation processes act as a barrier to meaningfully participating in oil and gas governance, while fulfilling minimum legal requirements to consult.

2) Treaty 8 First Nations must play a principal role in determining how their proposals for long term planning and cumulative impact monitoring and assessment are developed, implemented and enforced. (Or in other words, First Nations must participate in the development of new governance mechanisms from their inception).

The adoption of these two recommendations, in addition to those above, would facilitate the implementation of collaborative, culturally appropriate decision-making processes in oil and gas development.

This thesis also supports recommendations put forward over the last decade by ENGOs and policy analysts for improved environmental regulation in the oil and gas industry. Lands Managers proposals for long-term landscape planning, and cumulative impact assessment and monitoring echo calls by the Environmental Law Centre at the University of Victoria (Campbell

& Hume, 2012), the Canadian Centre for Policy Alternatives (Parfitt, 2010, Parfitt, 2011), the Pembina Institute (Campbell & Horne, 2011), and West Coast Environmental Law (2003, 2004), to name only a few. To date these calls have not been heeded; development has occurred out of sight and mind of the majority of British Columbians. The validity of government claims that the environment is being adequately protected (BC Ministry of Energy, Mines and Natural Gas [BC MEMNG], 2013; Coleman, 2013, July 21) is questionable considering landscape scale, cross-sector monitoring and management are not occurring (Forest Practices Board, 2011). Indeed the Auditor General's Office warns that British Columbia's biodiversity (2013), and groundwater (2010b) are at risk due to inadequate research, monitoring and reporting. Ongoing recommendations for improved environmental protection, including the creation of an independent monitoring body (separate from the OGC), more enforcement officers, and higher fines to deter violations, would address the concern shared by ENGOs and First Nations that the OGC has conflicting mandates to protect the environment, meaningfully consult, and facilitate development, continually appearing to favour the latter.

The Government of BC currently lacks motivation to adopt the above recommendations, in part because British Columbians are not demanding that socially just and environmentally sustainable development take place. Elected decision-makers will take the path of least political resistance (Ageyman et al. 2002; Lazarus, 1992). As documented in Chapter 3, Treaty 8 First Nations voices are being ignored, and will continue to be until industry's social license to operate is put at risk. This requires the support of all British Columbians. Throughout this thesis, environmental injustices have been discussed in the form of procedural injustices with consultation, a lack of cultural recognition in terms of the scale and implementation of consultation, and the resulting distributional injustices on the landscape. British Columbians residing in southern BC are benefiting from these injustices, and so have a responsibility to ensure that they are not perpetuated. Gosine and Teelucksingh (2008) have noted that there is structured resistance in Canada to speaking about racist and colonial policy-making. Certainly this is seen in the mainstream debate around BC's shale gas industry, where discussions regarding the impacts of development on treaty rights, and First Nations' involvement in the industry's development have been noticeably absent, or obfuscated to only focus on the economics. While reports may mention the need for the recognition of First Nations Aboriginal

and treaty rights, the reality of what is occurring on the ground is rarely explored. With this thesis I have tried to contribute a missing piece to the debate, not in place of Treaty 8 First Nations direct contributions, but to highlight their importance.

3. Broader implications

The need for this research is best illustrated with a real world example: In November 2012 FNFN started their media tour off with a press conference in Vancouver. The FNFN was publicly voicing its opposition to the wholesale giveaway of water to oil and gas companies for hydraulic fracturing in their traditional territories. In the press conference, Chief Sharleen Wildeman outlined five conditions that must be met in order for FNFN to support development within their traditional territories. The first question the media asked was why the current negotiated consultation process was not adequate to this task. This reveals the need for research such as this that systematically identifies the shortcomings of the oil and gas consultation process and its implementation. As First Nations expand their toolkit of strategies to access decision-making it is necessary for people to understand that government mandated consultation processes are fundamentally unable to address First Nations' concerns, explaining why potentially controversial tactics are being taken up.

In order to activate broader change that works to move the entire province towards a more just approach to resource development there must be a widespread understanding that the government's current approach towards oil and gas consultation with First Nations is unacceptable. The OGC must not be permitted to create new agreements that continue to include the same fundamental procedural flaws that inhibit landscape scale Aboriginal and treaty rights from being protected. As LNG development advances, agreements will be made with many more BC First Nations. This research documents the inadequacy of the current process with the hope that it will inform other Nations negotiating consultation agreements with the province of BC.

More broadly, research on consultation with Treaty 8 First Nations provides a focal point for understanding larger structural tensions between the state and First Nations, and between the state and global capital. As Lisa Gezon's (2004, p.136) work demonstrates "connections between what we may refer to as local (geographic spaces and resident people) and processes that we

define as extralocal are often performed within and are inseparable from specific locales." In other words, abstract concepts and ideologies that inform and emerge from global processes are articulated in concrete actions at the local level. Therefore, it is at the local level where the impacts are felt, and where pushback and innovative thinking will first emerge. As Esteva & Prakash (1997, p.280) argue: "Since 'global forces' can only achieve concrete existence at some local level, it is only there at the grassroots that they can most effectively and wisely be opposed." By understanding global conditions through the local we are able to identify tangible strategies and actions that may contribute to the development of a just and sustainable BC shale gas industry. In this case study, by starting at the local scale where global capital touches down, the impacts to individual communities and cultures became the focal point, rather than the typical approach taken by government and industry that frames shale gas as a solution to provincial and global challenges, in turn ignoring the social, cultural and environmental impacts on local communities and Treaty 8 First Nations.

As neoliberal policies continue to break down trade barriers and open up communities to global pressures this type of critical social research only becomes more important as a tool to advance equitable and just resource development. As the province makes decisions regarding the development of LNG, the voices of Treaty 8 First Nations must play a prominent role as those experiencing the upstream impacts of the industry's development.

4. Looking to the future

Moving forward, a number of questions that may contribute to the development of a more equitable shale gas industry remain unanswered. Considering the reduced role of the government through neoliberal reforms, there is the question of how remote communities can protect themselves from destructive capital accumulation. More research is needed on the growing number of industry-First Nation agreements and partnerships that seek to accomplish this, such as those being negotiated by FNFN. These agreements are introducing new scales and forms of governance. Research is needed to better understand the shifting power configurations that are expressed and created through these agreements. Past types of agreements, such as Impact Benefit Agreements, have been found to prevent future objections to development and reinforce power inequalities (Caine & Krogman, 2010). As the government's role changes with neoliberal

policy-making, new types of agreements will continue to evolve that require the same critical investigation. For example, can environmental monitoring agreements with shale gas companies provide communities with more decision-making power over where, when and how development occurs? Are agreements introducing new forms and scales of regulatory authority? How does a First Nation's choice to enter into an industry agreement impact neighbouring First Nations?

Additionally, fieldwork documented the urgent need for independent scientific research on the potential environmental impacts of shale gas development. All participating Lands Managers voiced a desire to work with independent researchers to learn more about their traditional territories in order to establish thresholds that can be used to cap development at ecologically and culturally sustainable levels. Without adequate information, fact-based decision-making cannot occur, even if there is the political will.

In conclusion, in the absence of provincial institutions able or willing to ensure that land-based cultures are protected, the responsibility to protect and manage the land in the context of rapid capital accumulation is falling on the shoulders of local First Nations. There is no simple solution to the challenges this presents, as communities work to balance the costs and benefits of large-scale resource development through agreement-making, consultation, direct action, and participation in the energy industry. Current steps being taken by individual First Nations to gain greater control over development within their territories are incremental and unevenly distributed across the landscape, depending on local capacity and the individual industry proponents. Without adequate and equitable government regulation and enforcement, communities with less capacity will continue to be disadvantaged and dispossessed of their land and culture by environmentally destructive development practices. The recommendations discussed in this chapter will only be adopted if British Columbians shift the government's political will. The shale gas and LNG industries have created a pivotal moment in BC's history. British Columbians have a choice to continue pursuing large-scale capital accumulation at the expense of a few - causing potentially irreparable damage to Treaty 8 First Nations - or to work towards a future that embraces the idea of a just sustainability.

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Appendix

Appendix A
Interview Questions

Lands Manager Interview Questions:

1. How and why were Treaty 8 lands departments first created?
    a. What are the roles and responsibilities of the lands department?
    b. How has the role of the lands department changed/developed since its creation?

2. How has the shale gas industry developed in this region since its introduction?
    a. What has that development looked like? And what do you expect it to look like in the future?

3. How is (insert community name) involved with the shale gas industry?
    a. What is the range of involvement within your community?
    b. How has the community responded to the development?
    c. What opportunities are there for individual community members to participate in the consultation process?

4. How is your time (and your staff's time) spent dealing with shale gas development related issues and the activity application referral process?
    a. How many referrals does your office receive on a weekly or monthly basis?
    b. Can you walk me through the referral process from start to finish?
    c. What sort of information do you receive with a permit? What other information would you like to see being delivered with a permit?

5. What is the purpose of the existing consultation process for shale gas?
    a. What role does consultation play in development decisions?

6. Discuss some of the limitations of the current consultation process.
    a. What types of relationships do you have with government and industry?

7. What community concerns and values are being addressed by the consultation process?
    a. What are other concerns or values that may not be addressed right now?
    b. How could they be better addressed?

8. What are your minimum expectations for the regulatory process in general, and the consultation process in particular?

   a. What are the most immediate priorities for change within the consultation process?

Industry interview questions:

1. How has the shale gas industry developed in the region since its introduction?
   a. What is the future trajectory for the shale gas industry? What do the next 10 years look like?

2. How is industry involved in the consultation process?
   a. What are other ways that industry engages First Nations?

3. What is the purpose of the consultation process?
   a. What role does consultation play in end development decisions?

4. How are First Nations involved in the current government consultation process? How are other stakeholders included in the process?
   a. What processes allow First Nations to voice their opinions regarding development and the regulatory process itself?

5. How does the activity application referral process work?
   a. How many referrals are sent to individual lands departments on a weekly/monthly basis?
   b. What capacity do First Nations have to process referrals?

6. What community concerns and values are being addressed by the consultation process?
   a. What concerns are you hearing from First Nations?
   b. How is industry addressing these concerns?

7. What's the OGC's role for industry, government and First Nations?

8. What are your expectations for the consultation process?
   a. What are the most immediate priorities for change within the consultation process?

Government Interview Questions:

1. How has the shale gas industry developed in the region since its introduction?
   a. I've heard from First Nations that the pace and scale of development is rapidly increasing, what is the future trajectory for the shale gas industry?
   b. What do the next 10 years look like?

2. What is the purpose of the consultation process?

   a. What role does consultation play in shale gas development decisions?

3. How are Treaty 8 First Nations involved in the current regulatory process? How are other stakeholders included in the process?
   a. What processes allow First Nations to voice their opinions regarding development and the regulatory process itself?

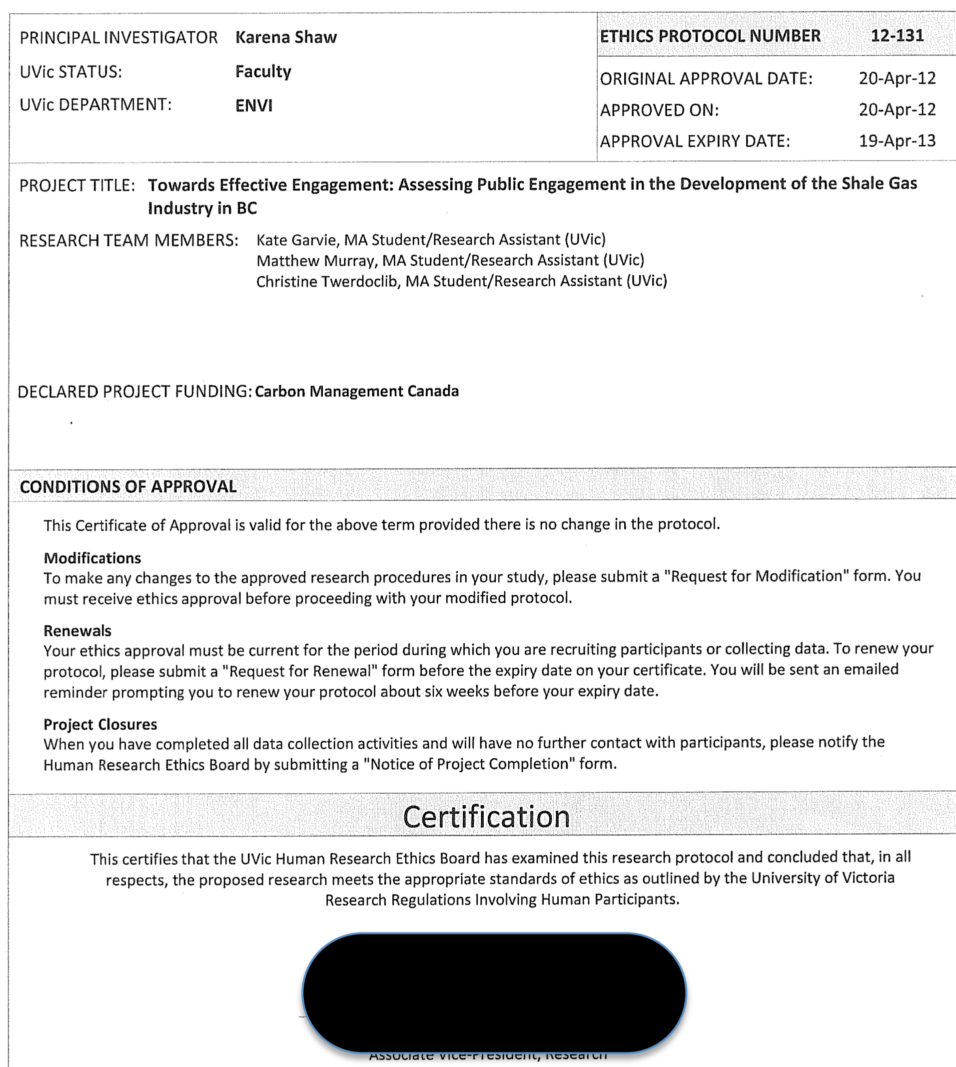
4. How does the activity application referral process work?
   a. How many referrals are sent to individual lands departments on a weekly/monthly basis?
   b. What capacity do First Nations have to process referrals?

5. What community concerns and values are being addressed by the consultation process?
   a. What concerns are you hearing from First Nations?

6. What's the OGC's role in balancing the needs of industry, government and First Nations?

7. What are your expectations for the consultation process?
   a. What are the most immediate priorities for change within the consultation process?
   b. What are you hearing from Treaty 8 First Nations?

Appendix B
Human Research Ethics Board Approval



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Certificate of Approval

PRINCIPAL INVESTIGATOR	**Karena Shaw**	**ETHICS PROTOCOL NUMBER**	**12-131**
UVic STATUS:	**Faculty**	ORIGINAL APPROVAL DATE:	20-Apr-12
UVic DEPARTMENT:	**ENVI**	APPROVED ON:	20-Apr-12
		APPROVAL EXPIRY DATE:	19-Apr-13

PROJECT TITLE: **Towards Effective Engagement: Assessing Public Engagement in the Development of the Shale Gas Industry in BC**

RESEARCH TEAM MEMBERS: Kate Garvie, MA Student/Research Assistant (UVic)
Matthew Murray, MA Student/Research Assistant (UVic)
Christine Twerdoclib, MA Student/Research Assistant (UVic)

DECLARED PROJECT FUNDING: **Carbon Management Canada**

CONDITIONS OF APPROVAL

This Certificate of Approval is valid for the above term provided there is no change in the protocol.

Modifications
To make any changes to the approved research procedures in your study, please submit a "Request for Modification" form. You must receive ethics approval before proceeding with your modified protocol.

Renewals
Your ethics approval must be current for the period during which you are recruiting participants or collecting data. To renew your protocol, please submit a "Request for Renewal" form before the expiry date on your certificate. You will be sent an emailed reminder prompting you to renew your protocol about six weeks before your expiry date.

Project Closures
When you have completed all data collection activities and will have no further contact with participants, please notify the Human Research Ethics Board by submitting a "Notice of Project Completion" form.

Certification

This certifies that the UVic Human Research Ethics Board has examined this research protocol and concluded that, in all respects, the proposed research meets the appropriate standards of ethics as outlined by the University of Victoria Research Regulations Involving Human Participants.

Associate Vice-President, Research

Certificate Issued On: 20-Apr-12

12-131 Shaw, Karena