Settler-colonial politics in B.C.'s consultation and accommodation policy: A critical analysis

by

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B.A. (Honours), Queen's University, 2013

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Abstract

This thesis explores technologies of power that operate in British Columbia's policy for consultation with Indigenous peoples about proposed land and resource decisions. I use the concept of settler colonialism to analyze the contents of British Columbia's consultation and accommodation policy to assess whether and how the policy is oriented toward settler-colonial relationships. I analyze a British Columbia provincial policy document entitled *Updated Procedures for Meeting Legal Obligations When Consulting First Nations Interim.* By focusing on this policy document, I examine how power operates through settler state law and policy. I critically analyze three technologies of power that operate in British Columbia's consultation and accommodation policy: the administrative law principle of procedural fairness, recognition politics, and the assumption of legitimate settler sovereignty. I consider how the policy's focus on process reveals colonial power dynamics. Furthermore, I argue that recognition politics operate in the policy because Indigenous difference is recognized and some space is made for Indigenous actors to exercise authority, however the settler state retains final decision-making authority, which shows a colonial hierarchy of power. Finally, I consider how the assumption of legitimate settler state sovereignty that underlies B.C.'s law and policy is a source of authority through which the settler state has various types of power under the policy, including definitional power and final decision-making power.

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Acknowledgments

I would like to acknowledge with respect the Lekwungen-speaking peoples on whose traditional territory the University of Victoria stands and the Songhees, Esquimalt and W̱SÁNEĆ peoples whose historical relationships with the land continue to this day. Most of my work on this thesis took place in Lekwungen territory, as did the government jobs where I gained experience working with policy.

I would also like to acknowledge with respect that some of this thesis was written in Southern Ontario, on land that for thousands of years has been the traditional land of the Huron-Wendat, and most recently the Mississaugas of Scugog Island First Nation, in territory covered by the Williams Treaties.

Thank you to my family and friends for your support throughout the process of working on this thesis.

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Introduction

This thesis explores the following question: what technologies of power does the British Columbia (B.C.) government use in its policy for consultation with Indigenous peoples about proposed natural resource development projects? My hypothesis is that settler-colonial governments claim to be striving to improve their relationships with people Indigenous to the lands they claim sovereignty over, and yet these governments perpetuate settler-colonial relationships in their policies.

In this research, the settler state is the object of analysis. I focus on a widely invoked policy document from the B.C. provincial government as a way of examining how power operates through settler law and policy. I am a settler in Canada, on Indigenous lands, and I am interested in doing work to help other settlers and myself understand the actions and subsequent impacts of settler governments. McConney (1996) writes about what settlers can learn from the field of Native studies. She urges the need for settlers to learn the history of colonization, and to learn from Indigenous peoples about how to shift away from colonial relationships and toward living in sustainable ways: “I believe we - non-Aboriginal people - must start this change with taking collective responsibility for what we have done so far” (p. 120). She also writes about this responsibility as extending into the present: “I believe that as those who have prospered from this [system of colonization], we do have responsibilities for what happened and what continues to happen” (McConney 1996, p. 121). Monture-Angus (2010) similarly mentions settler responsibilities: “Canadians must carefully examine their past and present relationships with Aboriginal Peoples in an effort to take themselves to the place where they

understand what is required to move beyond the colonial relations on which this country is based" (p. 22). It is with these responsibilities to examine past and present relationships in mind that I write this thesis, focusing on a settler government's policy regarding one aspect of its relationships with Indigenous peoples. By analyzing issues with one current system of governance, consultation and accommodation policy, I hope to do some of the work of examining a settler state's law and policy in a way that is attuned to Indigenous critiques of settler colonialism.

There are a few reasons that I am writing this particular thesis. I started the process of finding a thesis topic with an interest in natural resource sector politics in settler-colonial contexts. I have experience working in the natural resource sector as a tree planter. This thesis was motivated in part by thinking about relationships to land in a settler-colonial context. At one point, I planned to write a thesis that examined tree planting as a way of thinking about conceptions of land, relationships to/with land, resource economies, and settler colonialism. I also have experience doing policy work for a provincial government. As I learned more about public policy and legal contexts, my focus for this thesis shifted to an analysis of consultation and accommodation policy in B.C.

I chose to focus on B.C. partly because although some of B.C. has been part of historic or modern treaties, much of the land in B.C. is not part of treaties between the Crown and Indigenous peoples. Partly because of this context of a lack of treaties in many parts of the province, some of the major court cases that have shaped the duty to consult and accommodate have been brought forward by Indigenous peoples in B.C. (for example, see *Haida Nation v. British Columbia [Minister of Forests]* 2004 and *Tsilhqot'in Nation v. British Columbia* 2014). I also chose to focus on B.C. partly

because I have been living, learning, and working in B.C. while I complete this degree. I acknowledge with respect the Lekwungen-speaking peoples on whose traditional territory I have attended the University of Victoria, lived, and worked, and the Songhees, Esquimalt and W̱SÁNEĆ peoples whose historical relationships with the land continue to this day.

Land and resource politics are an important site of contestation about settler colonialism. A comment article in a local Victoria, B.C. newspaper by Nicholas XEMTOLTW Claxton, who is W̱SÁNEĆ, and John Price, who is Scottish-Canadian, connects land-based resistance against colonialism at Wedzin Kwah in Unist'ot'en territory to W̱SÁNEĆ relationships to land:

> For a W̱SÁNEĆ person, it is really important to support the Wet'suwet'en peoples, because their struggles are essentially what all Indigenous nations in B.C. face. Indigenous Peoples have lived on their respective territories for many thousands of years, and had developed complex and intense relationships to the natural world. (Claxton and Price 2019)

The article explains that Indigenous worldviews are often expressed through language, and gives an example of the SENĆOŦEN language, spoken by the W̱SÁNEĆ peoples.

> In the SENĆOŦEN language, many parts of the natural world were referred to as relatives. Salmon, trees, deer, killer whales, even land forms were all considered to be relatives with human-like spirits. Within this relationship, there was a responsibility to each other and a relationship that could not be ceded or sold. We are here to protect them, as much as they are there for us. (Claxton and Price 2019)

The authors connect the colonial theft of Indigenous peoples' lands to the assertion of Crown sovereignty and the attempted assimilation of Indigenous peoples (Claxton and Price 2019). They argue that "the First Nations case for sovereignty is strong and also offers a potential path forward to ending the pillaging of the earth" (Claxton and Price

2019). This article gives some B.C.-based context for the relevance of land and natural resource governance to Indigenous and settler-colonial politics.

Critical investigation of technologies of power used in settler states' policies for consultation with Indigenous peoples is important for a number of reasons. First, the policy impacts people, lands, waters, and legal systems. Second, the duty to consult is a timely topic because Indigenous peoples are launching many court cases about consultation and accommodation (for example, see *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*. 2017 and *Clyde River [Hamlet] v. Petroleum Geo-Services Inc.* 2017). Third, in the current political climate, where governments simultaneously prioritize economic growth and cannot be overtly imperial, it is important to examine how governments advance their own interests and the interests of businesses. In B.C., resource permitting and regulation are governed by provincial legislation. This means that when a natural resource development project is proposed within the borders of B.C., the applicable provincial legislation designates a decision-maker for decisions about permitting that project.[1] The legislation or regulations will also often outline criteria on which to make that decision.

B.C.'s consultation and accommodation policy occupies an interesting space in this policy and legal context. The duty to consult and accommodate is based on s. 35 of the *Constitution Act, 1982* and has been developed by the Supreme Court of Canada through case law (Sossin 2010).[2] It applies to all land and resource decisions that may affect a claimed or proven Aboriginal right (including title), as defined in Canadian law.

[1] Currently in B.C., legislative authorities are divided up based on the natural resource sector they pertain to. For example, generally forestry decisions are governed by particular statutes, and mining decisions are governed by different statutes.

[2] For a discussion of the court cases that led to the development of the duty to consult and accommodate, see Sossin 2010, pp. 98-107.

Consequently, for decisions about lands and resources, provincial decision-makers have legal obligations to act in accordance with the duty to consult and accommodate, as well as the provincial legislation that empowers them to make the decision. This thesis focuses on a policy document entitled *Updated Procedures for Meeting Legal Obligations When Consulting First Nations Interim* (Province of British Columbia [B.C.] 2010). This policy document outlines the province's broad approach to meeting its legal obligations to consult with First Nations possibly affected by a land or resource decision and, where deemed necessary, to set out accommodation measures.[3]

Method

The method I use in this thesis is Foucault-inspired critical discourse analysis. The concept of discourse does not have one commonly agreed-upon meaning, even if we consider only Foucault's work: "Foucault's thinking in relation to the concept and methodology of discourse was certainly complex, difficult, nuanced and, at times, flawed and contradictory" (Hook 2001, p. 543). As such, the task of defining what I mean by discourse and discourse analysis in this thesis has not been simple. As a starting point, Foucault's understanding of discourse went beyond the understanding of discourse as pertaining to language. Hook (2001) argues that Foucault's conception of discourse was

[3] A brief note on terminology: Linda Tuhiwai Smith (2012) gives a detailed discussion of the usage of the term "indigenous" (pp. 37-40). She writes that "[t]he term 'indigenous' is problematic in that it appears to collectivize many distinct populations whose experiences under imperialism have been vastly different" (Smith 2012, pp. 37-8). In this thesis I use the term Indigenous to refer to refer to people descended from ancestors who lived on these lands before European settlement. I acknowledge the risks of homogenizing different Indigenous peoples under that label. This analysis focuses on B.C.'s broad strategy for consulting with and accommodating with First Nations, and so I am referring to B.C.'s approach to consulting with the many different Indigenous peoples who have traditional territories on lands that B.C. claims as provincial lands.

Although the term "Aboriginal" can be used in a similarly broad sense, in this thesis I use it to specifically refer to Aboriginal in the Canadian legal context (e.g. Aboriginal rights and title). B.C.'s consultation and accommodation policy uses the term "First Nations" to refer to the Indigenous peoples it consults with. As such, I use the term First Nations when I am referencing the policy.

also concerned with materiality and power: "From the outset, then, Foucault is involved in a concerted attempt to restore materiality and power to what, in the Anglo-American tradition, has remained the largely linguistic concept of discourse" (pp. 522-523). The understanding that discourse affects and is affected by the material world of objects and practices is embedded in Foucault's usage of the term.[4] Olssen (2010) explains this interaction in Foucault's thought: "For Foucault, then, language, discourse, and thought, are theorized as belonging to an autonomous realm, theoretically, and conceptually separate from the being of the world, but in practical senses embedded in and interacting with the world" (p. 32).

It is this interaction between them that makes drawing a distinct line between the discursive and the other-than-discursive challenging in Foucault-inspired work:

> Indeed, one needs only briefly consider the complexity of the mutually beneficial and interdependent relationship of the material and the discursive in the operation of power to be aware that discourse often appears as both *instrument* and *result* of power, as both its antecedent and its offshoot. (emphasis in original, Hook 2001, pp. 539-540)

In this project, the object of my analysis is a B.C. government policy document. I take the position that this policy document is one of many possible windows into the work and effects of power in the context of land and resource decision-making by a settler-colonial government. I do not mean to suggest that the study of written texts is the only way to study discourse. Rather, if we take the position that "extra-textual factors" like history, materiality, and conditions of possibility (Hook 2001, p. 543) are themselves discursive,

[4] Olssen (2010) refers to Michèle Barrett (1988/1991), who argued that Foucault's understanding of discourse changed with his change in methodology from archaeology in his early works to genealogy in his later works. With archaeology, Barrett writes that Foucault focused on the "production of 'things' by 'words'" (Barrett 1988/1991, p. 130, see also Olssen 2010, p. 27). With genealogy Foucault's focus shifted to practices, understanding "discourse in a framework of 'organised and organising practices'" (Barrett 1988/1991, p. 135, see also Olssen 2010, p. 27). In each of these conceptions of discourse we see that discourse is seen as capable of affecting the material world, whether through objects or practices.

it becomes clear that there are many other possible objects, processes, and experiences that could be examined in order to analyze power's operation. In this project, I look to the text of the *Procedures* as one way of examining how power operates in a settler-colonial society.

The written text of a policy document is one type of "artifact" that is a "potential carrier[] of meaning, open to interpretation by legislators, implementors, clients or policy 'targets,' concerned publics, and other stakeholders" (Yanow 2000, p. 17). Discussing artifacts, Yanow (2000) writes:

> …in their use, they are tools for the re-creation of those meanings and for the creation of new meanings. Through artifactual interaction, we re-embody them with meaning at the same time that we use them to communicate those meanings and to create extensions of those meanings. (p. 17)

Analyzing written documents is a way to think about the meaning making that led to their creation and that may result from their existence (while also acknowledging that the analysis of a policy document is a form of interaction with it). Thinking about policy documents as artifacts is also one way of addressing their relationality. Intertextuality, a term often attributed to Kristeva (Kristeva 2002, p. 8) is a useful term in thinking about the wider context of texts, and of the multiple theories and practices that are constitutive of texts. In literary theory, intertextuality is a concept that includes "the recognition that the creation of literary texts depends in significant part on the alignment of texts to prior texts and the anticipation of future texts" (Bauman 2004, p. 1). Through an analysis focused on one policy document, some aspects of the wider context of that document will be considered.[5]

[5] It may also be useful to consider the "genre" of policy documents. There are likely many different types of policy documents in different governance contexts, and I will not attempt to give a general definition of the genre of a policy document. However, some features of the *Procedures* suggest the genre of policy

The discourse analysis in this thesis is organized around technologies of power I identify in the *Procedures*. In Chapter One I explain how I am using the Foucauldian concept of technologies of power. Technologies of power are a variety of tactics, laws, and strategies oriented toward achieving governance objectives. These technologies are employed in numerous ways (i.e., not only in text-based documents), and I look at the text of the *Procedures* as one window into seeing how they are employed by the B.C. government. For some scholars, analysis of texts constitutes coding documents and counting the number of times particular words, phrases, or themes arise.[6] That is not the type of analysis I am doing in this thesis. Instead, I focus on the operation of power, and what B.C.'s consultation and accommodation policy reveals about how power operates regarding land and natural resource decision-making in a settler-colonial state.

Chapter Outline

In this thesis I am doing critical analysis of a widely applicable policy document, drawing heavily in that analysis on Foucault. Chapter One sets out my approach. I begin by discussing some implications of using Foucault-inspired critique in a public policy context. Broadly, I argue that this approach enables me to focus on the ways power operates in the current context of the policy, without requiring me to prescribe how things should be done in the future. This non-prescriptive approach is useful to a public policy context because it can open up space for possible "experimentation" (see Lovbrand and

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documents that they are part of. The *Procedures* are a statement of official government policy based on law (including constitutional, statutory, and case law) that provide general guidance for the official interpretation and implementation of the law. They are not to be considered a substitute for seeking legal advice (Province of B.C. 2010, p. 5) and they are oriented toward practice and implementation. Some other types of documents in a governance context may have different genres, for example the genres of white papers or party platforms, each of which operates in different contexts but is generally oriented toward proposing future policy directions.

[6] For example, see O'Connor's (2017) content analysis.

Stripple 2015).[7] This chapter also introduces several key concepts from Foucauldian analysis that I use to explicate my approach. I focus on the concepts of *critique*, *governmentality*, *technologies of power*, *processes of differentiation*, and *systems of domination*, all of which give insights about the ways power operates. My analysis focuses on how particular technologies of power operate through B.C.'s consultation and accommodation policy in ways that demonstrate B.C.'s commitment to remaining in settler-colonial power relationships with Indigenous peoples.

In Chapter Two, I explain why I am using Glen Coulthard's (2014) definition of a settler-colonial relationship. I draw on other scholars in the fields of Indigenous studies and settler-colonial studies to discuss commonly identified features of settler colonialism and why I rely on Coulthard's definition, in light of these other features. Explicating settler colonialism is important to this project because it is the system of domination I focus on in my analysis. Only by identifying aspects of settler colonialism can I analyze the contents of B.C.'s consultation and accommodation policy to assess whether and how the policies are oriented toward settler-colonial relationships. I conclude Chapter Two with a critical analysis of the assumption of legitimate settler state sovereignty in Canadian law. By critiquing the assumption of legitimate settler state sovereignty, I set the stage for my analysis of the assumption of legitimate settler state sovereignty in the *Procedures* in Chapter Three.

[7] As I discuss in Chapter One, however, this experimentation can lead to possible changes in various ways. Careful attention has to be taken to critique in such a way as to open up space for experimentation in particular ways (e.g. in this thesis, by attending to settler-colonial technologies of power, I hope that any ensuing spaces for experimentation that could be opened up would be opened up in a way that seeks to shift *away* from colonial relationships between settlers and Indigenous peoples, and toward less dominative, less dispossessive relationships).

Later, in Chapter Three, I analyze B.C.'s consultation and accommodation policy using the concepts introduced in chapters one and two. I focus on the *Procedures* (Province of B.C. 2010) because they outline B.C.'s approach to consultation and accommodation, and they are applicable in multiple natural resource sectors. In my analysis I identify three technologies of power that are apparent in the consultation and accommodation policy: the administrative law principle of procedural fairness, recognition politics, and the assumption of legitimate settler state sovereignty. I will systematically analyze each technology of power, discussing a) what it is, b) where it appears in the policy, c) what it has to do with power and how power operates, d) whether it is a process of differentiation, and e) how the technology of power interacts with the system of domination of settler colonialism. Foucault-inspired analysis enables me to critique B.C. government policy in a way that seeks to denaturalize settler-colonial domination in the way that Glen Coulthard understands the latter term.

Chapter 1: Approach

My approach in this thesis is Foucauldian analysis. This approach enables me to focus on how power operates through diffuse practices. Chapters one and two set the theoretical foundations for my analysis.

This chapter introduces concepts from Foucauldian analysis that I use to build my analysis of B.C.'s consultation and accommodation policy in Chapter Three. I begin by discussing some insights that this type of Foucauldian approach can bring to critical public policy studies. Then I move to a discussion of main concepts I take from Foucault and Foucault-inspired literature, which are critique, technologies of power,[8] processes of differentiation, and systems of domination. The first concept I address is *critique* because it permeates my analysis. After this section, I move into a discussion of *governmentality*, which is an area of study in which Foucault thought about how "specific knowledges" and techniques are used to govern populations (Rose et al. 2006, p. 84). Governmentality serves here as a way to ground and contextualize my subsequent discussion of *technologies of power*. Finally, I explain how attention to *processes of differentiation* and *systems of domination* allows me to focus my analysis on practices, which aligns with Foucauldian analysis.

Foucault and Public Policy

In this section, I explain my choice of analytical framework. I begin with a discussion of some limitations and analytical insights that a Foucauldian governmentality approach

[8] Later, I discuss my usage of technologies of power and technologies of government in this thesis. Technologies of government is also a key concept I draw on from Foucault-inspired studies. I do not mention it in this list because I take the position that there is little conceptual difference between the two terms (technologies of government and technologies of power) for the purposes of this paper.

can have for policy studies, following McKee (2009). Next, I look at how critique based in discourse analysis can lead to discursive disruption. I build on these ideas by arguing that the space disruption opens up can be valuable to policy studies because different ways of thinking and acting may come about through that disruption (within policy areas and the discipline of policy studies). Thus, Foucauldian-inspired critical analysis is a useful approach to conducting policy studies.

McKee (2009) helpfully identifies insights and limitations of a governmentality approach in critical social policy studies, some of which have implications for my project. At the same time, the analysis leaves the researcher committed to a Foucauldian approach, since most of the limitations are attributed to scholars who use Foucault's concept of governmentality, and not to Foucault himself (McKee 2009, pp. 467, 472-3). Although McKee's work is focused on critical social policy studies and my research is not about social policy (in the sense of the direct provision of social services such as welfare or housing), the notions of discourse and governmentality in her work are useful.

McKee (2009) writes that many critical social policy scholars have used a Foucauldian governmentality approach in their research. McKee (2009) suggests scholars use a "realist governmentality" approach, as theorized by Stenson (2005). Stenson (2005) conceives of discourse analysis as pertaining to "mentalities of government" (p. 265). "Realist governmentality", according to Stenson (2005), entails combining this type of discourse analysis with "grounded, empirical, realist analysis of governing practices" (p. 266). The noteworthy connection here is the combination of "mentalities" with "practices". This gets at "the inevitable gap between what is attempted and what is accomplished" (Li 2007, p. 1). Discourse analysis, in Stenson's formulation, investigates

"what is attempted", but understanding "what is accomplished" (and comparing the two) requires analysis of governing practices.

As discussed earlier, I take the perspective that knowledge, materiality, and power are all part of discourse in a Foucauldian sense (see Hook 2001, p. 542). So, Stenson's (2005) characterization of discourse, which McKee (2009) draws on, is narrower in scope in its focus on mentalities of governance. However, this critique that discourse analysis does not take into account "extra-textual factors (history, materiality, conditions of possibility)" (Hook 2001, p. 543) is important to consider, especially since my analysis in this thesis is based on the text in a policy document. McKee argues that some governmentality scholars focus too much on discourse analysis of texts and neglect the complex realities of how politics actually play out in the real world. "By ignoring the messiness of realpolitiks, this top-down discursive approach neglects that subjection is neither a smooth nor a complete project; rather one inherently characterized by conflict, contestation and instability" (McKee 2009, p. 474). My research is based on government policy documents, and as such bears this risk, potentially failing to attend to the complexity of how policies are implemented and received in the real world.

I am aware of this risk. Partly, I take it on because a master's thesis is inherently limited in scope. Partly, I seek to be attuned here to the messiness and complexity of how politics are played out in the real world. For example, the provincial policy documents I examine are somewhat attuned to the complexity and nuances of their implementation.[9]

[9] For example, the consultation and accommodation policy procedural steps include guidelines for government staff to do research about prior engagement with First Nations potentially affected in the project area (see Phase One, step 3, on page 9 of Province of B.C. 2010). They also include procedural steps to take prior agreements between government and potentially-affected First Nations into consideration regarding if a particular type of consultation and accommodation has previously been agreed to for the type of decision at hand (see Phase One step 2 on page 9 and Phase Two, step 1 on page 14 of Province of B.C. 2010). Furthermore, in the flow chart on page 20, the potentially-circular nature

However, they also present a procedurally focused policy rather than one focused on achieving the broader goals of reconciliation (The First Nations Leadership Council [FNLC] 2013, pp. 97-99). The policy's procedural focus may limit its capacity to guide participants effectively during real-world occurrences that are not contemplated in the policy. Part of the usefulness of using Foucauldian critical discourse analysis in my analysis of policy is its attention to relationships between "mentalities" and "governance practices".[10]

McKee (2009) identifies two further limitations of a governmentality approach that involve the perceived role of the state. On one hand, studies of governmentality tend to focus on "the perspective of the 'governors' alone" (McKee 2009, p. 474). With this focus, she identifies a risk that the state can be overdetermined as a monolithic entity with overwhelming coercive power (McKee 2009, p. 475-476). This is directly contrary to Foucault's characterization of power as having a "dispersed, capillary nature" (McKee 2009, p. 475), as something that operates through many different aspects of society, not just from the state in a top-down direction.

On the other hand, governmentality approaches to policy studies can risk failing to ascribe sufficient power to the state:

> Whilst [Foucault's] emphasis on the dispersed, capillary nature of power illuminates the plurality of sites of government, such a focus downplays the influence of governing institutions as social forces, and the central role of the state in shaping social policies that regulate our daily lives. (McKee 2009, p. 475)

In this research, I focus on particular aspects of the B.C. state by analyzing its consultation and accommodation policy. I try to bridge the gap between these two

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of consultation and accommodation processes is explicitly outlined (Province of B.C. 2010).

[10] The terms "mentalities of government" and "practices of government" were discussed above in reference to Stenson (2005).

limitations in two ways. First, I focus on B.C. policy and Canadian law as manifestations and sources of power, because they have significant discursive power that affects people, land, and resources.[11] Second, I try not to essentialize the state as being a cohesive whole wherein all its parts work seamlessly toward unified ends. Part of this attempt not to give the state too much power in my analysis is also attention to how actors outside the settler state[12] have shaped the policy.

One analytical insight of a governmentality approach McKee highlights is the productive nature of power. Foucault's "concern lay in the different means by which human beings are made subjects" (McKee 2009, p. 470). This relates to my study in two ways. First, my thinking about settler colonialism has been shaped by Indigenous scholars who have written about the importance of considering the productive nature of settler colonialism (Stark 2016, no page numbers available; Coulthard 2014, p. 152). Second, though the present study strategically brackets the question of subject formation, consultation and accommodation policy contributes to producing people as subjects by setting out categories people may belong to, and limiting the ways members of each category may participate in consultation and accommodation processes. These categories are not exclusive to consultation and accommodation policy; they are related to wider social and political contexts.[13] These categories shape the conditions of possibility for action and focusing on them allows us to see the productive nature of power.

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[11] Again, I am thinking about discourse as encompassing knowledge, power, materiality, and conditions of possibility (see Hook 2001, p. 542).

[12] For example, the policy has been shaped by Indigenous peoples going to court about consultation and accommodation. In this example, the courts are part of the settler state. However, by going to court about consultation and accommodation, Indigenous peoples' actions have effected change to consultation and accommodation law and policy.

[13] See Nadasdy 2003, p. 263 regarding the importance of the social contexts in which processes are embedded.

So far in this section, I have relied on McKee's work to clarify my approach in relation to the insights and limitations she sees in a Foucauldian governmentality approach. Now I consider why disruption makes a Foucauldian approach particularly useful for my analysis of a settler state's public policy. By doing Foucauldian-inspired critique that seeks to denaturalize what has come to be taken as given, discourses that have been entrenched and possibly unexamined are disrupted.[14]

Discursive disruption can open up space for experimenting with different ways of thinking, communicating, or acting. Lovbrand and Stripple (2015) write about what Foucauldian analytics of power and government can bring to critical policy studies. They write that some people criticize Foucault for the "uncertain position" these disruptive politics leave us in: "Foucault's invitation to think and act differently does neither suggest any definite direction for resistance and change, nor does it guarantee that it lead us to a better situation" (Lovbrand and Stripple 2015, p. 103). However, it is precisely these uncertainties that lead to processes of "experimentation" within this opened up space. Lovbrand and Stripple (2015) write: "By problematizing what is given to us as necessary to think and do, this analytical tradition sets out to open up new fields of experience that allow us to do things differently" (p. 102). When this type of critical work is done in public policy research, space can be opened up for new or different ways of thinking about and carrying out governance.

In the context of this thesis, disruption is one of the reasons I do a critical analysis. My analysis calls attention to current technologies of governance that may further settler-colonial domination and the dispossession of Indigenous peoples' lands and self-

[14] Dhamoon's (2009) discussion of the "disruptive quality of taking accounts of meaning-making" (pp. 145-151) gives a thorough explanation of this concept of disruption.

determining authorities. Given that disruption is not necessarily directive or leading to a "better" situation (Lovbrand and Stripple 2015, p. 103), this is not to say that *any* alternative would necessarily be less colonial the status quo. Current consultation and accommodation policy makes more space for potentially affected Indigenous peoples' input than previous settler governments' approaches to land and resource management (FNLC 2013, p. 91).[15] So, the disruption I am engaging in is done with a clear strategic sensibility, informed by Indigenous scholars' writing about colonialism and its alternatives. For example, Atleo (2009) writes about the ways neoliberalism has shaped the discourse of Indigenous-settler relations, and argues that Indigenous ways of living can provide inspiration to other Indigenous and non-Indigenous peoples seeking alternatives. He writes about neoliberal policies and practices being taken up in general in Canada, in settler-Indigenous policy, and within some Indigenous communities (Atleo 2009). He writes that "[a]lternatives to neoliberalism exist because Indigenous peoples have lived them. Many Indigenous peoples continue to live in sustainable, self-determining ways today and they provide inspiration to other Indigenous and non-Indigenous peoples seeking alternatives" (Atleo 2009, p. 31). Chapter Two of this thesis discusses some other Indigenous scholars' writing about colonialism and its alternatives. Atleo's (2009) paper states:

> Although the primary goal of this paper is not to present an extensive study of economic alternatives, given the prevalence of the neoliberal economic development model in Canada and around the world, it is important to know that they do exist. (p. 28)

[15] As such, disruption leading to land management similar to B.C.'s approach before the 1990s would not be consistent with the way I am seeking to conduct this analysis.

Similarly, the primary goal of this thesis is not to present an extensive study of Indigenous scholars' and activists' conceptions of alternatives to colonialism. However, it is important to the context of this research that they exist.

By doing this analysis I am not prescribing ways of acting, but I am focusing on technologies of government that further settler-colonial aims of dispossessing Indigenous peoples of their lands and self-determining authorities.[16] As such, the disruption that my critique is oriented toward is strategically aimed at settler governments' colonial discourses. I imagine the space that may be opened up by this disruption as not solely being *within* B.C.'s consultation and accommodation policy. That is to say, the possible experimentation that could result from such disruption would not necessarily need to take place as changes to consultation and accommodation policy, as it is currently contextualized within the B.C. government. The space that is opened up could lead to experimentation with radically different forms of consultation and accommodation, like those suggested in a FNLC (2013) report about consultation and accommodation policy (p. 20). The space that is opened up could also relate to relationships between Indigenous peoples and settlers more generally. Many Indigenous scholars have written about decolonial and noncolonial ways of living (see, for example, Monture-Angus 2010, Atleo 2011, or Kimmerer 2013). I hope there is the possibility that critically examining a settler government's policy could help open up space for settlers and our governments to listen to, take seriously, and make space for Indigenous peoples' authorities, responsibilities, and ideas.

[16] See later discussion of Coulthard's (2014) definition of a settler-colonial relationship.

Critique

I begin this section, drawing on Foucault and Dhamoon, by introducing critique in the Foucauldian tradition as a practice that denaturalizes what has come to be taken as given. I then identify ways that denaturalizing what has come to be "taken as given" is taken up in academic literature about settler-Indigenous relations. Next, I analyze the phrase "taken as given" to reveal much of how power operates and is understood. Lastly, I explain why my approach in this thesis is premised on critique.

Foucauldian analysis is a critical practice that involves "problematizing what is given to us as necessary to think and do" (Lovbrand and Stripple 2015, p. 102). In "On Method", Foucault answers a question about his work having affected social workers working in prisons such that they felt like they did not know what to do. Foucault responds that this is what he hopes his critique will accomplish: "But my project is precisely to bring it about that they 'no longer know what to do', so that the acts, gestures, discourses which up until then had seemed to go without saying become problematic, difficult, dangerous" (Foucault 1991b, p. 84). Critique is aimed at having people question the actions and discourses they normally engage in. In this thesis, I am looking for what "goes without saying" in consultation and accommodation policy.

This conception of critique is largely consistent with the general understanding of critique in critical theory. In the various uses of critique over recent centuries, there is a pattern of theorists interrogating the concepts and forms of thought their predecessors used to conduct their critiques (de Boer and Sonderegger 2012, p. 4). As such, de Boer and Sonderegger acknowledge the challenges in attempting to broadly characterize for critique in a particular way. Toward this end, they write:

> …we would venture that critique always seems to arise from the need to draw a line between, on the one hand, forms of knowledge, culture or politics alleged to have become inadequate and, on the other hand, forms of knowledge, culture or politics considered to possess a liberating, emancipatory or future-oriented force. (de Boer and Sonderegger 2012, p. 2)

They are not arguing that critique involves a straightforward determination of what falls on either side of that line. Rather, critique is oriented toward making that sort of determination. In being so oriented, critique has a negative and a positive moment. The positive moment entails deciding where to draw that line: "a positive determination of the criterion that allows the critic to draw a fixed line" (de Boer and Sonderegger 2012, p. 3). The negative moment is critique's "effort to shed stifling forms of thought or life" (de Boer and Sonderegger 2012, p. 3).[17] The positive determination is what leaves critique vulnerable to itself being critiqued on the basis of its criteria and possibly the forms of culture, knowledge, or politics that are thereby deemed future-oriented.

Foucauldian critical analysis can be seen as oriented toward "drawing a line" and making determinations about what forms of life and knowledge are deemed to have become inadequate, and what forms of life and knowledge may be deemed more adequate. In an interview, Foucault describes critique as a pushing back against certain modes and forms of governance:

> …in this great preoccupation about the way to govern and the search for the ways to govern, we identify a perpetual question which would be: 'how not to be governed *like that*, by that, in the name of those principles, with such and such an objective in mind and by means of such procedures, not like that, not for that, not by them.' (emphasis in original, Foucault 2007, p. 44)

Foucault would likely argue that the positive moment of critique (required to draw the line and determine forms of life and knowledge that fall on either side of the line) can

[17] de Boer and Sonderegger (2012) draw on Kant's *Critique of Pure Reason* in their discussion of these positive and negative moments (p. 3).

only be made by people actively involved in issues and participating in resistance struggles. Foucault frequently rejected the notion that intellectuals like himself should be cast in the role of prophets who tell people what they should do (Hendricks 2012). We see this when he repeatedly refuses to prescribe ways of being and doing (Olssen 2010, p. 51, Foucault 1991b, p. 84). Rather, "the choice whether, how, when and why to resist must be made by those who are struggling against a particular set of power relations" (Hendricks 2012, p. 215).[18]

Hendricks (2012) argues that Foucault has a more complex relationship to the role of intellectual prophet than outright rejection (p. 218). Instead, Hendricks argues that Foucault's work suggests to his readers that they critique past and present practices based on certain shared values:

> Providing a clear, rational argument for the values that ground Foucault's genealogical works runs counter to the transformative experience that these works seem designed to provide. They rely to a large extent on values already accepted by his readers, and he does not give arguments for these values because he emphasizes their contingency and leaves them open to question. (Hendricks 2012, p. 218)

Thus, Hendricks argues that in some ways Foucault does assume the role of intellectual prophet, at least insofar as he encourages particular types of critical thinking based on particular values.[19] By emphasizing those values as contingent, however, Foucault encourages readers to problematize "what is given to us as necessary to think and do"

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[18] Foucault did consider that there is space for the intellectual to participate in processes of experimenting with new ways of thinking and doing: "After thus revealing problems, intellectuals may also act as citizens among other citizens in order to generate and test possible solutions alongside others if they so choose" (Hendricks 2012, p. 216).

[19] One such value has been interpreted as a commitment to an agonistic interplay of power relations as an alternative to dominative power relations: "In a sense, it is because power factors are always co-present in knowledge processes that an equality of power could be seen as the best strategy normatively by implication, to ensure the 'best' outcome. Hence, the view that Foucault is committed to a rough equality of agonistic social and political relations clearly seems warranted by his thesis of the irremovability of power from epistemological processes" (Olssen 2010, pp. 51-2).

(Lovbrand and Stripple 2015, p. 102), even when what is given is the assumed shared values in his work.

To further explicate a Foucauldian approach to critique, I draw on Dhamoon's interpretation of Foucault. In "Considerations on Mainstreaming Intersectionality", Dhamoon (2011) leads the reader through a critical examination of what she refers to as intersectional-type research (p. 232). I am drawing on Dhamoon's characterization of critique, whereby the subjects of critique are the processes of differentiation and systems of domination. Although my work is not intersectional in that it does not analyze two or more axes of domination, the article's discussions of critique, processes of differentiation, and systems of domination are highly useful in the present context.

Dhamoon's discussion of intersectional-type research has been formative to my project in several important ways. She identifies a "central component of this research paradigm [as] critique of the work and effects of power" (Dhamoon 2011, p. 231). Dhamoon (2011) broadly defines "critique", as a "form of analysis that denaturalizes what is taken as given, thus showing that subjectivity is structured by language; that the universal unified subject of reason is a falsity; and that grand narratives are inadequate explanations of political life" (p. 231). The focus on denaturalizing what is taken as given is important to my work because I am examining B.C.'s consultation policy to see what it reveals about how settler state sovereignty and jurisdiction are taken as given in that policy.

The notion that settler colonialism (or aspects thereof) is entrenched and "taken as given" is a recurring theme in analyses of settler state and Indigenous relationships. For example, Chris Andersen (2014) argues that race and racialization are aspects of settler

colonialism that continue to have effects on the (mis)recognition of Indigenous peoples. He explores tensions between Métis seen as an administrative category in English for "mixed-race", and Métis as peoplehood or nationhood based in historical and cultural connections to the Red River settlements (Andersen 2014, p. 13). [20] He argues that it is only in recent decades that "Métis" has been used in an anglophone context as an administrative category denoting racial mixedness (Andersen 2014, pp. 81-3).[21] This racialization is related to colonialism. Andersen (2014) argues that focusing on Métis as racially mixed focuses on Métis people's lack of pre-contact Indigenous authenticity and neglects their history as a pre-colonial, or pre-settler society (pp. 27-8).

In explaining his usage of the term racialization as "the hierarchical processes through which races are produced and legitimized", Andersen (2014) uses Bourdieu's term "symbolic power" to name the power to have things come to be seen as "just the way things are" (p. 15). Bourdieu (1991) defines symbolic power as "that invisible power which can be exercised only with the complicity of those who do not want to know that they are subject to it or even that they themselves exercise it" (p. 164). Andersen argues that this symbolic power manifests through Canadian categorizations for people that are used in Canadian courts and the census. For example, categories for "ethnic origin" (Andersen 2014, p. 78) on the Canadian census have changed over the years, which reveals the constructed nature of racialized categorizations. Similarly, under s. 35 of the

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[20] For anglophones, Andersen (2014) rejects the commonly-made distinction between small m "métis" as denoting general mixedness and large M "Métis" as referring to the Métis nation (those having historical ties to the Red River settlements) (p. 211, note 1). He also acknowledges the more general meaning of the term in French as mixed-race: "for Francophones and Francophiles, 'métis' of course reflects a more general meaning…" (Andersen 2014, p. 211, note 1).

[21] Andersen (2014) explains that "'[r]ace' is used in this book to refer to the socially constituted and distinctly modern processes through which certain physical and cultural features of individuals and groups are emphasized, elevated, and distinguished in the context of producing and sustaining social hierarches of dominance and inequality" (p. 15).

Constitution Act, 1982, the only legal categories available are Indian, Inuit, Métis, or not Aboriginal under the Act (Andersen 2014, p. 199). Andersen argues that these possible legal categorizations limit and shape how people self-identify. I have neither the space nor the expertise to get into a further discussion of Andersen's arguments about Métis peoplehood and the Canadian legal category of Métis. I have referred to his book here because it gives concrete examples of the constructed nature of knowledge and its integration with systems of power.[22] It also grounds the concept of symbolic power as the power to have things come to be seen as "just the way things are" in a settler-colonial context. This notion of symbolic power fits with a Foucault-inspired conception of critique because both are concerned with how things come be seen as "just the way things are". Critique is about questioning the things that have come to be taken as given, and symbolic power is about how they come to be taken as given.

Mark Rifkin discusses another way by which settler colonialism is naturalized. He uses the term "settler common sense" to refer to the presumption of settler sovereignty that underlies everyday actions of settlers. Settler common sense is another way to think about settler-colonial power dynamics having come to be seen as just the way things

[22] Following Foucault, I conceive of power as operating in a multiplicity of ways, not simply as a top-down relation of domination. He writes: "As you see, one does not have to work with power understood as domination, as mastery, as a fundamental given, a unique principle, explanation or irreducible law. On the contrary, it always has to be considered in relation to a field of interactions, contemplated in a relationship which cannot be dissociated from forms of knowledge" (Foucault 2007, p. 66). Andersen's focus in the census and court examples is on the power we see operating through categorizations made meaningful largely through their positions in settler-colonial law and administration. However, we can observe multiple processes of knowledge production and power operating in the examples Andersen gives (for example, the power of individuals to self-identify on the census; the historical power/knowledge processes involved in creating the meaning of Métis as peoplehood with historical connections to the Red River). Similarly to Andersen's focus on racialized categorizations in the Canadian census and courts, this thesis focuses on power/knowledge processes as legitimated and set out by the settler state. Though there are a multiplicity of power relations, I focus on the settler state because of its historical and current power to shape social, political, material, and economic realities.

are.[23] "The legal and political mappings that influence everyday life in the US remain predicated on the assertion of an underlying and incontestable national sovereignty that itself animates the work of law and policy-making in putatively domestic space" (Rifkin 2013, p. 328). Rifkin's focus is on the affective experiences of settlers as they go about their day-to-day lives, while my project focuses on a policy document outlining a settler government's policy. Even with this difference in analytical focus, my project is informed by the way Rifkin characterizes an underlying and incontestable presumption of national sovereignty that animates law and policy-making. Indeed, bureaucrats are well understood as just another group of mostly settlers going about their day-to-day lives, and so are most of the people whose businesses and land uses they regulate.[24] My analysis will be attuned to an understanding of the incontestability of Canadian Crown sovereignty being foundational to the consultation guidelines, and how that came to be.

Simpson and Smith (2014) also use the Gramscian concept of common sense in their discussion of the place of theory in the field of Native studies. They discuss various scholars' approaches to the use of theory in Native studies. Regarding the implications of settler nation-state building, they write: "The state is not only repressive; it is also educative – shaping common sense through ideological state apparatuses (such as the academy) that normalize the rule of settler colonialism" (Simpson and Smith 2014, p. 6). Although this

[23] Rifkin's understanding of common sense seems to derive from Gramsci's sense of the term. While common sense in the English language generally has positive connotations, in Italian the term "*[s]enso commune* refers simply to the beliefs and opinions supposedly shared by the mass of the population" (Crehan 2011, p. 274). Crehan (2011) argues that Gramsci's "inherently vague" concept of common sense "offers anthropologists…a way of thinking about the texture of everyday life that encompasses its givenness – how it is both constitutive of our subjectivity and confronts us as an external and solid reality – but that also acknowledges its contradictions, fluidity, and flexibility" (p. 286). Rifkin (2013) refers to Raymond Williams' *Marxism and Literature* in his explication of the notion of settler common sense (p. 323). The quotation Rifkin uses is in a chapter of Williams' (1977) book that is about the concept of hegemony as shaped by Gramsci (pp. 108-114).

[24] Thanks to Jamie Lawson for this point.

quotation focuses on state power, it suggests an understanding that is not limited to top-down formal state apparatuses. Rather, they argue that education and ideology have shaped "common sense" in ways that naturalize settler colonialism. As much as Gramsci understood common sense as a "heterogeneous jumble" resulting from historical processes (Crehan 2011, pp. 281-2, 286), there is power in common sense, as Rifkin has demonstrated.

This type of hegemonic[25] normalization also comes up in Glen Coulthard's characterization of settler colonialism as a system of domination: "settler-colonialism should not be seen as deriving its reproductive force solely from its strictly repressive or violent features, but rather from its ability to produce *forms of life* that make settler-colonialism's constitutive hierarchies seem natural" (emphasis in original, Coulthard 2014, p. 152). This productive characteristic of power is one of the analytical insights that can be drawn not only from Gramsci, but in a different way from a Foucauldian analysis of governmentality (McKee 2009, p. 470). Dhamoon's definition of critique is consistent with a type of analysis in Indigenous scholars' work about settler-colonial relationships, an analysis that exposes the extent to which key features of settler colonialism (and settler-defined identities for Indigenous peoples and individuals) are constructed and then taken as given.

[25] My usage of hegemony here derives from Gramsci. "Before Gramsci, the term 'hegemony' was more or less limited to meaning the predominance of one nation over others, especially within relatively friendly alliances. Significantly due to his writing, hegemony is now used to describe the intricacies of power relations in many different fields" (Ives 2004, p. 2). Ives (2004) writes about the complexities of the Gramscian term hegemony and its possible meanings. He claims: "Among all the different possible meanings for the term, one common element is that it helps explain why large groups of people continually acquiesce to, accept and sometimes actively support governments – and entire social and political systems – that continually work against their interests" (p. 6).

Having put forward denaturalization as central to the idea of critique, I am now going to discuss what the phrase "taken as given" reveals about how power is organized and understood. Looking closely at that phrase is revealing about the way in which power is structured into relationships of authority and acceptance of that authority's influence. The phrase implies some*thing* that is taken as given. I will call that "something" an object with material effects; in fact, it can be many things, for example an ideology, a process, or a power structure. In this thesis, I discuss ways by which the legitimacy of settler state sovereignty is taken as given. The legitimacy of settler state sovereignty would be the object of the phrase "taken as given". The phrase also suggests two "actants": somebody or something who gives or grants, and somebody or something who accepts or takes this object that is given.[26] My usage of actants, drawn from Bruno Latour rather than Foucault, is intended to be broad and include those deemed to have effects. For example, it includes those deemed to have agency including individuals, groups, institutions, and other-than-human beings. It also includes entities that have effects but are not necessarily created by the conscious choices of particular social forces, like the structures created by sedimented historical struggles.[27]

Thus, a research paradigm that is centred on denaturalizing what is taken as given provides a particular set of tools to analyze how power functions. We can analyze categories that have been constructed and how power is seen to operate through them. This analysis allows us to raise questions about who is seen to be taking something as given or granted, and what the source of that "given-ness" is seen to be. It also allows us

[26] Although this phrasing suggests that the actant that "gives" is outside or other than the actant that "takes", I am not sure there is a reason they could not be the same person, organization, body of knowledge, etc.

[27] Latour (2004) uses actants to refer to human and nonhuman entities that modify other entities (p. 237). For more on Latour's usage of actants, see Latour 2004, p. 237 and Latour 1996, for example pp. 225-6.

to think about the nature of authority and raises the question of whether one has to defer to the authority in order to take something as given. For example, if one agreed that an actant had "given" something but disagreed with the source of that actant's authority to give, I think it is possible to say that one took the object as given without necessarily meaning that one agreed with the object that was so given.[28]

For example, if we say that the legitimacy of settler state sovereignty is taken as given, it raises a question of who gives it or has given it. Arguments could be made that the giving actant is (or was) the Imperial Crown, God, legislators in Britain, legislators in Canada, Indigenous peoples who have made agreements or treaties with the Crown, or citizens who vote, thereby tacitly validating at least some of the authority the state exercises, for example.[29] In terms of the actant who is seen to "take" an object as given, the phrase "taken as given" is ambiguous in some ways; it could mean that specific groups take something as given, a majority of people within a group (and thus not everybody), or it could be making claims to universal applicability. The phrase could also be taken in its more general meaning, where a more abstract subject like mainstream history is seen to be that which gives.

There is a similar semantic meaning in Andersen's (2014) definition of symbolic power as "just the way things are" (p. 15). We can highlight this by thinking about the difference between Andersen's phrase "just the way things are" and, for example, "the way things are". The usage of "just" suggests that there is no further explanation

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[28] Questions about the validity of authority come up in Foucault's work on critique. He writes that "'to not want to be governed' is of course *not* accepting as true…what an authority tells you is true, or at least not accepting it because an authority tells you that it is true, but rather accepting it only if one considers valid the reasons for doing so" (emphasis in original, Foucault 2007, p. 46). Butler (2004) points out the "ambiguity in this situation, for what will constitute a ground of validity for accepting authority?" (p. 313).

[29] Chapter Two of this thesis includes a critical analysis of the assumption of settler state sovereignty.

necessary, and perhaps no further explanation known. By including the "just", Andersen hints at a non-agential relationship to the way things are. There is a tone of passivity on the part of the speaker; that is "just the way things are" suggests there is no changing things, or there is no use in questioning why they are that way. This is important to the point Andersen is making about symbolic power, in that it works to produce conditions that are not seen as remarkable or changeable. We see symbolic power as "an apparent reality that results from our investment in a series of seemingly natural yet nonetheless historically rooted material and symbolic conditions" (Andersen 2014, p. 15).

Through using critique as an analytical tool, present conditions can be questioned in light of the power relations that create them. Critique can open up space for showing these historically rooted material and symbolic conditions in order to "denaturalize" them. By working to reveal aspects of how things have come to be as they are, such analyses can reveal the constructed nature of power and open up space for discussion of alternatives. This opening up of space can be seen in Foucault's characterization of critique, which, as discussed earlier, does not require prescribing a particular course of action:

> Critique doesn't have to be the premise of a deduction which concludes: this then is what needs to be done. It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law. It isn't a stage in programming. It is a challenge directed to what is. (Foucault 1991b, p. 84)

I am using this thinking about critique because it puts the emphasis on evaluating what is, rather than prescribing solutions. This lack of prescribing solutions is a point of connection between Foucauldian critique and an early stage of the policy process.

In public policy analysis, there is a multi-stage policy process wherein the first step is to "define the problem", and later steps involve research and suggesting recommendations for addressing the problem (Irwin 2003).[30] One common complaint about policy analysis is that people neglect to spend enough time "defining the problem" and jump right to giving recommendations that may or may not be related to things people are experiencing as "problems". Monture-Angus (2010) writes about problem-definition in the context of environmental issues, saying that "[t]he answers are dependent on how we define the problem" (p. 162). Thus, it matters how one characterizes issues within current systems of governance, because possible "solutions" are shaped by those characterizations.

This problem definition phase (along with the other phases of the policy process) is also something to think critically about. It involves choices about defining what entails a problem. As such, it is a moment where power is exercised. For example, the same phenomenon might be regarded by different actors in different ways.[31] The process of "defining the problem" in policy analysis involves making choices about whose input and perspectives are considered, and to what extent that input is valued, when defining problems. By analyzing issues with one current system of governance, consultation and accommodation policy, I hope to do some of the work of directing a challenge to what is (focusing on the settler state's law and policy) in a way that is attuned to Indigenous critiques of settler colonialism.

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[30] I do not mean to equate Foucauldian critique with problem definition in policy analysis. I do mean to highlight that neither requires prescribing solutions.

[31] E.g. theft might not seem like a problem to the thief but rather a just compensation for unjust inequality, punishment of the victim for inadequate vigilance, etc.

Foucault's approach to critique is useful because it does not presume to know the answers to issues with the current state of affairs, but instead suggests that an in-depth look at the current state of affairs (and how they came to be) can be revealing about relations of power. From that place of disruption, perhaps change will come in a way that the people involved could not have known before engaging in critique. Rather than prescribing solutions to problems, Foucault sees generative potential in "a long work of comings and goings, of exchanges, reflections, trials, different analyses" (Foucault 1991b, p. 84).

Interestingly, this notion of generative potential seems consistent with Coulthard's (2014) thinking about practices of Indigenous resurgence. Coulthard (2014) advocates for a "*resurgent politics of recognition*" for Indigenous peoples, and he says that politics will prefigure new ways of being in the world that will be shaped by and come about through practices of resurgence (emphasis in original, p. 18). The Foucauldian focus on examining current (and past) practices and power relations matters to my approach because I am not seeking to prescribe particular courses of action. Rather, I seek to critique consultation and accommodation policy as they recently have been, and examine how they operate in relation to settler colonialism.

Governmentality

My project involves analysis of technologies of power, of government, and of differentiation. As Walters (2012) writes,

> Studies of governmentality are … replete with terms like technologies of government, apparatus, mechanisms of rule [*sic*]. The point they consistently make is that there is no governance, and likewise no contestation of power, without material mechanisms, inventions and the like. (p. 61)

Asking questions about such technologies can reveal how governance shapes material conditions of possibility (Walters 2012, p. 61). The technologies that implement power shape things as they are, and future possibilities.

Foucault's usage of the terms "technology" and "technique" changed over the course of his academic career and his usage of both terms can be ambiguous (Behrent 2013). Behrent (2013) writes that Foucault's earlier work was influenced by humanists' critiques of technology, but that his ideas differed because he did not criticize technology "*in the name* of humanism" (emphasis in original, p. 65). Later on, Foucault changes his use of technology to highlight the effects of power without necessarily attaching a value judgment to technology: "Foucault uses the term 'technology' to highlight the ways in which power relations operate – not necessarily to denounce them, but rather to challenge their professions of neutrality (i.e., their claim to have no effects)…" (Behrent 2013, p. 55). It is this later understanding of technology that informs my usage of "technology" when I analyze technologies of governance and the other cognate terms.

Scholars including Jean-Jacques Salomon (1984, pp. 113-115) and Jacques Ellul (see Holford and Saives 2013, pp. 9-10) make sharper distinctions between technology and technique. But following Foucault and Foucauldian studies of governmentality, I am using the terms techniques and technologies interchangeably (see Behrent 2013, p. 59 and Walters 2012[32] on this point). Although Foucault used the term technique in his earlier work and technology in his later work, Behrent writes that "Foucault's use of both terms

[32] In Walters' (2012) index, there is an entry for "techniques and technologies of government" (p. 188). Some pages referenced in that entry only refer to technologies of government (e.g. p. 15), and others refer only to techniques of government (e.g. p. 20). This grouping suggests significant overlap between the two concepts as it directs readers searching for one of the concepts to pages that reference either.

increased dramatically once he began to employ 'technology' to define power relations" (2013, p. 59).

I am also taking the position that little distinguishes the terms "technique of *power*", "technique of *government*", and "technique of *governance*" as I am using them here. To some extent, it would make sense to conceive of techniques of power as a broad category and techniques of government or governance as smaller sub-categories. Agrawal's (2005) usage of "technologies of government" is partly consistent with this thinking; he uses the term to refer to ways governments seek to achieve their aims through institutions, policies, and delegation of power.[33] However, Foucault "proposed a definition of the term 'government' in general as meaning 'the conduct of conduct': that is to say, a form of activity aiming to shape, guide, or affect the conduct of some person or persons" (Gordon 1991, p. 2). This is broader than a strictly institutional focus, and "[g]overnment as an activity could concern the relation between self and self, private interpersonal relations involving some form of control or guidance, relations within social institutions and communities and, [*sic*] finally, relations concerned with the exercise of political sovereignty" (Gordon 1991, p. 2-3). We see this broader interpretation in Agrawal's (2005) study of technologies of government, which encompasses many factors including how peoples' subjectivities change. This notion of techniques of government as broader than institutions of government - narrowly conceived - seems consistent with Foucault's problem of "how men govern (themselves and others) by the production of truth" (1991b, p. 79). This production of truth occurs not just through power operating through the state,

[33] Agrawal's (2005) book is discussed in more detail in the following section about technologies of power.

but also in other areas of society.[34] Dhamoon (2009) "approach[es] power in Foucauldian terms as a relation and as a capacity that is spread throughout the socio-political body, rather than as something that is possessed or held by a sovereign subject or the state" (p. 10). With a Foucauldian sense of governmentality, even those techniques of power that are not directly flowing from a government institution, for example, could be considered techniques of government. Thus, I will use "techniques of power", "techniques of government", and "techniques of governance" in this thesis to address the mechanisms of rule within the consultation guidelines.

Foucault's concept of governmentality provides a larger context in which to understand his analysis of such technologies or mechanisms. As Walters (2012) writes, governmentality:

> [E]quips us to…understand governance not as a set of institutions, nor in terms of certain ideologies, but as an eminently practical activity that can be studied, historicized and specified at the level of the rationalities, programmes, techniques ad subjectivities which underpin it and give it form and effect. (p. 2)

In "Governmentality", Foucault traces historical shifts that took place in governance from the sixteenth century to the twentieth century (Foucault 1991a, pp. 87-103). He says that Machiavelli's *The Prince* exemplifies the type of sovereignty-centred governance that was common in the sixteenth century, in that it is "essentially a treatise about the prince's ability to keep his principality" (Foucault 1991a, p. 90). This entails a "self-referring circularity of sovereignty or principality" whereby the aim of sovereignty is the perpetuation of sovereignty and the aim of the prince is to retain their principality (Foucault 1991a, p. 95). As part of tracing the change from sovereignty to the art of

[34] Indeed, about power, Foucault writes: "One impoverishes the question of power if one poses it solely in terms of legislation and constitution, in terms solely of the state and the state apparatus. Power is quite different from and more complicated, dense and pervasive than a set of laws or a state apparatus" (Foucault 1980, p. 158).

government, Foucault (1991a) outlines the change from the family being the model of government to population being the model of government (p. 100). Economics took on a different meaning during this process, earlier referring to the scale of the family and later referring to the scale of population. He describes this shift to population as being a double move, wherein population becomes the object on which government acts, and also the aim of government:

> Interest at the level of the consciousness of each individual who goes to make up the population, and interest considered as the interest of the population regardless of what the particular interests and aspirations may be of the individuals who compose it, this is the new target and the fundamental instrument of the government of population: the birth of a new art, or at any rate of a range of absolutely new tactics and techniques. (Foucault 1991a, p. 100)

This contextualization is helpful to show what Foucault means by technologies of power. Within this paradigm of governmentality (that has the wellbeing of the population as the goal of governance), technologies of governance are used to produce effects in the population. In the following section I discuss some examples of definitional and administrative technologies of government that render populations (and resources) governable in particular ways. Technologies sometimes function overtly and sometimes without making it clear to members of the population what their aims are. Foucault (1991a) writes:

> …it is the population itself on which government will act either directly through large-scale campaigns, or indirectly through techniques that will make possible, without the full awareness of the peoples, the stimulation of birth rates, the directing the flow of population into certain regions or activities, etc. (p. 100)

Within the broader context of governmentality, techniques are the means used to achieve various ends. This notion that the people who comprise the population may not be fully aware of techniques of governance is related to the discussion of naturalization and

symbolic power above. If technologies of governance are naturalized or seen as just the way things are, some of the governance objectives underlying those technologies may not be readily apparent. Governmentality's "goal is to understand and describe how modern forms of power and regulation achieve their full effects not by forcing people toward state-mandated goals but by turning them into accomplices" (Agrawal 2005, pp. 216-217). People may acquire the practices of accomplices, not being fully aware of technologies of governance that have come to be *taken as given*.

Using this type of critique is fitting for a project in the field of political science that draws on governmentality. Describing studies of governmentality in political science, Walters (2012) writes:

> If they begin with problematizations it is not with the aim of formulating and testing causal hypotheses, as might many political scientists. Instead, it is with the aim of calling into question much that we would otherwise take for granted about governance. (p. 58)

My project is one of critique, "calling into question" what might otherwise be "taken for granted" about consultation and accommodation policy in B.C. To do that, I analyze technologies of government. As Walters (2012) notes above, technologies of government are part of studies about governmentality and they contribute to a study of power that focusses on studying the "material conditions of possibility" of governance (p. 61).

Along with the shift from sovereignty to governmentality discussed above, Foucault theorizes a shift in the effects of law. Within what he interprets as sovereignty's self-referential cycle, law was something that was imposed on people to reinforce sovereignty. However, under governmentality, law becomes one of many possible tactics to create conditions whereby the aims of government are achieved: in this new understanding, "with government it is a question not of imposing law on men, but of

disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics - to arrange things in such a way that, through a certain number of means, such and such ends may be achieved" (Foucault 1991a, p. 95). This characterization of law in an era of governmentality helps to ground my analysis of consultation guidelines, understanding the latter as policy based on such a tactical version of law. Thinking through a Foucauldian lens, the law is interrelated with other tactics. My analysis will show that multiple tactics, or technologies of governance, are used in B.C.'s consultation and accommodation policy.

Technologies of power

My analysis likewise identifies technologies of power that are apparent in B.C.'s consultation and accommodation policy. The latter sets out material conditions of possibility for the various actors who are invited to be part of consultation and accommodation processes. As the analysis section suggests, below, the policy structures interaction and limits possible outcomes of consultation and accommodation processes. That is, the policy sets out rules and, if all parties follow the rules, the possible material outcomes are limited by the process.

In this regard, we can turn helpfully to Agrawal's (2005) Foucauldian account of environmentally oriented subject identities as they emerged in forest conflicts in rural India. Agrawal (2005) clearly explains in his theoretical explorations what he means by technologies of government in a Foucauldian sense and gives concrete examples of some technologies of government in the case study he has chosen. He writes specifically about the connections between shifts in technologies of government and shifts in peoples'

environmental subjectivities. This focus on how governance affects individual subjectivities is common in governmentality studies:

> The principled refusal to equate government with the state, understood as a centralized locus of rule, means that governmentality scholars seldom begin their analytics of government in the formal state apparatus. Focus is more often turned to the heterogeneous and dispersed ways by which practices of government are applied in micro-settings including at the level of the individual subject. (Lovbrand and Stripple 2015, p. 97; see also Jessop 2011, p. 58)

(Although subject formation is an interesting and integral part of Agrawal's research, I am focusing less on that aspect of his work, and more on how his examples of technologies of government are illustrative of power relations.)

The context in which Agrawal (2005) examines technologies of government is forest governance in Kumaon. In Kumaon in the early twentieth century, new environmental policies were implemented with the aim of regulating forests. Local people protested those policies by setting large areas of forest on fire (Agrawal 2005, p. 3). Those protests eventually led to a change of government policy: a committee appointed by the colonial government to investigate the protests recommended allowing villagers to take control of the forests (Agrawal 2005, p. 5). Since the 1930s, local people have formed forest councils and these councils have regulated forest use.

Agrawal describes several technologies of governance that were implemented, first before the forest councils were set up, and later under the forest councils. For example, the centralized colonial government used statistics to create governable forests (2005, p. 6).[35] Walters (2012) calls this type of technology "[m]aking issues legible" (p. 62). Thus, when we talk about forests, we are talking about a construct: somebody has defined what

[35] This had implications for villagers because nearly 80 percent of Kumaon's forests became classified as reserves in the early twentieth century, and villagers had "limited or no rights left in the reserves" (Agrawal 2005, p. 3).

a forest is (and how it can be governed) in particular ways. After the protests in the early twentieth century, the government implemented a new technology of government that operated on three main levels: politics, institutions, and individuals (Agrawal 2005, p. 3).[36] At the political level, new centres of environmental decision-making in local communities changed the relationships between local communities and states from attempted state centralized control to local forest councils that encourage and depend on "the willing participation of those subject to rule and rules" (Agrawal 2005, p. 125). At the institutional level, social and institutional relationships were changed among people in the community with the implementation of forest councils (Agrawal 2005, p. 89).[37] At the level of individual subjectivities, some people became more concerned about the environment than local people had previously been (Agrawal 2005, p. 89). This change in subjectivities shows that this technology of power, the dispersal of power to local forest councils, had the effect of changing peoples' relationships to local forest regulation. He discusses these technologies not only to show a policy that was implemented by government, but also to examine its effects on peoples' subjectivities. Again, my emphasis is narrower than Agrawal's: rather than focusing on people's subjectivities, I look primarily at consultation guidelines as technologies of government and processes of differentiation that reveal how power operates through a settler-colonial province's policy.

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[36] Though he focuses on these three levels as categories, he also points out the constructed nature of each of these three terms (Agrawal 2005, p. 89).

[37] Agrawal (2005) describes a number of changes (see pp. 92-97, 127-163). For example, there was a change from "earlier, more repressive forms of government practiced through the forest department" (p. 94) to governance under local forest councils wherein "decision makers within the community use their intimate knowledge about members of the community to ensure that power is wielded neither too forcefully nor too weakly" (p. 93).

Agrawal's discussion of Foucault, technologies of government, and governmentality emphasizes power. As mentioned earlier, Agrawal (2005) sees governmentality studies as interested in how modern forms of governance turn people "into accomplices" (p. 217) in achieving state governance objectives. Analyzed alongside Coulthard's study of recognition politics, Agrawal's study shows a pattern wherein governments maintain their goals but switch their technologies of control and rule to try to get people on board with their goals. Coulthard's (2014) book shows a switch in policy from one of assimilation to one of a colonial "politics of recognition", in which the reproduction of colonial rule "rests on the ability to entice Indigenous peoples to *identify*, either implicitly or explicitly, with the profoundly *asymmetrical* and *nonreciprocal* forms of recognition either imposed on or granted to them by the settler state and society" (emphasis in original, p. 25). Agrawal's book shows a switch in technology of government from centralized decision-making and enforcement of government policy, to one of decentralized control over forests. Both authors attribute the "switch" in technology of governance to groups of affected people protesting the earlier policy in each example. In the case of Kumaon, Agrawal (2005) shows that environmentally-minded regulation of forests was the goal of both the former and the later policy. In the case of Canada, Coulthard (2014) shows that dispossession of Indigenous peoples of their lands and self-governing authority was the goal of both the former assimilationist policies and the later colonial politics of recognition (p. 25). These analyses show that governments can respond to peoples' concerns by implementing new technologies of governance that entail some changes (e.g. local control of forests in Kumaon, less explicitly

assimilationist policies in Canada), and yet remain oriented toward the same broader aim as the former policy that incited protest.

Processes of differentiation and systems of domination

Following Dhamoon's (2011) use of Foucault's conception of critique, I am thinking about consultation and accommodation policy as a process of differentiation, and about settler colonialism as a system of domination. Dhamoon (2011) identifies four "aspects of socio-political life" (p. 232) that have been foci of analysis in critical research: identity, categories, processes of differentiation, and systems of domination (pp. 233-5). Of these four, she argues that studies focusing on the latter two are "most effective at analyzing the complex dynamics of power" (Dhamoon 2011, p. 233). She defines processes as "the ways in which subjectivities and social differences are produced, such as through discourses and practices of gendering, racialization, ethnicization, culturalization, sexualization, and so on" (Dhamoon 2011, p. 234). She defines systems as "historically constituted structures of domination such as racism, colonialism, patriarchy, sexism, capitalism, and so on" (Dhamoon 2011, p. 234). While acknowledging the risk that analyses based on processes and systems can essentialize categories of difference, she maintains that they are useful because of the ways they enable a focus on power relations. For example, these studies can reveal how active processes of racialization and gendering (re)produce relations of domination and subordination that "organize[] subjects in varied and changeable ways" (Dhamoon 2011, p. 235). In my research, I am seeking to critique the B.C. government's consultation policy in part by examining how it constitutes processes of differentiation between B.C. decision-makers and First Nations' actors, and in part by analyzing how it fits into the larger settler-colonial system(s) of domination.

Consultation and accommodation are processes of differentiation because they structure relationships between Indigenous peoples, settler states, and proponents of natural resource development projects.[38] As we will see, the policy document I examined sets out different roles and responsibilities for the Crown's representatives, proponents, and potentially affected Indigenous peoples.[39] Those roles and responsibilities include different decision-making powers for different parties. For example, the ultimate decision-making power that this document references rests with the Crown's representative, rather than with First Nations. These processes set conditions of possibility for interactions and decisions that keep settler states in a position of dominance where they have more power to influence outcomes than First Nations do under the policy. Here we can see the interplay between consultation and accommodation, as processes of differentiation, and settler colonialism, as a system of domination.

By focusing on processes of differentiation and systems of domination, I am focusing on active practices rather than ideas of static categories. This is consistent with a Foucauldian analytical focus on practices rather than objects. In "On Method", Foucault demonstrates this focus on practices through a discussion of the type of questions he asked in his study of prisons as punishment. He "wanted to ask the question: *how* does one punish?" instead of asking "what" questions, for example studying what prisons are as institutions (emphasis in original, Foucault 1991b, p. 74). Walters (2012) calls this a

[38] In the consultation and accommodation process specifically, proponents are structurally positioned closer to the side of the settler government. So much so that the Crown's duty to consult can be met by actions carried out by a proponent; although the ultimate responsibility for consultation and accommodation and decision-making about the adequateness of both and the decision to proceed with a project rest with the Crown.

[39] These are just the groups of people identified in the policy. Other groups of people, for example settler opponents of projects, may be interested parties to the decision, but are not addressed in the *Procedures*.

"shift from the study of objects to the practices that produce those objects as their effects" (p. 18). Foucault (1991b) says that by focusing on practices he can look at not only the institutions, ideologies, and historical circumstances that affect a practice, but he can also be attuned to the "specific regularities, logic, strategy, self-evidence, and 'reason'" within the practice itself (p. 75). Foucault identifies two axes, jurisdiction and veridiction (roughly, the enunciation of law and of truth), that help to analyze practices,[40] but for the purposes of this thesis I will focus on Dhamoon's suggestion to analyze the interplay between processes of differentiation and systems of domination.

My reasons for this choice are as follows. Processes of differentiation and systems of domination operationalize and shape what Dhamoon calls a matrix of meaning-making. Dhamoon's conception of the latter suggests a focus on dynamic practices:

> The idea of a matrix of meaning-making aims to foreground an expanded Foucauldian understanding of power so as to capture the ways in which processes of differentiation and systems of domination interrelate. The focus of analysis is thus not 'just' domination but the very interactive processes and structures in which meanings of privilege and penalty are produced, reproduced, and resisted in contingent and relational ways. (Dhamoon 2011, p. 238)

In this definition is a sense of active production, reproduction, or "making" of difference that gets at the ways power produces effects. Agrawal makes a similar case for the

[40] Foucault identifies two axes that help to analyze practices: jurisdiction and veridiction. He defines jurisdiction as the rules that guide behaviour, and veridiction as the production of what is seen as true and what is seen as false: "To analyze 'regimes of practices' means to analyze programmes of conduct which have both prescriptive effects regarding what is to be done (effects of 'jurisdiction'), and codifying effects regarding what is to be known (effects of 'veridiction')" (Foucault 1991b, p. 75). He says that his "problem is to see how men govern (themselves and others) by the production of truth" (Foucault 1991b, p. 79). Thus, technologies of government can be looked at in terms of both jurisdiction and veridiction - examining which aspects of technologies of power produce the rules that shape how people do things, and which aspects of technologies of power produce "true discourses which serve to found, justify and provide reasons and principles for these ways of doing things" (Foucault 1991b, p. 79). In my analysis I am attuned to both jurisdictional and veridictional ways of analyzing consultation and accommodation policy. For example, the policy is jurisdictional because it sets out rules to guide behaviour of people involved in consultation and accommodation processes. Furthermore, by being based on the assumed legitimacy of the sovereignty of the settler state, the provincial government's consultation policy can be seen as a process of veridiction where settler state authority and legitimacy are reproduced as true.

benefits of analyzing active processes and power relations. In his study, different practices mattered more to "shaping environmental subjectivities" than social categories like gender and class (2005, p. 9). The things he says mattered more were "different types of participation in regulation, different forms of involvement in councils, and different levels of benefits from forests" (Agrawal 2005, p. 9). Thus, his research involved looking at "practices of regulation" in order to "trace a more lived and living connection between subjects and power, environment and actions, and institutions and identities" (Agrawal 2005, p. 9). Although this focus on practices and movement is not common to all studies of governmentality,[41] I am following Dhamoon and Agrawal's Foucauldian understandings of power and focusing (to repeat) on the interaction between processes of differentiation and systems of domination.

The concepts related to a Foucauldian-inspired approach that this chapter focused on are picked up in Chapter Three, where they inform the analysis of B.C.'s *Updated Procedures for Meeting Legal Obligations When Consulting First Nations* (Province of B.C. 2010). In the next chapter, I move to a discussion of how scholars of Indigenous studies and settler-colonial studies characterize settler colonialism. In thinking about Foucault-inspired conceptions of power, I focus on settler colonialism as a system of domination. The critical analysis in Chapter Three will examine how settler-colonial power operates in the *Procedures*.

[41] Walters (2012) writes that "…there is certainly a rather static feel about many studies of governmentality" that "on the surface at least give the impression of a world populated by immobile constructions" (p. 78).

Chapter 2: Settler Colonialism

My work is informed by a commitment to work toward "understand[ing] what is required to move beyond the colonial relations on which this country is based" (Monture-Angus 2010, p. 22). In this thesis, I use the concept of settler colonialism as the main theoretical tool to think about Indigenous-settler relations. I do this because my focus is on identifying how settler-colonial relationships have been naturalized in B.C.'s consultation and accommodation policy. Strakosch (2015) writes that "[i]t is the underlying settler drive toward this [colonial] completion that needs to be challenged" (p. 71). By critiquing settler colonialism in B.C.'s consultation and accommodation policy, I seek to challenge this underlying settler drive in this specific context.

In the first section of this chapter, I draw on the works of Indigenous studies scholars to outline key features of settler colonialism. I begin with Glen Coulthard's definition of a settler-colonial relationship and explain why it is particularly relevant to my analysis. Following this, I refer to other works from Indigenous studies and settler-colonial studies to discuss some of the main aspects of settler colonialism that are addressed in the academic literature. The main aspects I identify are: the intended dispossession of Indigenous peoples' lands and self-determining authority; policies aimed at the elimination of Indigenous peoples; the productive character of settler colonialism; policies aimed at assimilation of Indigenous peoples into settler society; and the intended permanence of settlers and settler governance structures. Indigenous peoples' continued resistance to settler colonialism also forms part of the following discussion. My intention is to paint a fuller picture of how various scholars characterize settler colonialism, and to

justify my use of Coulthard's definition as the main touchstone for my analysis. In doing so, I specify the criteria I use to assess the *Procedures* document. The last section of this chapter involves an analysis of assumptions of the naturalized legitimacy of setter state sovereignty. One of the technologies of governance analyzed in Chapter Three is the assumption that settler state sovereignty is legitimate, and this chapter sets a foundation for that analysis.

Settler-colonial relationship definition

In this thesis, I am using Glen Coulthard's definition of a settler-colonial relationship:

> A settler-colonial relationship is one characterized by a particular form of *domination*; that is, it is a relationship where power – in this case, interrelated discursive and nondiscursive facets of economic, gendered, racial, and state power – has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate the *dispossession* of Indigenous peoples of their lands and self-determining authority.[42] (emphasis in original, Coulthard 2014, pp. 6-7)

This is a conceptually strong definition of a settler-colonial relationship because of how it characterizes power as sedimented and hierarchical, and because it centres two interrelated features of dispossession: land and self-determining authority.[43]

Coulthard's (2014) book *Red Skin, White Masks* is notable for the contributions it makes about recognition politics and for the way it takes up Marx's primitive accumulation thesis in relation to settler-Indigenous relationships in Canada. He argues

[42] Coulthard's usage of "discursive and nondiscursive" in this definition suggests an understanding of discourse that differs from mine in this thesis in that it suggests a clear distinction between discursive and nondiscursive (e.g. perhaps discursive is taken to refer to language and ideas, and nondiscursive relates to other entities like materiality or conditions of possibility). However, since this definition sees discursive and nondiscursive as interrelated, it also suggests less of a separation between the two, at least in the context in which they are applied. I am mainly interested in the other aspects of Coulthard's definition, but this usage of discourse and power seems important to note because of my project's attention to discourse and power.

[43] In the paragraphs that follow I elaborate on why these characteristics make it a conceptually strong definition.

that recognition politics are a key tool of domination (Coulthard 2014, p. 17), and that contemporary settler-colonial domination operates subtly through combinations of coercion and consent, rather than in overt and bloody ways (Coulthard 2014, p. 113). He also draws on certain aspects of Marx's primitive accumulation thesis and critiques others (Coulthard 2014, pp. 9-15). Marx's primitive accumulation thesis postulates that capitalism took shape via a double move: land was privatized, and over time this created a class of workers to enter the labour market (Coulthard 2014, p. 7). While Marx focused on the emergence of wage workers, Coulthard (2014) argues that for Indigenous peoples in Canada, dispossession "has been the dominant background structure shaping the character of the historical relationship between Indigenous peoples and the Canadian state" (p. 13), whether or not they later became workers. Although this thesis does not focus on Coulthard's approach to Marxian thought, knowledge of Coulthard's points about primitive accumulation and dispossession explain why dispossession is a central feature of Coulthard's definition of a settler-colonial relationship. Coulthard's focus on dispossession fits with Dhamoon's (2011) focus on processes of differentiation and systems of domination. Dispossession is both a process of differentiation (i.e., it differentiates between those dispossessing and those dispossessed, which continues to have power implications) and a system of domination (i.e., the act of dispossession involves dominative power relationships between the dispossessing and the dispossessed).

Coulthard's focus on the structural elements of power, and how they are relatively entrenched in settler-colonial relationships, is relevant to my work because I am analyzing how policy structures material conditions of possibility in a settler-colonial

context. The B.C. policy about consultation and accommodation shows what the B.C. government is putting forward as its expectations, intentions, and best practices when it comes to interactions with First Nations that require a fulfilment of the duty to consult and accommodate under Canadian law. That policy is part of what structures the relationships between the B.C. government and Indigenous peoples. Since the policy was published by the B.C. government in 2010, it not only structures the relationship, but it is itself evidence of a hierarchical structure. The contents of the policy structure the relationship by pointing to procedural conditions whereby power lies with decision-makers set out by provincial legislation: "Provincial decision-makers with authority to make decisions about provincial land or resources are responsible for ensuring appropriate and sufficient consultation and accommodations" (Province of B.C. 2010, p. 3). Furthermore, through this decision-making authority, the *Procedures* reveal an assumption on the part of its authors that the B.C. government has relatively more power than First Nations in a hierarchical relationship. This power has allowed Canada and B.C. to set out laws and policies about consultation and accommodation, and to expect all parties to abide by them.

Another aspect of settler-colonial relationships Coulthard's definition points to is the "relatively secure or sedimented" nature of how power is structured via hierarchical social relations. In *Red Skin, White Masks*, he discusses a shift in the Canadian government's policies regarding Indigenous peoples from the pre-1969 period to the post-1969 period. In 1969, Pierre Elliot Trudeau's government published a white paper entitled *Statement of the Government of Canada on Indian Policy*; it suggested taking away all legal differences between Aboriginal peoples and non-Aboriginal Canadians

(Coulthard 2014, p. 4). This proposed policy exemplified an openly assimilationist intent, and Indigenous peoples resisted strongly. An era of Indigenous activism was shaped by "Indigenous anticolonial nationalism" that emerged in response to the White Paper, the Calder decision in 1973, and the proposed increase in northern resource extraction following the oil crisis of the early 1970s (2014, p. 6). The settler state responded to Indigenous peoples' objections to the White Paper by changing to a policy and a discourse of recognition and accommodation. Policy regarding Indigenous peoples became less openly assimilationist (Coulthard 2014, p. 6).

Throughout, Coulthard (2014) argues that despite this change, the new federal politics of recognition is oriented around settler-colonial dispossession (p. 25). He does this by using Frantz Fanon's critique of Hegel's master/slave dialectic to argue that recognition politics "can subtly reproduce nonmutual and unfree relations rather than free and mutual ones" (Coulthard 2014, p. 17). He empirically grounds this theoretical claim with three case studies of "post-1969…Indigenous-state relations in Canada" (Coulthard 2014, p. 18; see also Coulthard 2014, chapters 2, 3, and 4). Thus, we see how a relatively secure and sedimented structure of power remained in place even after a shift in discourse and policy from assimilation to recognition.

This conception of power is relevant to the research I am doing because B.C.'s consultation and accommodation policy has come about in response to Indigenous peoples' resistance to colonial laws.[44] Given Coulthard's definition and his discussion of the shift in recognition politics pre- and post-1969, it is clear that sometimes what a settler government seeks to make *appear* as a change in their way of interacting with

[44] For example, Indigenous peoples' lobbying led to s. 35 of the *Constitution Act, 1982* (Sanders 1981, pp. 426-7; Andersen 2014, p. 127) and Indigenous peoples have initiated court cases about consultation and accommodation.

Indigenous peoples is actually a different way of maintaining settler-colonial power relationships. The consultation and accommodation policy I am looking at is a manifestation of one of many shifts settler governments in Canada have taken in their ways of interacting with Indigenous peoples. My analysis will show that despite shifts in law and policy discourse to consultation and accommodation, and the shift in the structure of relationships to one that includes consultation and accommodation processes, many features of a settler-colonial relationship of domination and dispossession persist under the current consultation framework. Coulthard's definition leads us to this sort of analysis, because it encourages us to look for whether social relations seem to be securely sedimented in a hierarchy that suggests a settler-colonial relationship, or if they are less sedimented or less hierarchical (which could move toward noncolonial relationships).

This definition is also useful because it points out two facets of settler-colonial dispossession: Indigenous peoples' lands and Indigenous peoples' self-determining authority. Coulthard stresses the importance of land to settler colonialism. Chris Andersen (2014) also writes about these different facets of dispossession, saying that the building of colonial nation-states involves attempts to dispossess Indigenous peoples of their land as well as their "pre-existing forms of collective association and citizenship" (p. 17). As discussed, Coulthard posits land as the key target and ingredient of colonial (and capitalist) systems in the colonies. Similarly, Wolfe (2006) has said that "territoriality is settler colonialism's specific, irreducible element" (p. 388). The drive for land acquisition involved multi-pronged settler-colonial policies intended to remove Indigenous peoples from their lands and to erode their political authority (including their authority and responsibility related to those lands). Stark (2016) shows that the

criminalization of Indigenous people worked in tandem with the erosion of Indigenous political and legal systems in order to facilitate the expansion of settler law and hence, territorial expansion. Dispossession of land and loss of self-governing authority are interconnected in complex ways. By using Coulthard's definition of a settler-colonial relationship, I keep both in mind in my analysis of B.C.'s consultation and accommodation policy.

Now that I have introduced Coulthard's definition of a settler-colonial relationship, I will discuss some main features of settler colonialism that arise in the Indigenous studies literature and relate them to his definition. As mentioned, I will be using that definition to conduct my analysis. Although using one definition is necessarily a choice that limits, the definition I have chosen speaks to several features of settler colonialism.

'Dispossession' is a common term in the field of Indigenous studies to describe processes of lands being removed from Indigenous peoples and Indigenous peoples being removed from lands. Focusing on dispossession of land,[45] Rob Nichols (2018) discusses how the term has been used politically in recent centuries, and how dispossession's "recursive logic" about property is important to understanding how current Indigenous scholars use the term. He says that for many Indigenous scholars and activists, "dispossession is thought of as a broad macro-historical process related to the specific territorial acquisition logic of settler colonization" (Nichols 2018, p. 11). Dispossession refers to the theft of property, but if land was not thought of as property before it was stolen, then the term dispossession involves a recursive logic whereby theoretically theft precedes the land being thought of as property. He gives a historical account of settler

[45] Nichols (2018) does not write about dispossession of self-determining authority, at least to the extent that it is separate from dispossession of land.

squatters in the United States to show how the process of dispossession and settler colonial expansion turned Indigenous peoples' lands into property in particular ways. Nichols (2018) writes about the three types of rights associated with property (the ability to acquire, use and enjoy, and alienate property). At a certain point in history, settlers wanted to buy Indigenous peoples' land, and so in effect, Indigenous peoples acquired the right to alienate property, but were not afforded the same rights as settlers to use and enjoy or own land (Nichols 2018, p. 15, 19). This example shows how the recursive logic of dispossession was part of a historical process in a settler-colonial state. Dispossession is entwined with the territorial acquisition logic of settler colonialism and the making of private property.

Furthermore, settler-colonial logics of elimination are apparent in the dispossession aspects of Coulthard's definition. Like Coulthard, Audra Simpson repeatedly refers to the colonial imperative wherein settler colonialism requires land, and therefore seeks to eliminate Indigenous peoples in order to acquire their territory (Simpson 2014, pp. 19, 155, 187). She also points to these logics of elimination as sites of Indigenous resistance, for example when Mohawk people engage in politics of refusal by using Mohawk identification rather than Canadian or American identification at border crossings (Simpson 2014, p. 116). Simpson refers to Wolfe (2006), who asserts that the need for land possession and access to territory causes settlers in settler-colonial societies to seek to eliminate Indigenous peoples (p. 388). Heidi Stark (2016) cautions that this elimination thesis risks becoming overdetermined if it excludes the "productive nature of settler colonialism" (no page numbers available). Stark (2016) argues that settler colonialism "is

productive, actively producing both the settler state and its accompanying legitimating narratives" (no page numbers available).

Indigenous Studies scholars highlight the settler-colonial logics of blood quantum, territorial maps, and official languages as three mechanisms of Indigenous elimination. Andersen (2014) discusses constructions of Métis mixedness and blood quantum and points out that they can be used as a way of categorizing some Indigenous people as less Indigenous than others. The language of mixedness can be used as a tactic of elimination when Indigenous peoples are posited as less Indigenous or not sufficiently Indigenous, thereby having their Indigeneity eliminated in some senses of the term (e.g. discursively, legally). Goeman (2013) suggests that maps are sites of colonial power, and that colonial geographies are imposed on Indigenous territory in settler-colonial Canada in order to serve elimination strategies (p. 30). She suggests that Indigenous peoples resist by engaging in (re)mapping their territories. Similarly, Innes (2013) discusses the ways that language is related to culture in Cowessess First Nation and claims that when Indigenous languages are lost, some aspects of Cowessess culture are lost as well (p. 122). These examples are related to Coulthard's definition because the elimination tactics they mention involve seeking to dispossess people of their lands and/or self-determining authority.

The loss of Indigenous language and culture can be partly attributed to Canadian residential schools, which were a blatantly assimilationist aspect of Canadian settler colonialism that existed for decades before the White Paper. Robert Nichols (2014) examines another strategy of assimilation in Canada, that of compulsory enfranchisement of Indigenous peoples in Canada (p. 103). Assimilation has been explained as requiring

that Indigenous peoples disappear and let go of their traditions (Simpson 2014, p. 33), and as a key aspect of Canadian federal policy about Indigenous peoples (Coulthard 2014, p. 4). Attention to assimilationist policies reveals how the system of domination of settler colonialism has been enacted through processes of attempted assimilation. Drawing on the works of Rita Dhamoon and Richard Day, Chris Andersen (2014) discusses the relational politics created by settler colonialism. This can involve economic, political and social incentives for minorities to choose to integrate into the dominant society (Andersen 2014, pp. 22-23). Similarly, Innes (2013) discusses colonial attempts to replace the Indigenous kinship patterns that order social relations in Cowessess (p. 103). While Cowessess kinship patterns have changed since the beginnings of settler colonialism, "Cowessess people have maintained many aspects of their kinship roles and responsibilities" (Innes 2013, p. 115). Coulthard's definition of a settler-colonial relationship speaks to both assimilationist and eliminationist tactics because these tactics exemplify the aim to dispossess Indigenous peoples of their lands and self-determining authorities.

Another feature of settler colonialism is settlers' permanence on the land. We see this permanence in Coulthard's definition in that he posits settler-colonial domination as *continuing* to dispossess Indigenous peoples of their lands and self-governing authority. In the same vein, Wolfe (2006) frames settler colonialism as a structure that continues through time rather than an isolated event (p. 390). Coulthard (2014) calls this "the persistent character of settler-colonialism" (p. 125) and he argues that although the settler state's policies regarding Indigenous peoples have changed over time, "the *ends* have always remained the same: to shore up continued access to Indigenous peoples' territories

for the purposes of state formation, settlement, and capitalist development" (emphasis in original, p. 125). Similarly, in her discussion of settler colonialism, Audra Simpson (2014) refers to colonialism as something that is permanent in that it is ongoing yet has failed in its ongoing mission to eliminate Indigenous peoples (p. 33). Michael Asch (2014) speaks to the idea of settler permanence in Canada in a different way. His book responds to Chief Justice Lamer's assertion that both settler and Indigenous peoples are "here to stay" in the *Delgamuukw* decision (*Delgamuukw v. British Columbia* 1997, at para 186, quoted in Asch 2014, p. 3). Asch (2014) argues that treaties between the Crown and some Indigenous peoples gave foundational legitimacy to the notion of settlers being "here to stay", so settlers and settler governments should honour their treaty responsibilities. In the absence of that honouring of responsibilities, settlers' permanence is tied up with the "relatively secure or sedimented set of hierarchical social relations that continue to facilitate the *dispossession* of Indigenous peoples of their lands and self-determining authority" (emphasis in original, Coulthard 2014, p. 7). We can also see how this idea of settler permanence in settler-colonial societies manifests through assumptions of legitimate settler state sovereignty, as discussed in the next section.

Assumptions of legitimate settler state sovereignty

One of the technologies of governance analyzed in Chapter Three is the underlying assumption of legitimate settler state sovereignty. I will now introduce some of the literature on this topic and outline two different ways settler state sovereignty can be questioned. First, I discuss settler state legitimacy in and of itself (not necessarily

including settler state jurisdiction over Indigenous peoples and lands).[46] Second, I question the assumption that at the time Crown sovereignty was asserted in various parts of North America, the Crown legitimately acquired sovereignty over Indigenous lands and peoples. These underlying assumptions of settler sovereignty not only affect court decisions and policy, but as Rifkin (2013) discusses, such assumptions also permeate settler-colonial societies and affect settlers' quotidian actions and beliefs.

The two aspects of settler state legitimacy are worth separating out because of their different yet interconnected effects. One aspect is that the legitimacy of the settler state rests on treaties with Indigenous peoples (Asch 2014). Asch (2014) argues that "[t]o dwell on land we know already belongs to others requires their consent and our faithful keeping of the commitments we made in obtaining it" (pp. 164-165). If the settler state was established through treaties with Indigenous peoples, its legitimacy rests on the upholding of treaty rights and responsibilities. However, many treaty responsibilities have not been upheld, and Heidi Stark (2016) outlines how criminalization of Indigenous peoples in the nineteenth century contributed to Canada and the United States' nation-building projects. She explains that "both countries utilized Indigenous resistance as the rationale for the subsequent abrogation of treaty commitments" (Stark 2016, no page numbers available). Although much of the land in what is now B.C. has never been under treaty between Indigenous peoples and the Crown, treaties were still a large part of establishing colonies in what is now Canada. This first aspect is a questioning of settler state legitimacy in and of itself; regardless of who is deemed part of the settler state, if

[46] To clarify, I am referring to how there have been conceptions of settler societies that would not include jurisdiction over Indigenous lands and peoples. The Two-Row Wampum treaty, which is referenced elsewhere in this thesis, is one place where this conception can be seen.

treaty responsibilities have not been carried out, and treaties are the foundation of settler state sovereignty, the legitimacy of the settler state can be questioned.

The second aspect is a questioning of the legitimacy of settler state authority over Indigenous peoples and lands. Stark describes the shift that took place between a period when Indigenous nations were seen by European settler states as "foreign entities whose sovereign political authority was requisite for treaty-making", and a later period when they became seen by settler states as existing within the settler state (2016, no page numbers available). This shift is important because it reveals how the Crown's assertion of sovereignty over Indigenous lands and peoples came to be seen as legitimate. Through the criminalization of Indigenous peoples' activities and through "suppressing Indigenous legal and political institutions" (Stark 2016, no page numbers available), the settler state asserted its authority and reinscribed its claim to sovereignty. This was a double move wherein the US and Canada sought not only to "'eliminate,' or at least significantly diminish Indigenous political authority, …[but also] to produce their own legality by reframing their criminal activities as lawful" (Stark 2016, no page numbers available).

Borrows (1999) calls into question Canadian courts' acceptance that Indigenous peoples became subject to Canadian law after the assertion of Crown sovereignty. He is critical of judges' repeated reliance on settler state sovereignty (taken to include jurisdiction over Indigenous lands and peoples) as having been established at the assertion of Crown sovereignty. For example, Justice Macfarlane asserted in a provincial appeals court decision in 1993 that this had happened at the time of asserts this was established at the time of B.C. entering confederation in 1871: "…when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British

Columbia entered Confederation, the Indians became subject to the legislative authority in Canada" (Justice Macfarlane in *Delgamuukw v. British Columbia* Court of Appeal decision [1993] at para 171, quoted in Borrows 1999, p. 542). Borrows (1999) notes contradictory elements of Canadian court decisions about Indigenous rights that reveal the courts' "unreflective extension, and unquestioned acceptance, of Crown assertions of sovereignty" (p. 549). He argues that the 1997 Supreme Court of Canada *Delgamuukw v. British Columbia* decision reinscribes settler state sovereignty over Indigenous peoples while also seeming to engage in discourses of morality and justice, for example by attempting "to recognize and facilitate Indigenous legal pluralism within Canada" (Borrows 1999, p. 548). Similarly, the *Tsilhqot'in Nation v. British Columbia* (2014) decision explicitly states: "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada" (at para 69) , while at the same time accepting that "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province" (at para 69, also quoted in Borrows 2015, p. 703). Borrows (2015) argues that the courts' acceptance of the Crown's radical or underlying title "is a restatement of the doctrine of *terra nullius*" (p. 724), which "assume[s] away the underlying title and overarching governance powers that First Nations possess" (p. 742).

Coulthard (2014) connects the courts' unquestioning acceptance of settler state sovereignty to the systems of domination of racism and colonialism that factored into the *terra nullius* doctrine:

> …over the last thirty years the Supreme Court of Canada has consistently refused to recognize Aboriginal peoples' equal and self-determining status based on its adherence to legal precedent founded on the white supremacist myth that Indigenous

> societies were too primitive to bear political rights when they first encountered European powers. (p. 41)

Similarly, Monture-Angus (2010) writes that "Canada was not unoccupied at the time Europeans arrived here. If, [*sic*] the assertion is that Aboriginal Peoples were not civilized enough to 'control' the territory, the time has come to realise this myth" (p. 95). The courts' unquestioning acceptance of this underlying title assumes the shift that Stark (2016) points out: the shift from Indigenous nations being considered as sovereign and foreign nations, to being seen as subordinate to and within the settler state. In terms of recent court cases about Aboriginal title, Borrows (1999) points out that Indigenous peoples are held to much higher standards and burdens of proof to prove their historical usage of the land than the settler state is held to to prove its claim to sovereignty (p. 549). For all of these reasons, the settler state's foundational legitimacy and its claim to legal authority over Indigenous peoples needs to be questioned.

This chapter introduced Coulthard's (2014) definition of a settler-colonial relationship on which parts of my analysis in Chapter Three are based. I argued that his definition's focus on power and inclusion of two interconnected types of dispossession make it strong. Additionally, the chapter discussed other features of settler colonialism, as written about by various scholars of Indigenous and settler-colonial studies, in order to flesh out what scholars in these fields mean by settler colonialism. I argued that each of these elements can also been seen in Coulthard's definition of a settler-colonial relationship. Finally, I explored critiques of the assumption of settler state sovereignty in terms of both its foundations in treaty responsibilities that have not always been upheld, and in terms of the claim to settler state jurisdiction over Indigenous lands and peoples.

Chapter Three will apply these ideas to an analysis of B.C.'s consultation and accommodation policy, using a Foucauldian-inspired approach.

Chapter 3: The Settler-Colonial Politics in B.C.'s Consultation and Accommodation Policy

Overview: The *Procedures*

B.C.'s 23-page *Updated Procedures for Meeting Legal Obligations When Consulting First Nations Interim* (the *Procedures*) was published in 2010, replacing an earlier version of similar guidelines that dated from 2002 (Province of B.C. 2010). It is publicly available for download on the Province of B.C.'s *Consulting with First Nations* web page. Its introduction outlines the roles and responsibilities of different parties, some legal context of the duty to consult and accommodate, and a statement that the document is "to be used in conjunction with associated operational guides and tools" (Province of B.C. 2010, p. 3).

After the introduction, the *Procedures* outline four phases of the consultation process: 1) Preparation, 2) Engagement, 3) Accommodation, and 4) Decision and Follow-Up. Each of these phases is comprised of three or five steps. The final pages of the *Procedures* include a flow chart diagram of the process, a table with titles of the operating guides and tools Ministry staff may use at different stages of the process, and a glossary of definitions.

I have chosen to focus on the *Procedures* because they are applicable to decisions in multiple natural resource sectors (e.g. forestry, mining). For example, the *Procedures* appear in sector-specific guidelines for clean energy projects (Province of B.C. 2016, p. 93), environmental assessments (B.C. Environmental Assessment Office 2013, p. 11), and major mines (Province of B.C. 2013, p. 22). As such, the *Procedures* can be interpreted as B.C.'s broad approach to consultation and accommodation when a land or

resource decision may affect one or more First Nations' "claimed or proven" Aboriginal rights, including title. The First Nations Leadership Council's (FNLC's) (2013) "Review of British Columbia Policies on Consultation and Accommodation" focused on the *Procedures* in its analysis of B.C.'s consultation and accommodation policy (pp. 87-101). As such, it appears that the FNLC report authors also considered the *Procedures* to be a key text for analysis of the province's consultation and accommodation policy.

There are two possible meanings for the word "interim" in the title of the *Procedures*. First, it may refer to the claim that "[t]his procedure will be reviewed following one year of implementation in a process to be determined" (Province of B.C. 2010, p. 4). Based on searches of the public-facing Province of B.C. website, no further updates of these procedures are available to the public, if they exist at all. Second, the word interim may refer to the interim nature of the duty to consult and accommodate. That is, the courts have characterized the duty to consult and accommodate as interim to negotiated settlements between First Nations and settler governments (see Lawrence and Macklem 2000, p. 254; *R. v. Van der Peet* 1996 at para 31, *Delgamuukw v. British Columbia* 1997 at para 186; and *Haida Nation v. British Columbia [Minister of Forests]* 2004 at para 44). The *Procedures* state, "[t]he solution is interim to the resolution of the rights question at large. Final resolution can only be achieved through the negotiation and agreement of a treaty agreement or a declaration by a court" (Province of B.C. 2010, p. 12). However, both in *Haida* and in the *Procedures*, the idea of consultation and accommodation as interim to negotiated settlements is only mentioned in contexts where deep consultation is required. The *Procedures* pertain to the duty to consult and accommodate in contexts where various levels of consultation are required (mild and moderate as well as deep)

(see Province of B.C. 2010, pp. 11-12). Thus, it is likely that "interim" in the title meant the *Procedures* themselves were intended to lead to a later version of the policy.

Technology of Power: Procedural Fairness

Administrative law imposes a duty to be "procedurally fair". Administrative law applies where statutory decisions are made. Statutory decisions are made by tribunals, which (as the name suggests) are authorized by settler law; in administrative law, "the generic term 'tribunal' is used to include all public officials, boards, and agencies who exercise statutory authority" (Blake 2017, p. 4).[47] Main features of administrative law include a focus on procedures, the duty of fairness, the right to be heard and present evidence, an impartial judge, and discretion (see Blake 2002 and Blake 2017). Procedural fairness[48] has its roots in the natural law of the British legal tradition,[49] and is discussed in the present context as one element of administrative law. The duty of fairness exists to:

> …ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. (*Baker v. Canada [Minister of Citizenship and Immigration]* 1999, at para. 22)

The duty to be fair also includes provision for an impartial decision-maker (*Baker* 1999, p. 820). Decision-makers are constrained by the statute that gives them their decision-

[47] I rely on Sarah Blake's writings for administrative practitioners as my primary source of information about the logic and processes of administrative law. She has had a long legal career practicing general civil litigation and she wrote a book on administrative law as a clear yet thorough resource to help lawyers and non-lawyers understand administrative law (Blake 2017, p. vii).

[48] I take the position that "procedural fairness" and "the duty to be fair" both refer to the duty to be procedurally fair. In this chapter, I refer to administrative law in some contexts when the authors I cite are referring to administrative law more generally (rather than a focus on the duty to be fair *within* administrative law).

[49] For a succinct overview of natural law, see Lindsay 2010, p. 67. Lindsay (2010) writes that administrative and judicial contexts include two natural law principles, "the rule that the other party should be heard" and "the principle that no man should be judge in his own cause" (p. 67). As discussed presently, the duty of fairness includes "the rule that the other party should be heard" (see *Baker* 1999, at para 22).

making power and therefore by the legislature. The duty to be fair works in tandem with statutes. Blake (2017) explains the common law nature of the duty of fairness in the following terms: "If there is a gap in the statutory rules, the basic rule to follow is that of fairness" (p. 4). This relationship between statutes and fairness is relevant because not all circumstances will be contemplated in legislation or regulations. Decision-makers should therefore be able to make a decision based on the statute, the facts of the decision before them, and the "basic procedural rule" of fairness (Blake 2002, p. 470).[50] The duty to consult and accommodate is partly based on administrative law, and so administrative law principles, like the duty to be fair, appear in B.C.'s consultation and accommodation policy. Fairness is a place where decisions are made and thus a place of the operation of power and possible contention.

Procedural Fairness in B.C.'s Consultation and Accommodation Policy

The duty to consult and accommodate is partly based on administrative law concepts that include the duty to be fair (Sossin 2010, p. 106). For example, the duty to consult and accommodate includes administrative law concepts of "the provision of notice and disclosure, the opportunity to develop and present views by parties whose rights and interest [*sic*] are affected, [and] the entitlement to reasons before an impartial decision-maker" (Sossin 2010, p. 106). Some of these concepts appear in B.C.'s consultation and

[50] Interestingly, in Blake's 2017 textbook about administrative law, there is only one mention of Aboriginal rights:

> A tribunal has no role in the consultation of Aboriginal people under section 35 of the Constitution, except to the extent granted by statute, but if it has jurisdiction to base its decision on the public interest, it may consider whether the Crown complied with its duty to consult. (Blake 2017, p. 159).

This quotation is in reference to a court decision wherein a utilities commission was deemed to have authority to consider whether the duty to consult and accommodate had been met, but it was not deemed to have authority to consult (*Rio Tinto Alcan v. Carrier Sekani Tribal Council* 2010).

accommodation policy. For example, Phase Two of the process in the *Procedures* includes providing information to potentially affected First Nations and seeking their input (Province of B.C. 2010, p. 14). Interestingly, the policy does not mention anything about the decision-maker being impartial or unbiased (Province of B.C. 2010, see page 19). It does require that decision-makers keep records of "consultation considerations or analysis which led to the decision" (Province of B.C. 2010, p. 19). However, the policy only recommends that officials share those reasons with First Nations involved in the process in the case of "middle to deep consultation processes" (Province of B.C. 2010, p. 19). This differentiation between levels of consultation points to the contextual basis for determining the level of consultation necessary. This differentiation according to context is another way in which the duty to consult and accommodate is based on the duty to be fair as defined by administrative law. Crucially, the duty to be fair in administrative law includes a contextual basis for determining the level of fairness required, on a spectrum from minimal, to moderate, to maximum fairness standards (Sossin 2010, p. 106). The determination of which level of consultation is required is a site for the exercise of power, and hence, of contestation. The context-based decision about the level of consultation required has implications for all parties involved. These various features of B.C.'s consultation and accommodation policy show the ways administrative law and its principle of procedural fairness have shaped the duty to consult and accommodate.

However, the duty to consult and accommodate is also based in s. 35 of the *Constitution Act, 1982*, and as such it differs from ordinary administrative law on procedural fairness in some regards: "the duty to consult and, consequently, to accommodate Aboriginal rights and interests, cannot be severed from the overall purpose

of protecting the substance of s. 35(1) rights, and of furthering reconciliation between the Aboriginal and non-Aboriginal Canadian societies" (Potes 2006, p. 30). Sossin (2010) explains that one main way the duty to consult and accommodate differs from administrative law principles is that the duty to consult and accommodate includes a substantive constraint. It is not sufficient simply to provide Indigenous communities with the opportunity to be heard; the Crown must show that its "substantive position" has changed as a result of the consultation (Sossin 2010, p. 107).

Accordingly, a government document about statutory decision making for Ministry of Forests staff specifically states that "[t]he duty to consult First Nations is conceptually distinct from the duty of procedural fairness in administrative law" (Falzon n.d., p. 44). Although this is a fair claim due to the constitutional nature of the duty to consult and accommodate, major elements of procedural fairness are still evident in the duty to consult and accommodate. For example, two Supreme Court of Canada cases from 2010 dealing with the duty to consult demonstrate a heavy reliance on administrative law procedural principles (Promislow 2013, pp. 63, 66). Furthermore, the FNLC (2013) criticizes B.C.'s consultation and accommodation policy for its strong focus on procedure, with limited focus on substantive outcomes in line with the courts' and the B.C. government's stated goals of reconciliation with First Nations (p. 95). These examples show that procedural fairness is evident in court cases and B.C.'s policy about the duty to consult and accommodate, and that it tends to prevail over considerations of substantive outcomes.

Potes (2006) effectively addresses both the administrative law and the constitutional foundations of the duty to consult and accommodate in her distinction between a

procedural approach and a purposive approach to the duty to consult and accommodate (pp. 33-5). A procedural approach "perceives the duty as a qualified deviation of the administrative duty of procedural fairness and considers the State authority as the ultimate source of decision-making tempered by an obligation to balance interests" (Potes 2006, p. 33-4). A purposive approach:

> …identifies possibilities to foster actual reconciliation between Aboriginal Peoples and the settler society in Canada. It emphasizes the outcome, links the duty to the broader objective of protecting s. 35(1) rights, favours negotiation over unilateral decision-making and conceives the duty as constraining State discretion in favour of the substantial incorporation of Aboriginal concerns in its decisions. (Potes 2006, p. 34)

Of these two approaches, more evidence points to a procedural approach than to a substantive one in B.C.'s consultation and accommodation guidelines.[51] As in Potes' definition of a procedural approach, the policy positions state authority as the ultimate source of decision-making, while considering that "[b]alance and compromise are important - the Crown must balance concerns regarding potential impact of the decision on the Aboriginal Interest with other societal interests" (Province of B.C. 2010, p. 6). The entire document is based around a step-by-step procedure, which is strikingly depicted in a flow chart diagram showing each stage of the process, connected to different actors, actions, and decisions (Province of B.C. 2010, p. 20; see Figure 1). The policy clearly lays out steps for engaging in consultation and accommodation, but it includes minimal information about the constitutional basis of the duty to consult and accommodate and the broader goals of reconciliation the Courts have emphasized (FNLC 2013, p. 94-5).[52]

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[51] The title of the policy, *Updated Procedures for Meeting Legal Obligations When Consulting First Nations Interim* suggests this procedural focus. However, as has been discussed, the legal obligations of the duty to consult and accommodate include both "procedural" and "substantive" obligations, and the policy focuses on procedure.

[52] The FNLC (2013) report states: "The mechanics of how to consult and accommodate should not and

When procedural elements like steps and documentation of each step "are the primary content of a policy on consultation the impression left is a significant distortion of the law, and what must actually be done in order for the law to be upheld and honored" (FNLC 2013, p. 94).

Some evidence of a purposive approach also shows up in B.C.'s consultation and accommodation guidelines.[53] For example, the *Procedures* do mention the legal context of the duty to consult and accommodate, stemming from court cases about s. 35(1) of the *Constitution Act, 1982* (Province of B.C. 2010, p. 5). Furthermore, the process of reconciliation is mentioned as one of the three purposes served by the duty to consult (Province of B.C. 2010, p. 5). This attention to substantive outcomes makes sense, given that the policy gives guidelines for "meeting legal obligations" when consulting with First Nations. As has been shown, both working toward substantive outcomes that align with broader goals of reconciliation and following proper consultation and accommodation processes are part of legal obligations to consult and accommodate (Sossin 2010, Potes 2006). However, as the FNLC (2013) persuasively argues, B.C.'s consultation and accommodation policy devotes substantially more space to guidance on meeting procedural obligations than on explaining the constitutional basis of the duty and the importance of working toward substantive outcomes.[54] This analysis reveals power

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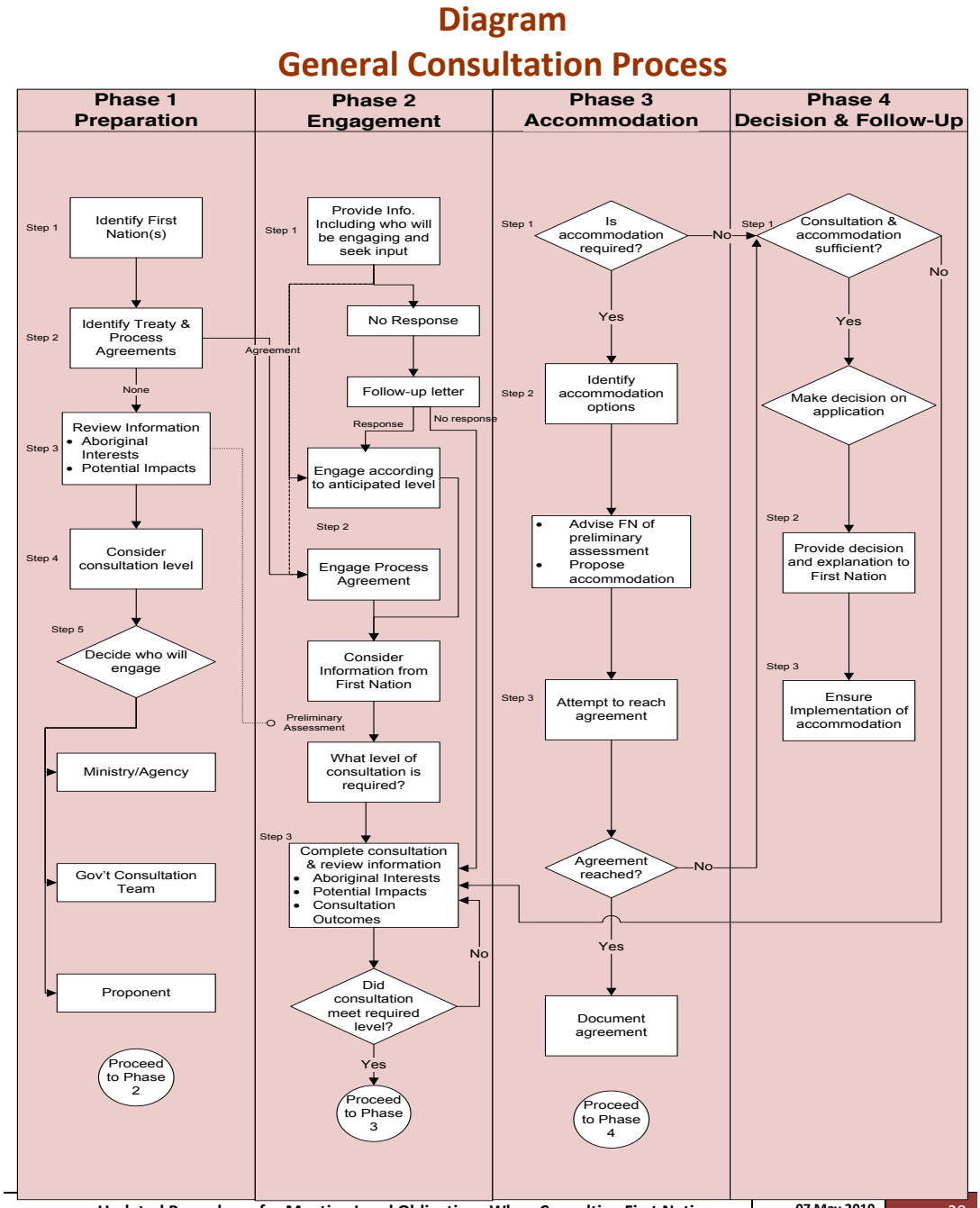
cannot be understand [*sic*] apart from a substantive understanding about how they are to be a means towards broader goals. Yet, this is precisely what provincial policies have done" (p. 95).

[53] Here, I am again referring to one of Potes' (2006) definitions, in this case her definition of a purposive approach.

[54] Above, I discuss a "procedural approach" and a "purposive approach" in a rather limited sense, focusing on the duty to consult and accommodate and how Potes (2006) has defined those terms in that context. Sossin (2010) identifies a similar dynamic tension between process and "just outcomes" (p. 113) in the context of the duty to consult and accommodate. Although beyond the scope of this thesis, this dynamic tension could be explored in broader contexts, including the broader context of settler-Indigenous relationships. In such a study, it would be important to consider historically-contingent understandings of what would constitute just or substantive outcomes for the parties involved.

operating in the *Procedures* in a way that can affect consultation and accommodation processes. The policy's focus on procedures (and comparative lack of focus on substantive outcomes) may lead people referring to the policy for guidance to carry out consultation and accommodation in procedurally-focused ways that lack attention to the broader context and stated aims of the duty to consult and accommodate.

Figure 1: General Consultation Process (Province of B.C. 2010, p. 20)



Procedural Fairness and Power

In the *Procedures*, we see power operating in three main ways. First, the administrative law we see in consultation and accommodation policy rests largely on Euro-Canadian legal traditions. All participants are expected to adhere to the format of the process outlined in the guidelines. Based on the *Procedures*, there does not seem to be room for participating First Nations to alter the process according to their various legal traditions. The *Procedures* acknowledge that there may already be treaties or agreements in place between particular First Nations and the province that set out protocols for consultation (Province of B.C. 2010, p. 9). The *Procedures* stress the importance of following those agreements, but even in a case where there is agreement about consultation processes, the *Procedures* must be followed: "Where this is the case, the applicable provincial entities are required to follow processes set out in the treaty or agreement, as well as ensure consistency with this document" (Province of B.C. 2010, p. 9). Thus, even when there are specific agreements about how to carry out consultation and accommodation, parties are expected to adhere to the process outlined in the *Procedures*.

The description of the legal context of the policy (Province of B.C. 2010, pp. 5-6) refers to Canadian courts and the *Constitution Act, 1982*, but makes no mention of Indigenous legal traditions. Napoleon (2007) uses the term "legal system" to refer to "state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions" (p. 2). She uses the term "legal order" to "describe law that is embedded in social, political, economic, and spiritual institutions" (p. 2). She also uses the term "Indigenous legal traditions" to

refer "to Indigenous legal protocols and laws" (p. 2). She discusses different aspects of Indigenous legal orders and asserts that "[a] deeper and more critical understanding of Indigenous legal orders can strengthen today's governance structures and functions" (Napoleon 2007, p. 19).

The *Procedures* are based on the Canadian legal system. For example, they state: "The courts continue to clarify the nature of existing aboriginal and treaty rights and, as a consequence, define the legal relationship between the Province and First Nations" (Province of B.C. 2010, p. 5). This shows that dominating systemic power has operated, such that settler states are in a position to write (and clarify) laws and policies, based in Western legal traditions, with impacts on both settlers and Indigenous peoples.

Second, the *Procedures*' focus on procedure shows the operation of power in its downplaying of substantive outcomes:

> In reading them, one is provided almost no clarity or guidance about the ultimate objectives and goals of the duties to consult and accommodate. The policies are formal, mechanistic, and procedural. They are without substantive guidance about 'why' government actors must do certain things, and the reality that 'why' they are doing them has real implications for 'how' they will be done. (FNLC 2013, p. 95)

The policy focuses significantly more on detailing process than it does on explaining *why* government actors engage in consultations with First Nations. As will be discussed below, the different roles and responsibilities set out in the *Procedures* for settler government actors and First Nations reveal a process of differentiation. The above quotation discusses how this procedural focus may affect how settler government actors carry out consultation and accommodation. This emphasis reveals a choice on the part of policymakers to emphasize process and under-emphasize substantive outcomes.

Policymakers had the power to emphasize certain aspects over others in their translation of case law into policy.

Third, power relations operate by empowering a statutory decision-maker to make decisions after considering consultation input and proposed accommodation measures. The statutory decision-maker is the representative of the Crown, and First Nations do not have comparable authority under the policy. That is to say, they cannot make a decision about the proposed project or appropriateness of consultation and accommodation. There are avenues for revisiting parts of the process if the First Nation does not agree to proposed accommodation measures and if the consultation and accommodation are deemed insufficient (Province of B.C. 2010, p. 18-19). However, under the policy, a First Nation is not empowered to make decisions for the project to be approved or rejected, or to attach conditions to a project's approval. Court decisions and B.C.'s policy emphasize that "a commitment to the process does not require a duty to agree" (Province of B.C. 2010, p. 6; see also Sossin 2010, p. 100). First Nations may dispute the consultation and/or accommodation process in court, as evidenced by multiple court cases about the duty to consult and accommodate. However, the decision-making power rests with statutory decision-makers empowered by B.C.'s laws: "This procedure applies to all provincial agencies that have authority to make decisions about provincial land or resource use that trigger a duty to consult" (Province of B.C. 2010, p. 3). This decision-making authority reveals that power relations are disproportionately skewed to different parties involved in consultation and accommodation processes in ways that consolidate state rule. This example is consistent with Foucault's understanding of power as operating everywhere. It also demonstrates that there is an unequal power relationship

wherein the settler state has more power under the policy to shape land and resource decisions, compared to First Nations.

Procedural Fairness as a Process of Differentiation

By being based in administrative law, the *Procedures* differentiate between the party that is the decision-maker and the parties that are interested in the decision (see Province of B.C. 2010, p. 3). Parties that are interested in the decision have the right to information and the right to be heard in their responses to that information. However, they do not have the right to make a decision. In the context of the duty to consult and accommodate, potentially affected First Nations are interested parties and not decision-makers. The B.C. government is the party that is empowered to make a decision, via a statutory decision-maker, and that has the obligation to fulfil the duty to consult and accommodate in a manner that upholds the honour of the Crown. First Nations are assigned limited authority by settler authorities (e.g. the authority to "provide their views on potential impacts on their Aboriginal Interests" in consultation processes [Province of B.C. 2010, p. 15]). However, since that authority is granted by the settler state, there is an asymmetrical relationship of power between First Nations and the Province, exemplifying the type of power relationship Coulthard (2014) alerts us to. 'Proponents' are empowered in a different way by B.C.'s consultation and accommodation policy. Proponents may be "any party, including industry, local governments, federal agencies and Crown Corporations, seeking decisions from the Province in support of activities related to land or resource development" (Province of B.C. 2010, p. 3). They are separate from the statutory decision-maker, but they may take on some or all of the responsibility of consulting with potentially affected First Nations and of suggesting accommodation

measures. Thus, we can see how the procedural nature of the consultation and accommodation guidelines sets out different roles and responsibilities for each party, that these roles and responsibilities are arranged in a power hierarchy, and only one party (agents of the settler state) is empowered to make a decision, even though Indigenous peoples are procedurally invited to be part of the process.

Procedural Fairness and Settler Colonialism

The administrative law principle of procedural fairness is evident in B.C.'s consultation and accommodation policy, and it interacts with the system of domination of settler colonialism in several ways. To analyze features of the system of domination of settler colonialism, I rely on Coulthard's (2014) definition of a settler-colonial relationship, which was discussed in Chapter Two:

> A settler-colonial relationship is one characterized by a particular form of *domination*; that is, it is a relationship where power – in this case, interrelated discursive and nondiscursive facets of economic, gendered, racial, and state power – has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate the *dispossession* of Indigenous peoples of their lands and self-determining authority. (emphasis in original, pp. 6-7)

First, B.C.'s consultation and accommodation policy sets out roles and responsibilities for parties invited to be involved in consultation and accommodation processes, and as such, who has the power to make decisions (see Province of B.C. 2010, pp. 3; 5-19). In doing so, it sets out a hierarchical power relationship wherein the B.C. government has final decision-making authority and First Nations do not. This power differentiation between parties can be seen as part of Coulthard's (2014) definition. The policy makes space for First Nations to participate in consultation and accommodation processes, and highlights that "[t]here is a reciprocal duty on First Nations to express

their interests and concerns once they have had an opportunity to consider the information provided by government, and to consult in good faith by whatever means available to them" (*Halfway River* note 103 at para. 161 and *Tommy* note 83 at para. 109, quoted in Province of B.C. 2010, p. 3; see also FNLC 2013, p. 96, note 6). Under the policy, Indigenous peoples' self-determining authority is constrained to giving input about a proposed project and proposed accommodation measures. The policy states that there is no "duty to agree" for parties involved: "[Accommodation] involves a process of seeking compromise in an attempt to harmonize conflicting interests; however, a commitment to the process does not require a duty to agree – it requires good faith efforts to understand and address each other's concerns" (Province of B.C. 2010, p. 6).[55] This lack of a duty to agree means that if a First Nation opposes the proposed project or accommodation measures suggested, under B.C.'s consultation and accommodation policy the statutory decision-maker may make a decision that goes against the First Nation's stated interests.[56] This is evidence of a settler-colonial relationship where there are hierarchical power relationships between B.C. and Indigenous peoples.

Furthermore, the *Procedures* differentiate between proven and claimed Aboriginal rights with important procedural implications attaching to the difference:

> In the case of proven rights or treaty rights, the extent of consultation is influenced by the nature of the rights and the possibility they may be infringed. In the case of claimed aboriginal rights (including title), the extent of consultation is determined by the strength of the case supporting the claim, and the seriousness of potential impacts upon the claimed rights. (Province of B.C. 2010, p. 5-6)

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[55] On the same page, there is a text box saying: "Consultation may not always lead to accommodation and accommodation may not always result in agreement" (Province of B.C. 2010, p. 6).

[56] It is interesting to consider the role of proponents (e.g. industry) from the perspective of a "duty to agree". Presumably, proponents need to agree for the project to proceed. (e.g. if it is not feasible for them to carry out the project, they have the freedom to "disagree" and decide not to pursue the project.)

Both "proven" and "strength" are determined by the authority of settler state actors, though not necessarily by actors that are directly or institutionally linked to the statutory decision-maker. Rights and title can be proven in courts, and strength in consultation processes appears to be determined by provincial decision-makers (and then reviewed by the courts, if their determination is contested). This shows the different roles and responsibilities for B.C. government and First Nations in consultation and accommodation processes.[57] Under this policy, the strength of an Aboriginal rights claim can be determined by settler state actors, not by a First Nation's representatives. Under the policy, how strong a First Nation thinks their claim is matters to the extent that a provincial decision-maker must consider their input. The power to decide on the strength of a claim rests ultimately with the statutory decision-maker based on settler law rather than any other legal authority. The policy leaves no space for questioning the strength of the province's claim to jurisdiction over the land, or to the province's claim to have the authority to require First Nations to prove their prior use and occupation. These roles, responsibilities, and powers reveal a settler-colonial hierarchical power relationship. Thus, the structure of interactions laid out by the policy limits space for First Nations to exercise their self-determining authority.[58]

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[57] I am not arguing that different roles and responsibilities for different parties is intrinsically problematic. Rather, in this instance, roles and responsibilities are structured along hierarchies and asymmetries of rule and control that consolidate Crown governance over Indigenous governance. This example also speaks to the differentiation of functions within the settler state, which are designed to protect the neutrality of processes (e.g. the avenue to appeal a decision in the courts).

[58] In this analysis I am focusing on the policy and taking it on its own terms. I do not mean to overstate the importance of consultation and accommodation policy and imply that it limits all self-determining authority for Indigenous peoples. There is capacity for self-determining authority in ways that have nothing to do with consultation and accommodation, in ways that work within the legal duty to consult and accommodate, and in ways that have to do with natural resource development projects but do not fit within the roles, responsibilities, and powers outlined in consultation and accommodation policy. However, if we take the policy on its own terms, it is clear that the roles, responsibilities, and powers give more power to the B.C. government statutory decision maker than to First Nations.

Second, this policy is explicitly about land. It applies to "decisions about provincial land or resource use" (Province of B.C. 2010, p. 3). By constraining Indigenous peoples' self-determining authority as described above, this policy demonstrates a settler-colonial relationship as defined by Coulthard (2014). Recall that Coulthard's (2014) definition includes two types of dispossession: "*dispossession* of Indigenous peoples of their lands and self-determining authority" (emphasis in original, p. 7). The ways the *Procedures* constrain and empower actors contribute to the settler-colonial project of dispossessing Indigenous peoples of their self-determining authority *about lands*. Acquiring land as an alienable commodity (rather than maintaining or establishing an ongoing relationship) is one of the key elements of settler colonialism. The consultation and accommodation policy shows a B.C. state that seeks to retain decision-making authority over "provincial lands and resources" while making some space for Indigenous peoples' input.

Third, I argue that the procedural focus of the consultation and accommodation policy obscures the "productive" possibilities of settler-colonial domination that the policy enables. The procedural focus shifts attention to whether or not all stages of the process have been completed adequately, rather than the substantive impact of the outcomes of the process.[59] Since the duty to consult and accommodate is met if all processes (e.g. consultation, consideration of possible accommodation) are followed, a settler government decision-maker can decide on an outcome that Indigenous peoples do not support.[60] The fulfillment of required processes is thus sufficient for the production of a

[59] See earlier discussion of Potes 2006 and Sossin 2010.

[60] In the *Procedures*, these processes are outlined in four phases. Phase one, preparation, includes identifying First Nations that may have Aboriginal rights affected by the decision; identifying treaties or process agreements; reviewing readily available information; considering consultation levels; and identifying who will engage First Nations (e.g. a B.C. government agency or a proponent) (Province of B.C. 2010, pp. 9-13). Phase two, engagement, includes providing information to and seeking input from First Nations;

legitimate decision under the policy, irrespective of what that decision is. The rule of law has been used to further settler colonial aims in different contexts (see for example Stark 2016, Wolfe 2006, p. 402). Sossin (2010) writes that "[a]ll legal process both reflects and advances claims to legitimacy, fairness, and accountability" (p. 94). B.C.'s consultation and accommodation policy reflects and advances claims to the legitimacy of settler state jurisdiction over lands. That "provincial lands" are legitimately under the jurisdiction of the Province, and that provincial agents are empowered to make decisions about those lands and resources is assumed throughout the *Procedures*: "This procedure applies to all provincial agencies that have authority to make decisions about provincial land or resource use that trigger a duty to consult" (Province of B.C. 2010, p. 3) It emphasizes process rather than substantive outcomes, which obscures the policy's potential for outcomes that further settler-colonial domination and dispossession.

Technology of Power: Recognition Politics

Recognition politics is another technology of power that shows settler-colonial power dynamics in B.C.'s consultation and accommodation policy. Charles Taylor (1994) wrote a widely read essay about the politics of recognition in liberal multicultural politics. He argues against a type of liberalism that is "inhospitable to difference" because its focus is on the universal application of rules to uphold individual rights (Taylor 1994, p. 60). In

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engaging First Nations (e.g. in meetings between those carrying out consultation and First Nations); and completing consultation at the appropriate level (Province of B.C. 2010, pp. 14-16). Phase three, accommodation, includes assessing consultation and the need to accommodate; identifying accommodation options; and proposing accommodation measure(s) and attempting to reach agreement between the Province and the First Nation (Province of B.C. 2010, pp. 17-18). Phase four, decision and follow-up, includes assessing the consultation and accommodation record (and, if the "record suggests that further consultation or accommodation may be appropriate, the Province should continue consultation, and/ or accommodation discussions" [Province of B.C. 2010, p. 19]); providing the decision to the First Nation(s); and ensuring the implementation of accommodations (Province of B.C. 2010, p.19).

response to this, he advocates for a type of liberal politics that balances individual and collective rights (Taylor 1994, p. 61). He draws on the Hegelian master-slave dialectic and historical cultural turns to argue that identity-based recognition is a "vital human need" (Taylor 1994, p. 26). As such, he argues that "[e]qual recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict damage on those who are denied it, according to a widespread modern view…" (Taylor 1994, p. 36). Many scholars have responded to Taylor's writings about recognition politics (for example, see Markell 2003; Wolf 1994; Coulthard 2014, p. 29). The following critiques of recognition politics in Taylor's sense have shaped my analysis of recognition politics as a technology of power that operates in B.C.'s consultation and accommodation policy.

First, Taylor's conception of recognition politics assumes there is a group of people that can be characterized as dominant or mainstream. Recognition politics are politics of inclusion and exclusion; the theory posits that members of dominant society have the capacity to include members of marginalized groups in their society by recognizing their differences. Dhamoon (2009) problematizes this assumption that there is a "primary (if not singular) mainstream culture" (p. 37). Not only does this homogenize those thought of as belonging to the mainstream group, but it assumes that inclusion in the dominant group would "bring[] equity" to formerly marginalized groups once they are recognized (Dhamoon 2009, p. 37). It also assumes that inclusion in the dominant group is "universally desirable" (Day 2001, p. 175). However, this assumed universal desirability fails to account for the complexity of peoples' real-world experiences and aspirations. For example, Day (2001) argues that "while most indigenous groups do not want to be

entirely excluded from non-indigenous societies, most do not want to be entirely included in them either" (p. 176).

Day (2001) also questions liberal multiculturalism's assumption that a mainstream or dominant group is empowered to include and exclude others. Day's (2001) article investigates possible points of overlap or building upon one another between Native American political theory and Western political theory. He focuses on Proudhonian federalism, especially as it was taken up by Landauer, and the Two Row Wampum to illustrate a possible way of thinking about political relations that would be commensurable between some Indigenous political theoretical traditions and some Western political theoretical traditions (Day 2001).[61] Importantly for this thesis, he critiques the liberal multicultural idea of a dominant group in society conceiving of itself as having the authority to "give the gift" of recognition to marginalized groups. He poignantly asks:

> How is it that 'we' - whoever 'we' are - can be so sure of what 'they' - whoever 'they' are - really want? And how is it that 'we' came to be in a position of granting or denying recognition to 'them' in the first place? Who is this 'we' that gives the gift of liberal multiculturalism? (Day 2001, p. 181)

This critique of a 'we' that gives the gift of recognition highlights a key aspect of recognition politics. There is an assumed power relationship between those included (the "we") and those excluded (those who may be "gifted" recognition). When people who advance theories of liberal multiculturalism see themselves as part of the "we" that gives

[61] Proudhon considered all political systems to be based on compromise between "authority and liberty", and he advocated for a "form of federalism" that is "based on *equal* and *reciprocal* contracts between diverse groupings", where groupings retain autonomy (emphasis in original, Day 2001, p. 191). Day (2001) quotes a presentation by the Haudenosaunee Confederacy to describe the meaning of the Two Row Wampum: "When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Teh or Two Row Wampum" (Mitchell 1989, p. 109 quoted in Day 2001, p. 190). Grand Chief Michael Mitchell (1989) writes that "[t]he original Two Row Wampum agreement stipulated that each side would refrain from interference in the other's government" (p. 110).

the gift, they are seeing themselves in a hierarchical power relationship to others who may or may not be recognized.

Coulthard (2014) critiques this aspect of recognition politics in the context of settler-Indigenous relationships in Canada:

> I argue that the logic informing this dimension – where 'recognition' is conceived as something that is ultimately 'granted' or 'accorded' a subaltern group or entity by a dominant group or entity – prefigures its failure to significantly modify, let alone transcend, the breadth of power at play in colonial relationships. (pp. 30-1)

Coulthard (2014) argues that Canada's colonial relations of power are no longer maintained through overt violence; they are maintained "through the asymmetrical exchange of mediated forms of state recognition and accommodation" (p. 15). On the surface, recognition politics including rhetoric of reconciliation and acceptance of Aboriginal difference may seem to entail the settler state giving up some of its power or shifting the dynamics of colonial power relations. However, Coulthard (2014) argues that this colonial recognition entails "entic[ing] Indigenous peoples to *identify*, either implicitly or explicitly, with the profoundly *asymmetrical* and *nonreciprocal* forms of recognition either imposed on or granted to them by the settler state and society" (emphasis in original, p. 25). In response to colonial recognition politics, Coulthard (2014) argues for a resurgent politics of recognition wherein Indigenous peoples prefigure radical alternatives to current colonial relations by "empowering themselves through cultural practices of individual and collective self-fashioning" (p. 18). His concluding chapter outlines "five theses on Indigenous resurgence" (Coulthard 2014, p. 165), which include direct action and "a massive transformation in the political economy of contemporary settler-colonialism [*sic*]" (p. 171) away from capitalism. Although his "theses are not meant to be overly prescriptive or conclusive" (p. 165), he argues that

Indigenous peoples' present condition demands they shift their attention to "a resurgent politics of recognition that seeks to practice decolonial, gender-emancipatory, and economically nonexploitative alternative structures of law and sovereign authority grounded on a critical refashioning of the best of Indigenous legal and political traditions" (Coulthard 2014, p. 179). The following analysis demonstrates that B.C.'s consultation and accommodation policy includes features of liberal-multicultural and colonial recognition politics.

Recognition Politics in B.C.'s Consultation and Accommodation Policy

Consultation and accommodation policy are an example of recognition politics in Canada. The *Procedures* exist to recognize Aboriginal difference, to ensure the B.C. government consults with First Nations potentially affected by land and resource decisions, and to ensure that where deemed necessary, First Nations' interests are accommodated (Province of B.C. 2010). In line with the critique of liberal-multicultural politics outlined above, the *Procedures* are imbued with a sense that the B.C. government is empowered to "give the gift" (Day 2001) of recognition. In this case, recognition comes in the form of recognizing that First Nations may be affected by a land or resource decision, informing them about the decision (or proposed project), and considering their input in the decision, which may include measures to accommodate their interests. In the policy, B.C. is in the position of the party that "gives the gift" of recognition. This can be seen by the way the *Procedures* set up consultation and accommodation processes. B.C. is responsible for ensuring potentially affected First Nations are contacted about proposed decisions, be it them or the proponent that does it (Province of B.C. 2010, p. 14), as well as being responsible for making the statutory decision and deciding what constitutes

appropriate accommodation. The next section will discuss how these recognition politics operate in ways that uphold settler-colonial power relationships.

Recognition Politics: Power, Differentiation, and Settler Colonialism

Examining recognition politics in B.C.'s consultation and accommodation policy enables me to analyze power, differentiation, and settler-colonial domination. Throughout the *Procedures*, B.C. is the party with decision-making power. For example, in a section that introduces the concept of accommodation in this policy context, they state: "Balance and compromise are important - the Crown must balance concerns regarding potential impact of the decision on the Aboriginal Interest with other societal interests" (Province of B.C. 2010, p. 6). This quotation exemplifies the type of politics that can emerge under discourses of recognition, as discussed above. In the quotation, Indigenous peoples are recognized as different and their interests are considered and accommodated. However, it is also evident that their interests are considered alongside the state's interests, and the people deciding what "balance" means are part of the settler state. There is acknowledgement of difference but the asymmetrical authority to decide how to balance interests lies with the settler state.

In this case, recognition politics reveals investment in a power relationship wherein the group that considers itself dominant conceives of "recognized" groups as contained *within* it. This containment strategy is embedded in the *Procedures* document as it dictates the terms of engagement between the state and Indigenous peoples. There are other possible ways the settler state could seek to relate to Indigenous peoples that would not include this type of subsumed relationship. For example, see Monture-Angus's (2010) discussion of the "gus-wen-qah", known in English as the "Two-Row Wampum":

"It is the treaty which governs the relationship between the Six Nations Confederacy (respectfully called the Haudenosaunee) and the settler nations" (pp. 36-37). She describes the two different paths it shows, each containing a ship or canoe carrying "laws, institutions and forms of government", one of European things and one of Mohawk things (Monture-Angus 2010, p. 37). Living in respect of the Two-Row Wampum Treaty would mean each group would have its own "laws, ways, language, and traditions" (Monture-Angus 2010, p. 38). A different example can be found in Pasternak's (2017) book, where she writes about how the Algonquins of Barriere Lake "sought to gain effective governing control over their lands without giving up their rights to the territory" (p. 268) through a Trilateral Agreement between themselves, Canada, and Quebec (p. 54).[62] The subsumed power relationships between Indigenous peoples and B.C. that the *Procedures* suggest are evidence of Coulthard's (2014) definition of a settler-colonial relationship, a type of dominance structured into hierarchy that upholds settler rule (pp. 6-7).

The consultation and accommodation policy actively *produces* difference and settler state dominance in this relation of difference. I am not arguing that these and other differences did not exist in varied ways before (or outside the scope of) consultation and accommodation policy. Rather, consultation policy (re)produces specific types of power relationships between the settler state and Indigenous peoples. In the policy, B.C. retains final decision-making power while being open to First Nations actors shaping some parts of the consultation and accommodation process. For example, the policy makes space for

[62] Notably, Pasternak (2017) focuses on the concept of jurisdiction as central to legal political authority rather than the concept of sovereignty (see, for example, p. 10).

recognition of different types of groups to represent a group of Indigenous people, stating:

> Whether a band, tribal council or more than one group should be involved in the consultation will depend on the history of the particular First Nation groups, what they have previously told government about their preferred consultation relationships, and whether any agreements exist on the matter. (Province of B.C. 2010, p. 9)

Making space for Indigenous groups to be organized as they see fit shows the settler state making some space for Indigenous actors to have authority. However, it can also be seen as consistent with a colonial politics of recognition (Coulthard 2014), wherein Canada's colonial relations of power are maintained "through the asymmetrical exchange of mediated forms of state recognition and accommodation" (p. 15). Though the policy makes some space for Indigenous actors to exercise power (e.g. deciding on how and whether to engage in consultation processes, giving input and engaging in consultation processes), B.C. retains final decision-making authority about whether a project proceeds, and what type of accommodation (if any) is necessary.

Monture-Angus (2010) makes a strong argument about the *Delgamuukw* decision that helpfully demonstrates this type of recognition politics at work in the context of court evidence. She says the decision in the Supreme Court reasons for judgement to admit oral history with the same credibility as written history shows the courts accommodating Indigenous difference (p. 31). They are not questioning whether something is wrong with the rules; they are making exceptions to the rules to accommodate Indigenous difference. Although this case also demonstrates the power of Indigenous actors to challenge the status quo of legal policy and procedures, Monture-Angus (2010) argues that the decision's admittance of oral history serves to keep systems as they are, because it "sees the Indian, and not the methods of history or law, as the problem" (p. 31). In a similar

sense, consultation and accommodation policy is a way of fitting Indigenous peoples' interests and Aboriginal rights (claimed or proven) into B.C.'s existing land and resource decision-making frameworks. In the sense that they require a decision-maker to show that "the governments' substantive position has been modified" as a result of Indigenous communities' input (Sossin 2010, p. 107), B.C.'s decision-making processes are affected by the duty to consult and accommodate. However, B.C.'s retention of final decision-making power reveals a settler-colonial power relationship.

Technology of Power: Assumption of Legitimate Settler State Sovereignty

In Chapter Two I discussed the ways an assumption of legitimate settler state sovereignty underlies settlers' everyday actions (compare Rifkin 2013). B.C.'s consultation and accommodation policy is an example of how this assumption also underlies governance in Canada, specifically in ways that extend state control and rule over access to territory. Earlier, I discussed two ways of critiquing the assumption of legitimate settler state sovereignty. First, settler state sovereignty can be criticized on the basis of unfulfilled treaty obligations (see earlier discussion and Asch 2014). Second, settler state sovereignty can be criticized in its assumption that the settler state has legitimate jurisdiction over Indigenous peoples and their lands (see earlier discussion and Borrows 1999, 2015). In this section, I look at the text of the *Procedures* and identify phrases that suggest the assumed legitimacy of the settler state. I argue that this assumption is a technology of power that functions to reinforce hierarchical relationships that dispossess Indigenous peoples of their lands and resources.[63]

[63] Here I am drawing again on Coulthard's (2014) definition of a settler-colonial relationship.

Assumption of Legitimate Settler State Sovereignty in B.C.'s Consultation and Accommodation Policy

The *Procedures* clearly show an assumption that the Province of B.C. has jurisdiction over the lands and resources it claims. This is evident throughout where provincial decision-makers are referred to, because the *Procedures* state that provincial decision-makers have the "authority to make decisions about provincial land or resources" (Province of B.C. 2010, p. 3). Here we see both a claim to possession of land (that the land in question is provincial land), and a claim to jurisdiction over decisions about that land. In the *Procedures* there is no further discussion of where that authority comes from.[64] Based on the lack of discussion of the source of provincial decision-makers' authority, the *Procedures* leave the reader with a sense that that authority is taken as given. The legitimate sovereignty of the settler state, and its representatives' authority to make decisions, is assumed.

In their explanation of their policy context, the *Procedures* refer to 2005 agreements between the Province and First Nations that sought to create new relationships between them. Following this, they state "the Province and First Nations are achieving new agreements that…provide frameworks for reconciling aboriginal rights (including title) and treaty rights with those of the Crown" (Province of B.C. 2010, p. 4). This conception of reconciliation is taken from court decisions. The *R. v. Van der Peet* (1996) decision states "the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the

[64] Here, I am referring to the underlying claim to settler state authority, which the *Procedures* take as given. Statutes are the more immediate sources of provincial decision-makers' authority, and the *Procedures* also do not mention them as a source of that authority. Since statutes also derive their authority from the assumed legitimacy of the settler state, their omission from the Procedures is not as significant for the purposes of this analysis.

Crown" (at para 31). This is quoted again in *Delgamuukw* (1997, at para 186). Asch (2014) critiques this framing to reconciliation. He argues that "the political rights of Indigenous peoples already existed at the time that Crown sovereignty was asserted and, therefore, it is the question of how the Crown gained sovereignty that requires reconciliation with the pre-existence of Indigenous societies and not the other way around" (Asch 2014, p. 11). The inclusion of the former phrasing of reconciliation in the *Procedures* is further evidence of their unquestioning acceptance of the legitimacy of settler state sovereignty.[65]

Assumption of Legitimate Settler State Sovereignty: Power, Differentiation, and Settler Colonialism

Because of its foundational assumption of legitimacy, the settler state has several types of power. I have already discussed how its power to make decisions about land and resource use, the adequacy of consultation and accommodation, and how to "balance interests" may contribute to settler-colonial relationships. The settler state also has definitional power. While some evidence of the exercise of definitional power in the *Procedures* is relatively obvious (e.g. defining what constitutes provincial land), some instances of definitional power are more subtly built into policy and legal processes (e.g. defining what constitutes a decision about lands and resources). Land and resource decisions are mentioned throughout the *Procedures* as they are the context in which the

[65] There are other ways of thinking about the possibility of shifting relationships between settlers and Indigenous peoples. Robin Wall Kimmerer (2013) writes about learning from the common plantain plant, also known by the name "White Man's Footstep" (p. 213). She considers what it might mean for settler people to "follow the teachings of White Man's Footstep, to strive to become naturalized to place", which would mean, among other things, "to live as if this is the land that feeds you, as if these are streams from which you drink, that build your body and fill your spirit" (Kimmerer 2013, p. 214).

duty to consult and accommodate is triggered (see Province of B.C. 2010, pp. 3, 5, 9, and 19).

There is also a process of differentiation between sovereignties that occurs with the unquestioned assumption of settler state sovereignty. The *Procedures* describe the legal requirements for proving Aboriginal title in Canadian courts (Province of B.C. 2010, p. 5). Earlier, I discussed Borrows' (2015) argument that Indigenous peoples are held to a much higher standard in seeking to prove Aboriginal title in the courts than the settler governments are in relation to their asserted authority over people, lands, and resources. The assumption of legitimate settler state sovereignty has implications beyond conceptions of Aboriginal title.[66] I would argue that the acceptance of legitimate settler state sovereignty *differentiates* and *hierarchizes* settler sovereignty in relation to any other conception of sovereignty, nationhood, or jurisdiction that may contradict it, including Indigenous ones. This process of differentiation is interrelated with the system of domination of settler-colonialism, in that it shows a commitment to maintaining hierarchical relationships wherein the settler state retains its dominance.[67]

As has been demonstrated, consultation and accommodation policy unquestionably assumes and accepts the notion that "provincial lands and resources" are under the jurisdiction of the province as a starting point for engagement between the province and First Nations. This perpetuates a settler-colonial relationship, as defined by Coulthard

[66] Here, I am differentiating between Aboriginal title in an Aboriginal rights framework based in the *Constitution Act, 1982* and developed in Canadian case law, and conceptions of Indigenous sovereignty, nationhood, peoplehood, or jurisdiction that may mean different things to different Indigenous peoples and are likely not equivalent or reducible to the framework of Aboriginal rights in Canadian law.

[67] Interestingly, the FNLC (2013) report argues that the 2005 *New Relationship Vision Statement* was an exception to the status quo of the province's "narrow, reactive and legalistic" policy focus (p. 94). Instead, the *New Relationship Vision Statement* "articulates in broader terms a vision of reconciliation, core principles, and general steps to be taken" (FNLC 2013, p. 94). The FNLC (2013) report argues that the way the 2005 new relationship vision is referred to in the Procedures is at odds with the content of the vision statement (see FNLC 2013, p. 97).

(2014), in that it facilitates the "*dispossession* of Indigenous peoples of their lands and self-determining authority" (emphasis in original, p. 7).

Conclusion

In this thesis I have critically analyzed three technologies of power that operate in B.C.'s consultation and accommodation policy:

- the administrative law principle of procedural fairness;
- recognition politics; and
- the assumption of legitimate settler state sovereignty.

I have discussed how each of these three technologies of power constitutes a process of differentiation that interacts with the system of domination of settler colonialism. The policy's focus on process and different roles and responsibilities assigned each party within that process reveals colonial power dynamics. Recognition politics operate in the policy because Indigenous difference is recognized and some space is made for Indigenous actors to exercise authority; however, the settler state retains final decision-making authority, showing a colonial hierarchy of power. The assumption of legitimate settler state sovereignty underlies the policy and is a source of authority through which the settler state has various types of power under the policy, including definitional power and final decision-making power.

My intention with this analysis has been to analyze some ways in which settler government policies – and particularly British Columbian ones – that are geared toward some understanding of "reconciliation" with Indigenous peoples contain within themselves the potential to perpetuate settler-colonial relationships. As discussed more in depth earlier, the notion of reconciliation put forward by Canadian courts itself demonstrates an assumed settler-colonial relationship, in that it characterizes the intent of constitutionalized Aboriginal rights to be the reconciliation of the "pre-existence of

aboriginal societies with the sovereignty of the Crown" (*Delgamuukw* 1997, at para 186, quoted in Asch 2014, p. 11), "and not the other way around" (Asch 2014, p. 11). The courts' conception of reconciliation demonstrates an assumption of the foundational legitimacy of the settler state. This thesis discussed critiques about the settler state's foundational legitimacy and argued that the settler state's foundational legitimacy and claim to legal authority over Indigenous peoples needs to be questioned. The technologies of power discussed in this thesis demonstrate some of the ways that settler-colonial relationships between the settler state and Indigenous peoples are "taken as given".

For example, the assumed legitimate sovereignty of the settler state underlies B.C.'s consultation and accommodation policy, Supreme Court of Canada decisions, and settlers' everyday actions (see Borrows 2015, Rifkin 2013). Canada and B.C.'s Crown sovereignty is not mentioned in the policy document analyzed in this thesis. Instead, it is assumed. McConney (1996) calls this type of assumption "unquestioned truths… that have supported the status quo for so long that they have almost disappeared from sight" (p. 121). The assumption of settler state sovereignty works at the very foundation of B.C.'s consultation and accommodation policy: that "truth" gives B.C. (and Canada) the authority to make laws, policies, and decisions. It also functions in the policy to give B.C. the seeming authority to be the "'we' that gives the gift" of recognition (see Day 2001), recognizing Indigenous peoples and setting out how Indigenous peoples' input will be considered.

Further research about peoples' experiences during consultation processes and accommodation phases would be a valuable contribution to this field of research. My

project is not a study of how a particular consultation process played out or of peoples' experiences during a consultation process (B.C. government employees', Indigenous peoples', or proponent company employees' experiences, for example). In particular, analyzing technologies of power that operate and are operationalized during the real-world implementation of consultation and accommodation could build on the analysis done in this thesis. I analyzed a policy document that is designed to pertain to multiple natural resource sectors (e.g. forestry, mining, oil and gas). However, case studies of particular local experiences with different types of land and resource decisions could provide different insights about how power operates through the policy.

Settler state policy is a privileged place for power to operate. Through my analysis of B.C.'s consultation and accommodation policy, I have critiqued some of the ways that relations of power operate in it to further settler-colonial relationships between B.C. and Indigenous peoples. Consultation and accommodation policy deals explicitly with land and Indigenous peoples' self-determining authority, as it dictates one aspect of how decisions are made about land and resources. The technologies of power identified in this thesis operate in different ways in different government contexts as well. By identifying these technologies and exploring their relationships to settler colonialism in the policy, I have sought to do one small piece of the work of settlers examining our institutions and governance systems, and identifying how they are built upon and perpetuate settler colonialism.

Earlier, I wrote about disruption as a possible outcome of Foucault-inspired analysis, where people "no longer know what to do" (Foucault 1991b, p. 84). Many of the possibilities of what disruption in these settler policy discourses might bring are

unknown. However, examples of discursive disruption can be seen in grassroots political actions like the Paddle for ŁEL,TOS and the Salish Sea, which drew attention to the history of ŁEL,TOS (James Island) as land that the Tsawout First Nation claims was sold in violation of one of the Douglas Treaties (Watts 2018). In 2018, the Tsawout First Nation "filed a civil lawsuit seeking the return of James Island" that outlines Tsawout historical usage of the land as well as their being "wrongfully forced off by the government in 1870", and subsequent uses of the land at different times as "a private hunting reserve for political elites", a place to manufacture explosives, and private property (Watts 2018). The Paddle for ŁEL,TOS and the Salish Sea was a community paddle around the island on September 2, 2018 "in support of the Tsawout's claim to the island" that was a "fundraiser to assist with the research and legal work required for the claim" (Paddle for ŁEL,TOS and the Salish Sea 2018). The Tsawout claim and the paddle call attention to colonial histories related to ŁEL,TOS and could be seen as an example of discursive disruption, disrupting some discourses about the land's use, ownership, and jurisdiction.

In the context of settler government policy, discursive disruption could come about through analysts, policymakers, and people interacting with policies asking questions like: What types of assumptions or investments in power relations underlie these policies? What types of assumptions or investments in power relations underlie my analysis or understanding of these policies? Thinking about subjectivity and relationships to land could be one way of thinking about these questions. In an article encouraging attention to narratives in contexts of land and resource conflicts, Lawson (2011) writes that narratives about land and resource use "may diverge because of differences in the

parties' everyday experiences of shaping the land and of being shaped by it in return" (p. 385). Policymakers, analysts, and people interacting with policies could think about experiences of land while also considering the wider contexts (e.g. histories, politics) relating to policies.

Perhaps through identifying settler-colonial technologies of power, settlers can be more willing or able push back against that power in ways targeted away from dominative power relationships between settler states and Indigenous peoples. If a politician or bureaucrat working for a settler state was to read this thesis, I hope they would bring thinking about technologies of power that have the potential to further settler-colonial hierarchies to laws, policies, or programs they work on. Future research could examine law and policy about issues other than lands and resources, possibly in places where governance relationships between settler states and Indigenous peoples are different than they are in B.C. and Canada.

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