

# **Making space for reconciliation in Canada's planning system**

by

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## **PREFACE**

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except where specifically indicated in the text. No part of this dissertation has been submitted for any other qualification. This dissertation exceeds the prescribed limit of 80,000 words, excluding appendices and bibliography.

## **ACKNOWLEDGEMENTS**

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## ABSTRACT

Early in 2012, the Minister of Natural Resources Joe Oliver released an open letter to Canadians where he identified 'an urgent matter of Canada's national interest': 'radical groups' were 'threaten[ing] to hijack [Canada's] regulatory system' for major projects and argued they should 'be accomplished in a quicker and more streamlined fashion'. This came on the eve of the first day of oral hearings for the public review into the controversial Enbridge Northern Gateway pipeline and tanker project that would allow for oil sands from Alberta to access outside markets other than the United States. A few months later, Canada's environmental decision-making process was dramatically reformed, resulting in a significant outcry across the country over the likely effects on environmental oversight and Aboriginal rights.

In Haida Gwaii, a series of islands off of the north coast of British Columbia (BC) around which the proposed tanker traffic would navigate, a process of reconciliation is in its early stages. The forestry sector is now subject to a collaborative provincial and Haida (First) Nation planning and decision process and a Haida-owned company is the biggest tenure holder and forestry sector employer. However, the Government of Canada has refused to participate in this reconciliation process in any meaningful way. It has, instead, encountered the Haida Nation through the court-like environmental review process for the proposed Enbridge project, the very same process that has been used to justify the dramatic environmental planning reforms.

This research constructs a framework for tracing the spatial and institutional dynamics of the reconciliation process in planning. A significant amount of the Crown's approach to reconciliation relies upon the consultation that takes place within and alongside planning and regulatory decision making for natural resource developments. While the process does not, in itself, lead to any meaningful engagement over reconciliation, a central research question is: What *opportunities* might exist for reconciliation to take place in planning? And, how do these opportunities change? Contributing to the Indigenous planning literature, this dissertation examines some of the discursive and institutional factors that led to (a) the collaborative planning taking place on Haida Gwaii today and (b) the 2012 federal planning reforms. For each case, the opportunities available in planning for modifying the dominant view of

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reconciliation are considered.

The dissertation begins with an overview of the very initial discussions on reconciliation between the Haida Nation and the Province of BC. It is argued that this move was facilitated by the Haida Nation shifting their concerns to various venues that were more or less receptive to their interests: the courts, a road blockade, collaborative planning, and bargaining. On the other hand, Canada has attempted to regain control by actively modifying the venues available to the Haida Nation in ways that excluded them or moved them to a venue that was less receptive to their concerns. It is reasoned that while planning spaces operate in ways that *tend* to be colonial, certain conditions and mechanisms are available in these systems that can be used to open up (perceived) opportunities for changing the way reconciliation is implemented across this system. These spaces reveal information about Indigenous-state power relations that are usually not observable until a conflict arises, at which point analysts may observe how actors respond to these perceived opportunities.

Evidence is collected from numerous sources. Interviews with key informants, observation, and policy document review composed the bulk of the data collection for both cases. Four days of oral hearings in Haida Gwaii were observed in 2012, offering a window into the encounter between the Haida and Canada just as a streamlined environmental review process was being developed and implemented. In contrasting the two cases, this research finds that planning is used both to control development and as an opportunity to engage with the Crown over the long-standing dispute about overlapping title to and, thus, jurisdiction over Haida Gwaii. The process by which one use prevails over another is the central research problem; indeed, there remains an important disconnect between Indigenous political actors and the Crown (and, in some examples, industry) on how environmental planning institutions *ought* to be used. This tension is present within a planning venue and across the planning system, opening up potential opportunities, such as those used by the Haida Nation to regain control over Haida Gwaii, or closing down these opportunities. For these reasons, planning is one of the most useful arenas for influencing and for understanding the politics of reconciliation in Canada.

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## CHAPTER 1. INTRODUCTION

Haida Gwaii is an island, lodged in the northeast corner of the Pacific Ocean. It's an isolated archipelago of forest, muskeg and ocean, shaped like a bear's canine tooth shrouded in swirling clouds. The closest landfalls are about eighty kilometers away on the mainland west coast of Canada, and the bottom of the Alaska panhandle where the Kiis Haada [the Alaskan Haida] live [Illustration 1].

The land was formed by ancient upheavals, volcanoes, sediments, ice flows and runoff. The surrounding ocean climate is warmer than the neighboring mainland, so during the ice ages some parts of the islands remained free of glaciers.

Most of the modern Hecate Strait and parts of our outer coastal regions were once above sea level, covered by tundra, streams and lakes, and inhabited by our ancestors. Over just the past few thousand years, the sea level has fluctuated by almost two hundred metres, while the fish, forest life and our people adapted to the changing times.

The weather is shaped by the dynamics of the largest ocean on earth: there are high winds and rain, large tides, mild winter temperatures and cool, cloudy summers. Warm ocean currents mix with cold water upwellings rich in nutrients. The sea is abundant in plankton, sea-weeds, fish, shellfish and mammals. Through the lives of everyone — people, seabirds and salmon, bear, and many others — the food webs of the ocean and land are woven tightly together.

Because of our isolation, unique forms of life have evolved — birds, mammals, fish, plants and insects — in plenty. The forests are renowned for growing trees of high quality, for large seabird nesting colonies, unique salmon populations, raptors, the world's largest black bears, and an abundance of diverse ocean life. This is the physical and biological world in which Haida culture has grown for thousands of years, ever since Raven coaxed the first people from a cockle shell<sup>[1]</sup> (Council of the Haida Nation, 2005, p. 6).

These are the introductory paragraphs describing 'our place' in the Haida Land Use Vision (2005), which sets the foundations for the co-developed land use plan and the multi-level collaborative decision regime that applies to much of Haida Gwaii today. 'Without this plan,' states then President of the Council of the Haida Nation in the foreward, 'this generation will have witnessed the last of the ancient forests and... we will have seen the end of our culture' (CHN, 2005, p. 4). The ancient forests are home to ancient cedar stands, vital to the culture, identity, livelihood, and genealogy of the Haida who have inhabited Haida Gwaii for over 10,000 years (Lee, 2012, p. 3).

Cedar is a vital part of the life and culture on Haida Gwaii. The rot-resistant wood has been used for shelter... [like] huge long houses... [It] can be steamed and bent to create storage boxes and bark can be peeled off in long strips from standing trees for weaving into cedar robes, mats and hats. Straight poles can be cut and carved with clan figure to celebrate stories from the past and present (Ramsay and Jones, 2010, p. 15).

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<sup>1</sup> This is a reference to one of the Haida creation stories depicted in the Bill Reid sculpture, *Raven and the First Men* (also see Cross, 2011).



Illustration 1: Haida Gwaii location map

By 2007, seventeen percent of the total land area of Haida Gwaii had been logged (Gowgaia Institute, 2007). Many of the last remaining ancient forests were part of provincial Crown land available to permit for further industrial logging, threatening monumental cedar stands, and the medicinal plants, salmon runs, clam beds, and everything else that is vitally linked to these forests, including the Haida. In the 1980s, a series of initiatives, including the now famous 1985 blockade, *Athlii Gwaii* – Lyell Island, raised awareness over these issues that were very much based on a history of colonialism:

[T]he Colony [of British Columbia] simply gave away its resources on irresistible terms, grating what turned out to be perpetual rights of harvest, often sweetening the pot with outright title to huge tracts of land. The awkward matter of aboriginal ownership of the land being given away was swept under the carpets of the federal governments in Ottawa (where it remains to this day<sup>2</sup>) and the pattern was set for the logging industry in British Columbia.

<sup>2</sup> Indeed, the Province of British Columbia denied the existence of Aboriginal title as forestry road blockades and activism emerged in across the province in the 1980s. Only when the New Democratic Party formed government in 1991 did BC take responsibility for title (Egan, 2012).

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The legacy of this hundred-year habit... [has led to cutting of] some 120,000 hectares of mature forest land... every year, while only 50,000 are replanted. This was all once prime timber growing land, now lying derelict, stripped of its protection from the erosive forces of wind, sun and water (Pojar and Broadhead, 1984, page 125).

This process of dispossession has been ongoing since the colonial state arrived but appears in a new form today. Geographer, Cole Harris (2002), describes this process in British Columbia (BC; the Canadian province within which Haida Gwaii is said to be part of):

[T]he initial ability to dispossess rested primarily on physical power and the supporting infrastructure of the state; the momentum to dispossess derived from the interest of capital in profit and of settlers in forging new livelihoods; the legitimation of and moral justification for dispossession lay in a cultural discourse that located civilization and savagery and identified the land uses associated with each; and the management of dispossession rested with a set of disciplinary technologies of which maps, numbers, law, and the geography of resettlement itself were the most important (Harris, 2002, p. 165).

Environmental planning is one such 'disciplinary technology' (Harris, 2002, p. 165) that has supported the process of dispossession of Indigenous<sup>3</sup> peoples from their identity and livelihoods and continues to do so. In a 2008 statement of claim, the Beaver Lake Cree Nation argue that the Crown has failed to uphold their rights protected in Treaty No. 6 signed in 1876 that 'promised reserves and some other benefits including the right to hunt and fish throughout the tract surrendered "saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes..."' (Beaver Lake Cree, 2008, s.8). They argue that the Crown in the right of the Governments of Alberta and Canada has made over 19,000 authorizations to approve oil and gas and other industrial or military projects since the Treaty was signed, without consultation with the Nation. This accumulation of decisions has led to loss of wildlife habitat, access to key hunting and fishing areas and cultural and spiritual locations in their territory.

Yet environmental planning has also been used to reassert identity and livelihood,

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3 The term Indigenous is used when discussing matters relating to theory and international matters, as this term can be generalized to other English-speaking settler states beyond the borders of Canada where the terms First Nation and Aboriginal are not applied (e.g. New Zealand-Aorotorea, Australia, and the United States). The term First Nation is used by many self-identified First Nations in BC and is used throughout the dissertation, often used interchangeably with 'Indigenous government'. The term Aboriginal is adopted by the Governments of Canada and BC, referring to First Nation, Métis, and Inuit Peoples as enshrined in 35(2) of the Constitution Act (1982), so is used when discussing Canadian policy and law. The term Indian is used in this way as well as it is used in older law. The term native is used when citing authors that use this term.

reconnecting peoples with their lands and waters to regain control over the institutions and laws that govern them. In the last decade in Canada, planning has offered important opportunities to do just this. Co-management is an increasingly common model, where fisheries, forestry, and protected areas are sometimes governed by federal and/or provincial governments and Indigenous peoples (e.g. Armitage et al., 2007). Government-led processes also offer these opportunities. In a recent example of an environmental planning decision for a bitumen (heavy oil) mining project<sup>4</sup>, a government-appointed panel upheld the arguments presented by the Athabasca Chippewyan Cree Nation. They found that industrial development – when considered with other development – has had lasting effects on culture, rights, and traditional land use, ordering no other provincial or federal authorizations to be issued until a strategic level planning process considering these effects is undertaken (Jackpine Joint Review Panel, 2013, para. 1305).<sup>5</sup>

Some of the ideas underpinning this planning decision and the adoption of co-management are presented in international law. Notably, the UN General Assembly's Declaration on the Rights of Indigenous Peoples (2007), which states that Indigenous peoples 'have the right to self-determination' and 'maintain and strengthen their distinct political, legal, economic, social and cultural institutions'. Commitment to Free and Prior Informed Consent (FPIC) is highlighted as an important aspect of the document (e.g. Gibson and O'Fairchaellaigh, 2011):

States shall consult and cooperate in good faith with [I]ndigenous peoples... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Article 32).

This principle is very much part of the debate in reconciliation today, with many Indigenous parties calling for its full adoption and use in Canada (e.g. Assembly of First Nations et al., 2011). However, the Government of Canada has been clear that, while it has endorsed the UN Declaration, it 'has placed on record its concerns with free, prior and informed consent when interpreted as a veto', stating that 'the Declaration is a non-legally binding document' (e.g. INAC, 2011, p. 9).

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4 This decision was issued in 2013 by the federal-provincial Joint Review Panel, six-years after Shell submitted their environmental impact assessment.

5 The degree to which this decision will be implemented by the responsible federal and provincial authorities is not clear at the time of writing.

## ***A planning lens***

Planning offers an intriguing lens through which to examine the historical and present practice of dispossession, and the way in which Indigenous rights might create opportunities to address and reverse this process. Through planning, we can ask: 'What is the proper relationship between the Aboriginal peoples of North America and the nation-states that encompass them' (Nadasdy, 2003, p. 1)? This question was raised in some of the earliest land mapping exercises in Canada and British Columbia (BC) and remains a central consideration in modern planning events today (Barry, 2012; Borrows, 1997; Harris, 2002). Governments have taken a dramatically different tack in their engagement with this 'relationship' throughout Canada's history (e.g. Harris, 2002; Tennant, 1990). The rationale for misallocating lands to settlers over Haidas in the early twentieth century, for example, rests on the idea that 'Indians make their living by fishing' and, so, 'they did not require more [land], as they were not farming' (CHN, 2001, p. 11). The position of many Indigenous peoples, however, has remained steadfast over this time period (Irlbacher-Fox, 2009), characterized by repeated assertions that the land and resources are theirs. In testimony given to a Royal Commission visiting Haida Gwaii in 1913, Chief Alfred Adams was just as firm as Haida Nation leaders today: 'I must say that we are entitled to the whole island' (CHN, 2001, p. 11). This begs another question: why have the ideas underpinning Canada's policies and institutions changed so dramatically?

Detailed political and geographical histories begin to address this question, providing useful narratives for tracing the complex web of social and political factors that influenced this change (e.g. Harris, 2002; Tennant, 1990). In Canada, these histories generally converge on one institution: the treaty process. This process has been identified as the central vehicle for determining what this 'proper relationship' might look like. It is adopted and used by some Indigenous leaders and their communities, but it has been deeply criticized by many others who are weary of the requirement to extinguish their 'Aboriginal rights' in exchange for clear agreement over only a small fraction of their lands (Egan, 2012). An Aboriginal right is a broad legal concept framing Indigenous peoples' collective ownership and jurisdiction over the vast majority of the land and water that comprises the nation-state of Canada. These rights have a particular definition in Canadian law, which is outlined below. Critics are sceptical of the approach taken by contemporary federal and provincial governments through

the treaty process, suggesting that Aboriginal people bear a disproportionate burden and must 'reconcile themselves to what the Crown has to offer' or find other ways of seeking control (Egan, 2012). What are these other ways? In his influential paper on the 'reconciliation process' in BC, Egan (2012) hints at this:

The difficulty is that, apart from the treaty process, there are few other options open to First Nations in British Columbia. ...Perhaps *more useful* have been court decisions (e.g., *Haida Nation v. British Columbia* 2004) which require the Crown to consult with First Nations when planning land and resource activities in areas where Aboriginal title may exist. Some First Nations have been able to use these consultation requirements to negotiate agreements with the province or with private firms that allow them some role in making decisions about the development of lands and resources in their ancestral territories (Egan, 2012, on opportunities for reconciliation in British Columbia, p. 415, emphasis added).

The avenue for reconciling Indigenous and Crown interests that is 'perhaps more useful' is the central focus of this dissertation. Specifically, what is the contribution of planning in facilitating change in the relationship between the Crown and Indigenous peoples in Canada? In the years that followed this pivotal Supreme Court of Canada case, *Haida v. BC* (2004), and subsequent court decisions, land and resource planning activities in British Columbia and the rest of Canada became subject to 'Aboriginal consultation and accommodation' policies (INAC, 2011). These policies are meant to address the Crown's commitment to reconciliation (Knox, 2010). The concept of reconciliation is a contested one that cannot be easily defined. Put simply, it is a process by which the Crown and/or Canadians come to a new relationship with the descendants to the original inhabitants of Canada. This new relationship may encompass everything from new institutions, through a shift in the cultural ethos of Canadians, or compensation for the historical and ongoing wrongs experienced by Indigenous peoples. The various interpretations of reconciliation are explored further in Chapter Two.

### ***The Crown's laws on reconciliation***

To understand the consultation and accommodation policies of Canada, we must first examine Canada's definition of Aboriginal rights. These rights are: (1) the 'practices, traditions, customs integral to the distinctive culture... prior to contact'<sup>6</sup> and (2) their 'exclusive use and occupation of land' (INAC, 2011, p. 62). Crown policy has interpreted their duty towards

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<sup>6</sup> This time is believed to be 1871 when BC joined the Confederation of Canada.

Aboriginal peoples as a spectrum of consultation and accommodation activities, from simply notifying a First Nation of an activity, when there is 'no serious impact', to providing opportunities to submit information to a decision maker when there is a 'serious adverse impact' (INAC, 2011, p. 44). The 'strength of claim' to territory is also used to evaluate these activities. When an impact is more serious and claim is strong, accommodation may take place in the form of mitigation to avoid or reduce an impact, financial compensation, or rejection of a proposal. These policies have been used to rationalise decisions to reject development that is considered to have a significant impact upon Indigenous rights (e.g. Morin et al., 2010). Illustration 2 summarises the policy and is adapted from the federal government guidance document on consultation and accommodation.

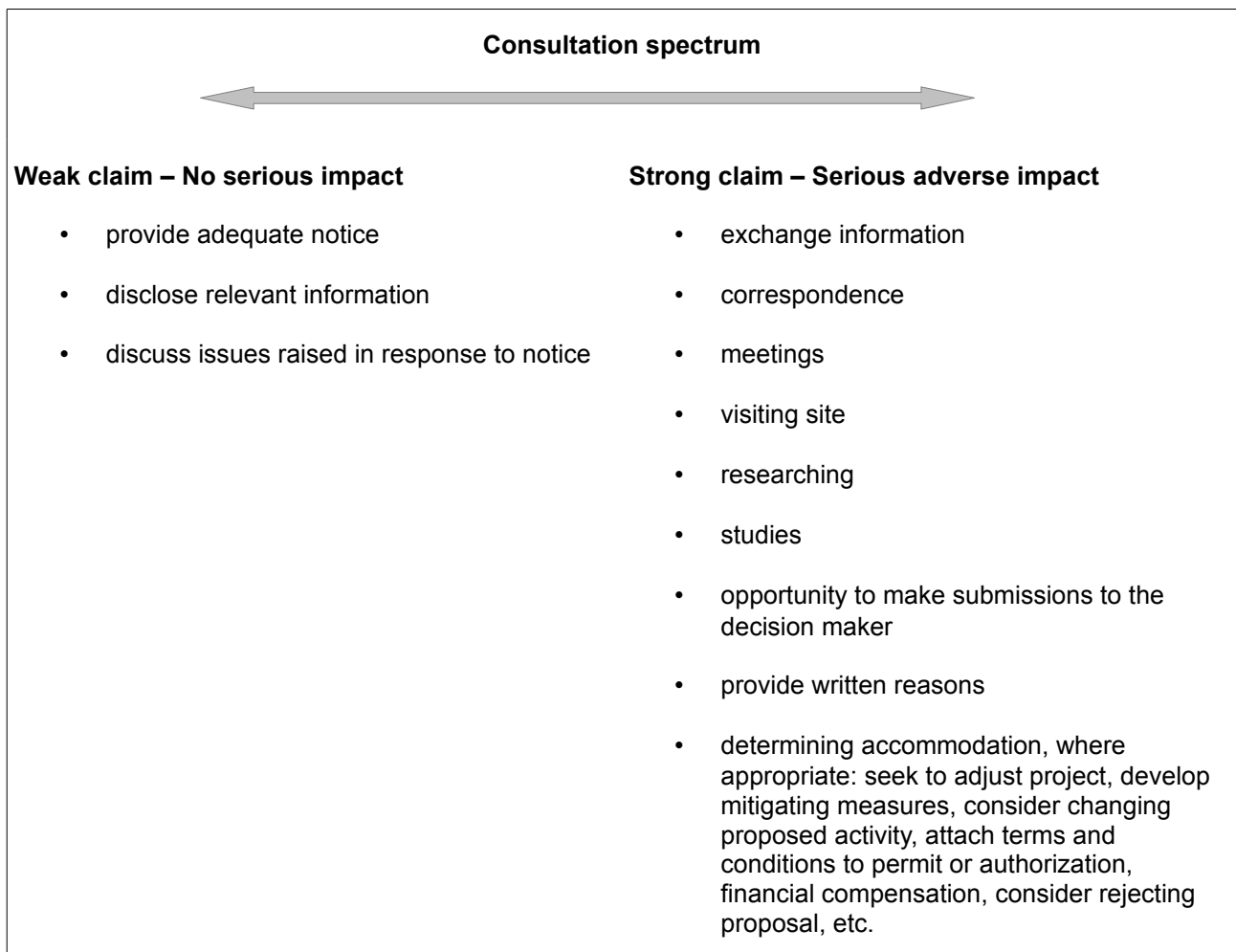


Illustration 2: The Government of Canada's consultation and accommodation process

Adapted from INAC, 2011, p. 44



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These rights are enshrined in the highest order of Canadian law, Canada's *Constitution Act* (1982), where they are not clearly defined. Section 35 states that 'existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed', while Section 25 of the Charter of Rights states:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Unlike most of the rest of Canada, treaties and land claims do not exist for much of British Columbia. The Royal Proclamation states 'that Indian people hold rights to unceded land in their possession throughout British dominions in North America' (Harris, 2002, p.14-15). This document underlies much of the case law that has shaped the reconciliation policies adopted in Canada today. Indeed, the courts have played an important role in characterizing the nature of these rights and the Crown's legal duty in upholding them. In 2004, a Supreme Court of Canada decision<sup>7</sup> affirmed and extended the Crown's legal duties to areas where rights were not proven through prior legal treaties or other arrangements. Even with this dearth of case law and government policy, these legal duties and the rights themselves are hotly debated in legal and political circles (e.g. Borrows, 2010). Authors have identified significant 'gaps' in legal and institutional definitions, especially in the Province of BC where most land is not subject to any treaties or land claims (Egan and Place, 2012).

In principle, BC and Canada have adopted consultation and accommodation policies in an effort to fulfil the Crown's legal duties and to meet its broader reconciliation policy objectives (INAC, 2011, p. 8; Province of BC, 2011, p. 4). In practice, however, consultation and accommodation policies are only used when a decision has the potential to infringe upon Aboriginal rights, even though the government duty is derived from a constitutional context, not a statutory one (McDade and Giltrow, 2007, p. 2). Specifically, consultation and accommodation take place when decisions that may affect these rights are triggered by legal

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<sup>7</sup> Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511.

statute (McDade and Giltrow, 2007). When an infringement is likely, the decision points are usually tied to some form of planning process, highlighting the importance of planning in Canada's reconciliation policies. The character of these consultation and accommodation opportunities is shaped by Canada's federal structure. These statutory decision points, and the planning processes they are tied to, are overlapping and multi-level. Today, a complex web of opportunities exist for discussing the merits of development in relation to Aboriginal rights. This practice, albeit subject to very significant criticisms (e.g. First Nations Energy and Mining Council, 2009), have institutionalized Crown-Indigenous relations in the planning process. In some cases, this policy has effectively displaced development considered to have too great an impact on Aboriginal rights (e.g. Morin et al., 2010).<sup>8</sup> In other cases, it has allowed development to occur despite significant infringements of Aboriginal rights (e.g. Jackpine JRP, 2013).

### ***Dissertation outline***

A number of researchers have examined the way Indigenous rights create opportunities to resist dominant views of the state with transformative effects (e.g. Barry and Porter, 2011; Hibbard and Lane, 2004; Hibbard et al., 2008; Lane and Cowell, 2001; Lane and Hibbard, 2005; Lane and Williams, 2008; Porter, 2010; Yiftachel and Fenster, 1997). This theme is considered in a 'modest literature on [I]ndigenous planning' (Hibbard et al., 2008, p. 136), which characterizes planning as both 'a major instrument of state control in settler societies' and 'a major force of reform and emancipation' (Yiftachel, 1997, p. 256; also see Barry and Porter, 2011; Hibbard et al., 2008; Lane and Cowell, 2001). These two very different expressions of the relationship between Indigenous peoples and the nation-state makes planning 'an indispensable conceptual and operational lens' through which to examine this dynamic relationship (Barry and Porter, 2011; Lane and Hibbard, 2005, p. 172).

The next two theoretical chapters also draw upon a set of analytical tools to describe and explain the way state-Indigenous relations are transformed and reformed through planning. Transformative possibilities are defined as those changes to planning institutions that

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<sup>8</sup> Though decisions have been made on this basis prior to the institutionalisation of these rights. Even prior to their enshrinement in s.35(1) of the Constitution Act in 1983, the Mackenzie Valley Pipeline Inquiry rejected a proposed gas pipeline on the grounds that '[t]ime is needed to settle native land claims, set up new institutions, and establish a truly diversified economy in the North' (Berger, 1977, p. 200).

reorient the relationship between the Crown and Indigenous peoples in a way that allows Indigenous peoples to 'regain a greater measure of control over their ancestral lands and resources' (Egan, 2012, p. 416). Dimensions of power and scalar politics are drawn upon to locate where these possibilities might exist in planning systems. Indeed, it is those 'forces and processes operating at other scales... [that] shape opportunities for, and constraints on, local action' (Howitt, 1993, p. 33). The reconciliation literature, also examined in Chapter Two, orient the trajectory of transformative possibilities towards one that attends to distinct Indigenous and western planning traditions. The literature on 'planning reform', which often positions related developments as a barrier to transformative possibilities, is considered in Chapter Three. Briefly, reform is characterized as 'speeding up' and 'streamlining' planning processes to avoid 'unnecessary delays' (Owens 2004; Wolsink 2003; Wolsink, 2006). A case is presented for drawing upon concepts within the policy dynamics and institutional change literature in order to better focus on the institutional conditions necessary in the planning system for certain actions to take place and to shape reconciliation.

Haida Gwaii offers a set of discrete cases to examine these theories. The case study approach is composed of two elements: (1) a series of cases that offer contextual insights on the character and durability of Indigenous planning transformations and reform that have occurred throughout the history of Haida Gwaii and (2) two divergent, in-depth cases that occur on Haida Gwaii. The in-depth cases are compared in order to offer insights on the causal mechanisms of change and the character of the broader governance regime, including the political strategies used by actors to have their interests heard. There are several methodological advantages to selecting cases that occur in the same place. A greater understanding of place can be built up, which is arguably an essential aspect of conducting research in an Indigenous community. The in-depth cases selected are: (1) the events leading up to the development of a collaborative land use planning regime centred on the *Kunst'aa Guu Kunst'ayaah* – The Beginning – Reconciliation Protocol agreement struck between the Province of BC and the Council of the Haida Nation; and, (2) a federal level environmental assessment for the controversial proposed Enbridge oil pipeline and tanker project, Northern Gateway. Each of these in-depth case studies involve Haida Gwaii exclusively or in part and both take advantage of Crown policies of reconciliation for the way in which the relationship between the Council of the Haida Nation and the Crown in the Government of Canada and/or

BC is shaped. Importantly, the first case study offers an example of democratic steering, where the Haida Nation have worked to open up a significant space in the planning regime to regain some control over Haida Gwaii, and the second case study presents an example of development control under planning reform, where government seeks to pursue their own energy policy agenda before Haida and other interests.

The research questions guiding this dissertation are as follows:

- *Drawing from a case study of Haida Gwaii, what opportunities exist for reconciliation to take place within the planning system?*
- *To what extent are wider shifts in the state and scales of decision-making supporting or thwarting effective reconciliation in planning?*
- *What is the character and durability of these changes?*

These questions are developed over the course of the next two chapters. Chapters Two and Three draw upon the aforementioned theories of power, scalar politics, planning, reconciliation, and institutional change underpinning this research in order to develop a set of propositions to guide the rest of this dissertation. Chapter Four presents the methodology, including a justification for the research design and methods as well as a discussion of the challenges and limitations encountered while undertaking this research. The research questions are explored in Chapters Five and Six where the empirical case studies are presented. Chapter Five begins with the several cases that provide a historical context of planning institutions in Haida Gwaii, followed by a focus on the events leading up to the collaborative land use regime. Chapter Six focuses on the Enbridge environmental assessment controversy and spends some time discussing the related planning reforms. The theoretical propositions are revisited in Chapter Seven in an analysis of the case study. Chapter Eight concludes with a direct response to the original research questions posed above. This work makes important research contributions to policy dynamics, reconciliation, and Indigenous planning literatures, finding that planning creates potentially influential encounters with the Crown. These encounters can create a rare empirical moments for observing the power dynamics that exist between the Crown and Indigenous Nations when perceived opportunities open up for Indigenous perspectives to shape the planning system, and when they close down.

## CHAPTER 1. INTRODUCTION

John Borrows (2010) distinguishes between Canada's legal *system* – the present set of practices that may be inclusive of many planning traditions - and Canada's legal *traditions* - the 'deeply rooted, historically conditioned attitudes' about the organization and operation of a legal system (quoting Merryman, 1985). 'When recognized, provided with resources, and given jurisdictional space, each legal tradition is applicable' (p. 8). The rules and practices that constitute Canada's planning system today are also based on tradition. A planning system builds up over time, mingles with other planning traditions to become the system it is today. The rules and practices that constitute Indigenous peoples' environmental management and planning traditions (e.g. Turner and Berkes, 2006) have been given recognition, resources, and jurisdictional space to co-construct ad hoc planning systems all across the country (e.g. Armitage et al., 2011; Jones et al., 2010; Pinkerton, 2007; Nadasdy, 2003). The recognition, resources, and jurisdictional space are not always on offer, however. The dominant planning system does not often attend to alternative interpretations of the prevailing planning tradition, despite reconciliation policies used in planning today (e.g. McCreary and Milligan, 2013). The very root of the problem examined in this dissertation, then, is why one planning system prevails over another. Through this problem lens we can seek out those systems that attend to multiple planning traditions in a way that might offer a path towards a more meaningful form of reconciliation.

## CHAPTER 2. LOCATING DECISION SPACES

### *Introduction*

One commonly identified 'fruitful' and under studied area of planning and policy research concerns implementation (Cowell and Flynn, 2006, p. 5). Within this area of research, the tools or mechanisms of policy and planning are a potential focus. As outlined in the first chapter, this research examines the tools and mechanisms of reconciliation used in two in-depth cases of environmental planning in Haida Gwaii: (a) a co-managed land use decision process and (b) a conventional environmental impact assessment (EIA) process that has fairly recently adopted consultation and accommodation processes. Cowell and Flynn (2006, p. 7) argue that research on such tools and mechanisms can be more usefully oriented to examine broader questions of governance. The authors suggest that they might be examined in light of how they are: implicated in wider scalar and sectoral recomposition of the state; offer opportunity structures for deliberating and contesting policy objectives; hold together new alliances across space; and, provide vehicles for exerting leverage over the political process.

The authors offer a sample question to guide this research in the direction of state rescaling, governance, and implementation: '[T]o what extent are wider shifts in the modern state and scales of decision making supporting or thwarting effective environmental policy and planning?' (Cowell and Flynn, 2006, p. 5-6). Following the author's line of reasoning, this question can be reframed to suit the analytical focus of this research on reconciliation in planning: To what extent are wider shifts in the modern state and scales of decision making supporting or thwarting effective processes of reconciliation in planning? For this research, the focus on reconciliation of the relationship between Indigenous peoples and Canadians – a process that is implemented by state in a very specific way in planning and decision processes – is very much the concept linking planning tools and mechanisms to wider dynamics. The research focus on reconciliation in a single locality, Haida Gwaii, narrows the analytical frame further to examine how planning practices in a single locality relate to 'broader events and forces' (Cox, 1998, p. 3). The focus on how practices operating in one place might relate to dynamics beyond the 'local' directs us to the problem of scale; a concept woven throughout this chapter.

There are 'a growing number of scholars who have remarked on the heightened attention of historical wrongdoing that characterizes our present moment' (e.g. Blackburn, 2007, p. 621; Jessee, 2012; Sundar, 2004). Reconciliation is one idea that attends to these wrongdoings, which are expressed in Canada as 'compelling claims' of 'stolen lands, unrecognised rights, and forced assimilation' that are very regularly brought to governments and courts (Blackburn, 2007, p. 621). These compelling claims, as well as historical events and processes, have led provincial and federal governments in Canada to explicitly adopt and implement the policy idea of reconciliation (i.e. Province of BC, 2010; INAC, 2011). However, it is widely held that the state's implementation of this idea does not achieve and may even undermine its original intent and meaning (e.g. Bhandar, 2004; Blackburn, 2007; Egan, 2012; Kotaska, 2013). These ideas are discussed at length in the next chapter. What is essential to know in this chapter is that the policy idea is largely implemented through the practice of consultation and accommodation that takes place in environmental planning and decision processes (INAC, 2011, p. 8; Province of BC, 2011, p. 4).

This emphasis on consultation is new. Prior to the pivotal *Haida v. BC* (2004) Supreme Court of Canada decision, the treaty negotiation process was viewed by many as the most fruitful venue to pursue reconciliation objectives (Egan, 2012). In BC, the treaty process 'was established in the 1990s to resolve the long-standing dispute between Aboriginal Peoples and the Crown over rights to land, and to set out the terms for Aboriginal self-governance' (Egan, 2012, p. 399). Today, provincial and federal government agencies, regulatory authorities, and decision-makers, all with competing and overlapping claims to jurisdiction themselves, frequently undertake consultation activities whenever a large project is proposed, and delegate many aspects of this process to the industry project proponent. As such, the practices that together construct the process of reconciliation have dramatically changed over the last decade: from the practice of treaty negotiations to the practice of consultation and accommodation, and from a long Aboriginal-Crown negotiation process to fast-paced, industry-driven authorization process for development. In other words, reconciliation is taking place in ever-changing and messy planning and regulatory 'decision spaces' (Cowell, 2003). While the practices themselves may be examined in relation to the definitions of reconciliation put forth in the scholarship (Blackburn, 2007), this research is interested in understanding reconciliation by examining how different decision spaces shape reconciliation

practices and how, in turn, these spaces are shaped themselves by broader events and forces.

Howitt (1993, p.33) argues that the focus of the analysis, or the specific social process in question, can only be understood by looking at wider shifts in state restructuring: it is essential to consider the 'forces and processes operating at other scales to shape opportunities for, and constraints on, local action in diverse localities'. In this way, scale does not constrain the analysis to any single spatial 'level' but operates as one of a number of social constructs used by political actors to exert power in ways that dominate and/or subvert this wider dialectic. This chapter will consider how the concepts of governance, scale, and power help us to understand the broader forces that 'shape opportunities for, and constraints on' the way in which reconciliation is implemented through planning tools and mechanisms used in the locality of Haida Gwaii.

An elaboration on notions of power and scale is provided in this chapter to consider how the spatial dynamics of power and politics shape planning and policy change. Cox's ideas on spaces of engagement (1998) are used to defend scale as a useful analytical concept for locating institutional spaces or venues that may grant some actors more or less influence over the policy process. Revealing the location of these venues within a diversely networked scalar hierarchy can be useful for characterizing the opportunities that become available to Indigenous political actors to challenge and unsettle the dominant conception of reconciliation usually imposed by the state. The purpose of understanding opportunities that might be available in Canada's political system to change the dominant policy idea of reconciliation is aligned with the broader political biases of the researcher – a topic that is elaborated upon in Chapter Four with the research methodology. It is pertinent, then, that this research also reveal how these spaces are rescaled and moved in the process of state restructuring to trace changes in the way actors use these spaces and, in turn, how this change may affect the process of reconciliation. To do this analytical work, a hybrid spatial model of scales and networks is adopted. The chapter finds that scale and networks are useful for locating these spaces of opportunity and for tracing their movement (or lack of movement) across 'levels' to reveal how local engagement with planning affects the broader reconciliation process. This model, however, does not provide insights on other important characteristics of this process, such as how political actors and institutions engage with these spaces in ways



that influence their function as one of opportunity or of domination. The next chapter will examine these dynamics to develop a coherent analytical framework for both locating and tracing important decision spaces (Chapter Two) and characterizing mechanisms of change (Chapter Three).

In order to address this broad research problem, Chapters Two and Three explore several theories and bodies of research. In this process, the following theoretical propositions are developed to guide the structure of this dissertation:

1. Planning is a contested space that has particular functions and qualities that limit its utility to serve as a venue for reconciliation. The mode of planning is influenced by the objects it governs and may not align with goals of reconciliation. (Notably, it serves to guide decisions using evidence and opinion and also serves an expressly political function. It is characterized by its unevenness and value conflicts.)
2. Consultation in planning is likely the most common decision space used by the Crown to implement Canada's reconciliation policy. The space is created by the Crown and, so, begins on uneven ground. Several mechanisms of reconciliation are available in Canada's planning system that may be used to shape its implementation, with important implications for resource development and planning policies. The posited functionality of these mechanisms is described below.
3. Spatial and temporal scale is an essential tool for influencing the function of these mechanisms. In fact, a rights-based approach to reconciliation relies upon a strong tie to place that directly challenges the approach to implementing reconciliation policy today.

One of the first tasks developing this theoretical framework is that of locating spaces of engagement that may (or may not) offer opportunities for change. This chapter locates these spaces within existing theories of power. It is organized into three parts: (1) an introduction to the dimensions of power drawing heavily upon Steven Lukes' (2005) three-dimensional view and (2) an introduction to spatial theories of power focusing especially on scalar politics in defense of scale as an essential analytical frame for studying power when considering

Indigenous engagement in state-led planning systems, drawing upon multi-level governance. The final section (3) begins to use these ideas to characterize the location of a likely decision space from which opportunities become available within the dominant political system. It is theorized that environmental planning spaces, notably the implementation of Canada's reconciliation policies within these planning spaces, offer important multi-scalar arenas for conflict between values and interests that can, in turn, create these opportunities. This section unpacks the idea of reconciliation and examines existing research on conflict in the planning and Indigenous planning literature.

### ***Dimensions of power***

Power is thought to be '[t]he ability or capacity to either act oneself or direct the action of others', it may be exercised by individuals, groups, and institutions and is 'thought to be the precondition for action but also as its outcome' (Castree et al., 2013). Power 'can be overt or covert, may involve force or coercion... [or] through consent or will... [and] may be expressed through actions... [or] discourse' (Castree et al., 2013). Before examining the spatial aspects of power and its impact on planning, some of the fundamental arguments about the dimensions of power are examined. Steven Lukes' most recent edition (2005) of his seminal book, *Power: A Radical View*, offers a broad examination and critique of existing theories of power. Lukes' ideas (and those he adopts and critiques) provide the foundations for articulating the conditions under which power is expressed, while also emphasizing the importance of studying opportunities for escape from 'subordinate positions in hierarchical systems' of power (p. 50). These foundational arguments prove to be useful in identifying the location of 'decision spaces' (Cowell, 2003) that are crucial for reproducing and potentially upsetting prevailing policies of reconciliation.

Lukes' (2005) one-, two-, and three-dimensional views of power help us to identify the circumstances through which we may observe power. The one-dimensional view relies upon existing work on pluralism that sees power as 'distributed pluralistically' across a political system. Empirical analyses rely upon blatantly observable behaviour over decisions that involve a disagreement or conflict over interests, expressed as policy preferences (p. 19). The two-dimensional view is an expanded definition of power that goes beyond 'concrete

decisions' to what is called 'mobilization of bias' (Bachrach and Baratz, 1962, p. 192; Lukes, 2005, p. 20). In other words, power also comes in the form of coercion, influence, authority, force, and manipulation and is shaped by existing rules that 'operate systematically and consistently to the benefit of certain persons and groups at the expense of others' (p. 21). Unlike the first-dimension that focuses on blatantly observable decision-making, the second-dimension examines the role of 'nondecision-making' to expand the boundary of what is political. Locating political spaces in this two-dimensional view becomes problematic because, as Bachrand and Baratz argue, nondecision-making is not behavioural and, hence, not observable. Because of this, nondecision-making is 'beyond the reach of a political analyst' (p. 24).

This conclusion opens up a crucial gap in the analytical framework that seeks to locate decision spaces to reveal something about policy change. It appears as though spaces of nondecision-making are equally as crucial as decision spaces when seeking to observe power. However, the two-dimensional view does not offer any tools for observing this crucial space. Lukes' original contribution to political thought is this very set of tools that he introduces in his three-dimensional view. This view is based upon the one- and two-dimensional views described above and critiques the two-dimensional the view that characterizes nondecision-making as not bahavioural and not observable. Specifically, the three-dimensional view of power involves:

[A] critique of the behavioural focus of the first two views... and allows for consideration of the many ways in which potential issues are kept out of politics... [and] can occur in the absence of actual, observable conflict... This potential [for conflict], however may never in fact be actualized. What one may have here is latent conflict which consists in a contradiction between the interests of those exercising power and the real interests of those they exclude (p. 29).

Lukes disagrees with the idea of 'individuals realizing their wills despite the resistance of others'. This is a Weberian notion that tends to overemphasize the power of the individual over institutions, an idea of power adopted in the two-dimensional view (p. 26). He argues that the mobilization of bias can only result from 'the form of organization', drawing from a Marxian idea of power:

Men (sic.) make their own history but they do not make it just as they please; they do

not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past (p. 26).

He also disagrees that power can only be associated with observable conflict. This idea neglects to consider the role of 'agreement based upon reason' when manipulation and authority may lead to agreement while values remain in conflict. Indeed, to understand any decision, the analyst may observe the reasoning behind the agreement. The two-dimensional view also ignores the possibility of conducting empirical work on nondecision-making – or how conflict is prevented from arising in the first place (p. 27). When grievances 'are denied entry into the political process', and not uncovered, consensus is presumed in the two-dimensional view of power (p. 28). This ignores a fundamentally important dimension of power. '[The] most insidious exercise of power to prevent people... from having grievances by shaping their perceptions, cognitions and preferences... they can see or imagine no alternative' (p. 28). Colonialism may operate in this way, where actions, policies, and practices that continue to occupy the culture, behaviour, and attitudes of a distinct people (Alfred, 2009).

How can nondecision-making and latent conflict be measured and understood? Lukes points to work by Gramsci (1971) who examines the difference between thought and action, where one is 'affirmed in words and the other displayed in action' (Lukes, 2005, p. 49).

We are concerned to find out what the exercise of power prevents people from doing, and sometimes even thinking. Hence we should examine how people react to opportunities - or, more precisely, perceived opportunities - when these occur, to escape from subordinate positions in hierarchical systems (p. 50, emphasis added).

Gramsci's theory of hegemony is tied to his conception of the state, which is understood to be composed of both political society (arenas controlled by political and legal institutions) and civil society (family, unions, etc.). Those in control maintain control by giving in to certain demands of civil society. Civil society is convinced that the ideas of the dominant groups will also benefit subordinate groups. In this way, domination occurs through common sense – cultural hegemony exists in the 'realm of meaning rather than in the formal political arena' (Creswell, 1996, p. 18).

To consider how these ideas of power provide guidance for examining reconciliation in

Canada, two critical questions arise:

1. Where do actors react to opportunities for challenging the dominant view of reconciliation in Canada? These opportunities must be located before we can observe reactions.
2. How do we interpret how people react in these opportunities? For instance, what do we include in our examination if not the formal decision outcome?

The first question is examined further in light of literature on spatial elements of power. Specifically, scalar politics and Cox's (1998) notion of 'spaces of engagement' offer strong foundations from which to build. Scalar politics begins by first challenging the spatial assumptions underlying much of the thinking on power in geography, sociology, and political science (including those presented in Lukes, 2005). These ideas help us begin to locate where policy ideas on reconciliation in Canada are enforced and challenged. The next chapter, Chapter Three, considers the second set of questions – how meaning is expressed, interpreted and acted upon when these opportunities present themselves. A framework is developed to view the interpretive and less formal expressions of power that act as mechanisms for enforcing or challenging prevailing policies on reconciliation, including their spatial characteristics.

### ***Locating the spaces of power***

From fixed, bounded, and nested hierarchies to relational scale

Until recently, political geographers have primarily shaped their understanding of power through the concept of 'territory' aligned with the spatial boundaries of the nation-state (Painter, 2008, p. 66) or empire (Castree et al., 2013) - it is a view that goes unchallenged by Lukes (2005). This view is elaborated upon in the nested hierarchies or levels model of power and space (Marston et al., 2005) that rely upon traditional definitions of geographic scale, 'referring to the nested hierarchy of bounded spaces of differing size such as local, regional, national and global' (Delany and Leitner, 1997, p. 94). Many geographers adopt these ideas today and place the nation-state as the 'primary geographical container for society' (Agnew,

1994; Painter, 2008, p. 67). This conventional model tends to view scale as inherently fixed and real.

Increasing attention has since been paid to alternative spatial configurations of power, such as the more nuanced and constructed notions of scale and scalar politics, networks and boundaries, and topological 'reach'. More recent debates on scale in human geography reject these fixed notions for what 'has become an accepted truism within human geography that scales are socially and politically constructed, and thus contested' (Bulkeley, 2005, p. 883; Brenner, 2001; Moore, 2008). Marston et al. (2005) has gone further, arguing for a 'flat ontology' that discards scale entirely. John Allen introduces a third spatial configuration of power – a topological account of power – suggesting that 'reach' is what matters, rather than scales or networks (Allen, 2009).

This chapter remains skeptical of any spatial theory of power that does not take into consideration inherent place ties of people, knowledge, and institutions, especially Indigenous peoples, ways of knowing, and organizations that derive identity, meaning, and power from ancestral lands and waters. With this in mind, these three dominant spatial models of power – scalar, networked, and topological – are engaged with in this section, in the context of reconciliation in Canada.

### Scalar politics

Contemporary human geography generally rejects any bounded or fixed notions of scale. Today, human geographers tend to view scale as socially and politically constructed, fluid and changing (Bulkeley, 2005, p. 883; Brenner, 2001; Moore, 2008). Literature on scalar politics has been influential in shaping this view, which provides a set of conceptual tools useful for locating power.

Neil Smith has undertaken much of the foundational work in scalar politics. He sees scale as 'both a product and a progenitor of social processes', where powerful groups seek to disempower subaltern groups by relegating them to 'lower' scales (MacKinnon, 2011, p. 24). This unidirectional flow of power from the top-down is the dominant way of thinking about how power is distributed and has been the traditional focus in the nested hierarchy view of

scale. In this view, policies constructed at higher order scales (e.g. the state) are tweaked to 'suit' particularities of lower scales (e.g. a municipality). Cowell (2003) and Gibbs and Jonas (2001) point out that the spatial structure that composes the state tends to be the more powerful 'determinant of what happens and where' than other scales (e.g. ecological scales; Cowell, 2003, p. 347). What is less conventional is an analytical focus on understanding how subaltern groups seek to command higher order scales. Neil Smith has also contributed to this understanding. 'Scale jumping' describes how certain social groups or organizations move to higher levels of activity, while 'scale bending' describes how social groups challenge or undermine existing arrangements that tie certain social activities to certain scales (in Brenner, 2001, p. 606-607).

These scalar changes could result in opportunities to redistribute power, to 'escape from subordinate positions', so certain actors are more able to express their values and interests. or to regain control over higher order scales. However, scales are more likely to be stable over time. Smith's 'scalar fixes' describe stable geographical hierarchies established where activities organized at some scales tend to predominate over others. In this way, there is not a single nested scalar hierarchy or 'an absolute pyramid of neatly inter-locking scales', but spaces that resemble 'a mosaic of unevenly superimposed and densely interlayered scalar geometries' (Brenner, 2001, p. 606), which 'may crystallize into scalar fixes' (Smith, 1995). Geographers have pointed out that these dominant scalar configurations and the political action that changes them are shaped not only by industrial restructuring (and likely other activities), but also by the pre-existing political environment (Brenner, 2001; Murdoch and Marsden, 1995).

Brenner's (2001) 'scalar structuration' describes the historical production and transformation of scales. The interaction between (usually capitalist) institutions and the state may produce certain 'scalar fixes' through the establishment and reproduction of 'nested hierarchical structures of organization' (Harvey, 1982 in Brenner, 2001, p. 606). Swyngedouw's see this process as one that uses scale as a 'territorial infrastructure, or geographical technology, for the expansion and reproduction of capital' (cited in Smith, 2004, p. 197). He argues (2000, p. 70-71),

...the importance and role of certain geographical scales, reassert the importance of

others, and occasionally create entirely new significant scales, but – more importantly – these scale redefinitions alter and express changes in the geometry of social power by strengthening power and control of some while disempowering others.

Scalar transformations occur when existing and historical scalar structures are met with political interventions to create new scalar arrangements. These new ‘geometries of social power’, as Swyngedouw calls them, frame everyday social action. There is a certain path dependency that occurs when ‘established scalar fixes may constrain the subsequent evolution of scalar configurations’ (Brenner, 2001, p. 607). Scalar configurations for natural resource governance in Canada, for example, were established at confederation distributing powers between the Provinces and Canada. This distribution of power has placed constraints on the way Indigenous governance has unfolded; that is, provincial authority over natural resources has led to a large number of decisions that infringe upon Aboriginal rights.

These treatments of scale are helpful in providing conceptual tools to begin mapping where power is located in space, the conditions under which its spatial character shifts and changes, or becomes immobile. State ‘scaling and rescaling’, however, is focused on a particular ‘issue at stake and the governance system called upon to resolve it’ (Cowell, 2003, p. 344). How do these spaces enable or constrain opportunities to redefine the idea of reconciliation in ways that attend to Indigenous perspectives? Kevin Cox’s (1998) ‘spaces of engagement’ provides a set of tools to help us understand the importance of *place* in shaping space and scale to achieve particular objectives, like an Indigenous-definition of reconciliation. For Indigenous governance, place is a foundational concept that underpins values, interests, and actions (Jones et al., 2010) and, thus, Cox's idea appears to be highly appropriate.

Actors and institutions within Cox’s (1998) ‘spaces of engagement’ interact with other actors and institutions operating at different scales. The function of these interactions, Cox argues, is to secure their ‘spaces of dependence’. In these spaces of dependence, the prosperity, power, or legitimacy of each actor or institution exists and continue to exist through the reproduction of certain social relations. Generally, the social relations that take place in spaces of dependence are often place-specific. These relations grant us our material well-being and sense of significance. Spaces of engagement, on the other hand, allow actors and institutions to encounter other higher ‘levels’. Though engagement can occur with lower ‘levels’ as well. Ultimately, spaces of engagement create the ordering processes we rely upon for our spaces of



dependence. Using these ideas, we can say that Indigenous communities operate within several place-specific spaces of dependence but operate frequently with spaces of engagement. For example, the day-to-day social relations that define the community – a space of dependence – are secured through a relatively frequent interaction with the state in spaces of engagement, to secure funding for community infrastructure and programming. This example describes most local communities and municipalities, but the place-tied identity of Indigenous peoples creates unique spatial encounters with the state.

For Aboriginal rights in Canada, the legal tools and mechanisms of reconciliation, like consultation with the Crown and the treaty negotiation process, are available expressly because of Indigenous peoples' tie to a distinct territory. Rights are recognized in Canada's legal terms because of a continuous history that ties a people to a place. In Cox's terms, a space of engagement (e.g. where consultation occurs) is only available because of a territorial tie (e.g. Aboriginal rights). In his model, Cox (1998) highlights the tensions between an actor group being fixed to a specific territory in their spaces of dependence and the same actor group engaging with a range of others in different places and scales in a space of engagement. The tensions are experienced when an actor group moves between fixed spaces of dependence and mobile spaces of engagement. In turn, an additional tension arises through the existence of multiple spaces of dependence (Cox, 1998, p. 7):

These tensions between fixity and mobility... are often internalized within the same agent... A different form of internalization results from the fact of multiple spaces of dependence. This allows collaboration for some purposes... What is at stake here are local interests. The ability to realize them is critically conditioned by the ability to exercise territorial power. The goal is to control the actions and interactions of others both within and between respective spaces of dependence; the means is control over a geographic area. The most obvious candidates for this purpose are the various agencies of the state and though territorial powers are not exclusive to the state, those of other agents, like the utilities or the political parties and labor unions, are underpinned by its own territorial power.

In Cox's model, all agents have power that is derived from territory in some way. However, these territorial ties appear to include those that are relatively loosely associated (e.g. a union representing workers living in a particular region). Even still, this model is useful for locating spaces in which politics occur and, notably, for conceptualizing opportunities for collaboration to accommodate for multiple spaces of dependence. Here, collaboration relies

upon the ability of an agent to exercise territorial power in a way that maintains or gains control over a geographic area and space of dependence.

These ideas begin to help us conceptualize how Indigenous engagement with planning is linked to wider shifts in the modern state and scales of decision-making (Cowell and Flynn, 2006) and how 'local' planning practices relate to 'broader events and forces' (Cox, 1998, p. 3). This relation is important for understanding the social process of reconciliation, as outlined at the start of this chapter, but Cox is also helpful in conceptualizing the way agents may gain influence over the state:

The problem then becomes one of influencing state agencies. This in turn requires the construction of a network of associations either incorporating state agencies directly or incorporating those who can exercise some indirect influence through (e.g.) their command of resources critical to them. It is this network which defines what I termed earlier a space of engagement (p. 3).

The model provides a useful relational framework where territorial interests may overlap with wider systems of governance in ways that have particular scaling effects, such as the production of uneven power or control across and over territory. These ideas help to characterize the ties that bind governance of natural resources with Aboriginal rights and the resulting scalar configurations. Indeed, these rights have influence over the ability of the Crown to hold command over critical resource sectors like oil and gas and related infrastructure.

Before focusing these ideas further, a brief examination of two arguments that reject scalar spatial arrangements are examined. These ideas have been influential in the literature on scalar politics, but are formally rejected in this chapter for reasons explained below. Cox's ideas are taken up again later in this chapter along with other theoretical and empirical work on scalar politics in defense of the utility of scales and relational conceptions of place and territory.

### The end of scale?

Relational or networked configurations have had increasing importance in studies of the political in a way that has, arguably, superseded scale as the most important spatial

configuration (Box 2.1). Marston et al. (2005) has gone so far as to call for an outright rejection of scale in favour of a flat and networked analysis, while Allen (2009) rejects both topographical accounts of scale and networks in favour of a topological account. Each of these arguments will be discussed in turn.

**Box 2.1 The rise of network typologies for studying the political**

Networks have been used to conceptualize the world in theories of lifeworlds (Simmel, 1950), structures of social relations (Granovetter, 1973), as well as politics. In discussions over the shift from government to governance, networks are the dominant spatial configuration (Hubbard et al., 2004). Networked typologies have also gained influence in theories of policy change. The work of Hecló (Hecló, 1974) has influenced our understanding of the policy process, replacing top-down models (e.g. Lasswell's 'policy stages model') with those that are more open to alternative spatial arrangements, including the role of the policy system in constraining behaviour (Parry, 2003, p. 3). In this vein, drivers of policy change are no longer situated solely within the closed sphere of the policy process or any single institution, but take place amongst networks of non-state actors. Several network theories of policy change are well established in the literature (e.g. Haas, 1992; Hajer, 1995; McCann et al., 2011; Peck and Theodore, 2010; Rhodes, 1997; Smith, 2000).

Other theories and methodologies also provide insight into the rise in importance of networks for understanding political dynamics, including: actor-network theory (Braun, 2001; Latour, 2005) that includes human and non-human actors (or actants) in networks on equal terms; the rise in importance the 'network society' to conceptualize a new 'information age' (Castells, 1996); and social networks analysis (Scott, 2000) that can aims to quantitatively measure constraining and enabling network factors influencing particular outcomes (Emirbayer, 1994).

Castree (2004, p. 134; also see Somerville, 2005) characterizes this empirical and theoretical spatial shift away from the state and scalar concepts as a 'paradigmatic shift' from topographic conceptions of place and power 'towards relational ones'. Marston et al. (2005) go further in their influential paper arguing that scale must be rejected as a concept entirely. They argue that hierarchical scale is 'politically regressive' in that it reproduces spatial inequities and 'de-limit[s] entry points into politics' in a way that is not helpful (p. 427; Moore, 2008). They argue that hierarchies should be denaturalized (Marston et al., 2005, p. 420):

Once we accept that participants in political disputes deploy arguments about scale discursively, alternately representing their position as global or local to enhance their standing, we must also accept that scale itself is a representational trope, a way of framing political-spatiality that in turn has material effects.

As Moore (2005, p. 206) explains, Marston et al. 'maintain that the dominant theory of scale is a vertical and hierarchical model' have important conceptual flaws in that it creates an unsupportable distinction between scale as size and scale as level and sets up an untenable

set of macro-micro, or local-global, binaries. What is most convincing about this argument is its critique of scale as an analytical tool - delineating an analysis using a particular scale. One of the most important aspects of the way scale is used by scientists of space is that 'most empirical work is lashed to a relatively small number of levels' (p. 422). These analytical boundaries tend to exclude empirical evidence and potential explanation and, by doing so, exclude the possibility of uncovering 'forces and processes operating at other scales' (Howitt, 1993, p. 33) and/or predetermining the analysis and its contents (Marston et al., 2005). As well, the top-down flow is often assumed and, from this view, 'social practice takes a lower rung on the hierarchy, while "broader forces", such as the juggernaut of globalization, are assigned a greater degree of social and territorial significance' (Marston et al., 2005, p. 427).

Moore (2005, p. 203) refines this critique by distinguishing between scale as a concept used for analysis and scale as a practice to be studied:

In adopting scale as a category of analysis geographers tend to reify it as a fundamental ontological entity, thereby treating a social category employed in the practice of sociospatial politics as a central theoretical tool.

While Marston et al.'s (2005) call for 'flat ontologies' in favour of 'horizontal' networks might be justification for deleting scale as a frame of analysis, scale must remain a subject of study (MacKinnon, 2011; Moore, 2005). Using this approach, more attention must be paid to how scale is used to shape the way reconciliation is practiced. In this way, scale may be observed as a tool used to manipulate agents operating within certain spaces of engagement; that is, agents tied to place-specific spaces of dependence may not be granted authority by agents within a spatially fixed configuration presumed to be tied to higher 'levels' (e.g. state level).

John Allen offers another spatial alternative to studying the political, one that is equally 'flat' - the topological spatial ordering of power (Allen and Cochrane, 2010). The authors explain:

The sense in which central government is geographically "higher up" is... an effect of the state's claim to spatial authority over a given territory. If we wish to avoid this reification, the solution is not to shift to a horizontal as opposed to a vertical axis of political practice, but to trace the different lines of authority, negotiation and engagement, and how they criss-cross one other in terms of their distinctive rhythms and spatial practice (Allen and Cochrane, 2010, p. 1077).

The spatial metric of power is 'reach' according to Allen (2009, p. 198). 'In topological terms,

the greater the distance that powers are dispersed or decentralized, the more spatially extensive is the reach of the state's authority' (Allen and Cochrane, 2010, p. 1073). This reach determines 'the ability of the state to permeate everyday life' or make itself present in regions and territories beyond the dominant territorial borders. Reach is 'inseparable from the social relations which comprise it' (Allen and Cochrane, 2010, p. 1073).

This is a useful set of ideas for conceptualizing power. They have some similarities to networked relations, but place greater emphasis on the state. It also sees power as traversing or cutting across regional and local lines of decision-making. Like Cox's (1998) agents that experience the tension of operating within fixed spaces of dependence and mobile spaces of engagement, an agent operating in Allen's topological view of power can be at once global and local. Unlike Cox's spatial theory of power, however, topological power does not necessarily have a territorial dimension. This is also the case for network spatial theories of power, though many are contingent upon knowledge, resources, and discourses tied to particular places – such as discourse coalitions (Hajer, 2003) or policy mobilities (McCann and Ward, 2010) – and have been used to examine the way places are connected through alliances or coalitions in the BC context (e.g. Crist, 2012; Howlett et al., 2009).

In the study of power and governance for Indigenous-state relations, Richard Howitt (1993) favours scalar configurations that are relational; specifically, a dialectical model of scale that is multi-directional and operates between and within scales. This relational concept of scale is, he argues, a commitment to Indigenous rights (p. 38):

[T]he social and political construction of scale is precisely [about] social action . . . [that seeks] to mobilize social networks, political institutions, economic resources and [importantly] territorial rights to the task of creating new geographies - new landscapes of power and recognition and opportunity (also quoted in Marston et al., 2005, p. 419, emphasis added).

In this chapter, these ideas are defended. Relational conceptualizations of scale challenge traditional ideas that privilege state territorial boundaries, yet they also allow for territory and place to shape and influence scalar configurations of power. Place and territory are crucial in constituting Indigenous rights and identity and, because of this, the analytical framework of this research adopts these ideas.

### A synthesis of the spatial dimensions of analysis

This chapter has begun to build an analytical framework based two of core geographical concepts: power and space. In this framework, scale is the subject of analysis where expressions of power are observed through real or perceived opportunities for escaping subordinate positions in constructed scalar hierarchies. Scalar ideas are used to manipulate and coerce these opportunities, in ways that have the potential to lead to scalar transformations. Decision spaces involving Aboriginal rights, notably planning spaces, can operate like relational spaces of engagement that provide opportunities for local interests to be heard. These local interests may be those of an Indigenous nation, a Crown government, the general public, or an industry proponent. Each of these decision spaces are linked to several, more specific, territorial spaces of dependence. The tie linking each group to territory is unique, with Indigenous ties to territory being extremely strong.

The theorizing so far has provided us with a framework that can help us to locate the decision spaces where there are opportunities for changing the way reconciliation is practiced. It has also provided us with an initial set of tools for conceptualizing spatial change. What is missing is an understanding of whether or not the characteristics of a decision space may accommodate for fulsome engagement with Aboriginal rights such that the practice of reconciliation might be changed. Can we extend this framework to help us understand why some scalar and spatial characteristics are more or less appropriate for engaging with the issue? Literature on multi-level governance examines scalar and spatial characteristics of a regime to understand the quality of its governance. The next section introduces this literature to extend the analytical framework.

### ***Linking spaces of power to Aboriginal rights***

Multi-level governance: The potential for reconciliation in a polycentric regime

Networks emerge as the dominant spatial configuration in discussions on the shift from government to governance. Hubbard et al. (2004) defines governance as one way of making sense of 'relationships between the sovereign state... the market... and civil society' (p. 175). Over the last few decades, analysts increasingly view government structures as 'just one

component of governance' involving a range of institutions producing policy outcomes; 'governance involves a shift from centralized and bureaucratic forms of decision-making to a plurality of co-existing networks and partnerships that interact as overlapping webs of relationships at diverse spatial scales, from the neighbourhood to the globe' (p. 175-176). According to Somerville (2005), this is an empirical as well as theoretical shift and has drawn attention away from the state as the exclusive holder and user of power. This move has 'forced geographers to develop new perspectives on political power' (Hubbard et al., 2004, p. 176; Somerville, 2005), increasing attention and focus on 'opportunities for new territorial networks' (Hubbard et al., 2004, p. 18) where policy is 'steered' through communication, negotiation, and partnerships between multiple actors operating in this network system (Jessop, 2002, p.228). From this view, 'the functions of the state are redistributed upwards, to international and transnational organisations and institutions, downwards, to cities and regions, and outwards, to non-state actors' (Bulkeley, 2005, p. 883).

A decentralised or polycentric governance regime is characterized by an increase in participation of non-state actors and nested (independent yet mutually interacting) spheres of influence (Andersson and Ostrom, 2008; Ostrom, 2010). '[N]o single management model or property regime is equitable, sustainable, and efficient; rather, a diversity of overlapping models and evolving norms and rules are important' (Ostrom, 2010, p. 1). Polycentricity is a useful concept to characterize the (constructed) scalar qualities of state-led planning systems considered in this research. It is posited that Indigenous engagement in a state-led planning system that exhibits more polycentric characteristics may allow more opportunities for challenging the way the dominant view of reconciliation is practiced in Canada, rather than conventional top-down, silo-oriented institutional arrangements. Indeed, research and theories on polycentricity suggests that issues that cross dominant scales, like Aboriginal rights across provincial and federal Crown jurisdictions, are granted more political opportunity spaces. Indeed, the centers of authority for these issues are distributed across many scales. These assertions are justified in the paragraphs below.

Literature on polycentric governance explicitly examines scalar 'relationships among multiple authorities with overlapping jurisdictions' to understand 'the degree and forms of nestedness of political actors within larger political systems' that, in turn, result in different outcomes

(Andersson and Ostrom, 2008, p. 73). This quality of scalar relations is observed through an analysis of the institutional setting, such as the dominant rules, policies, laws, and practices and those that challenge and contest them. While this chapter has already developed a framework for characterizing spatial configurations of a regime, this literature adds to our understanding. A critical idea is introduced in Skelcher (2005, p. 93): 'jurisdictional integrity'. This kind of integrity exists within polycentric regimes and is secured if a constructed boundary is 'not subject to intrusion by other agencies of government' at any scale. The goal is to exercise authority autonomously. In multi-level governance, scale matters to the agent operating within these constructed hierarchies. Yet, we know from the governance literature that dominant perspectives on the spaces of governance has shifted from one that is tiered with stable bodies operating within mutually exclusive boundaries towards one that is fluid and multi-level with overlapping jurisdictions. Jurisdictional integrity is a scalar construct, then, that constitutes scalar hierarchies in a regime and can be used as a tool of coercion and manipulation in decision spaces.

Crucially, theories of polycentricity help us to understand which spatial characteristics of a decision space may be more likely to accommodate for Aboriginal rights. According to Skelcher (2005), polycentric governance is composed of stable and nested hierarchies embedded within more fluid, multi-level, and overlapping jurisdictions. That is, organizations and institutions that were constructed on the assumption of stable and mutually exclusive boundaries must now accommodate for cross-scalar issues like sustainability and Aboriginal rights. Polycentricity is the combination of these forms of governance; it is collaboration amongst all of them: '[t]he resultant multiplicity of centers of authority creates new political opportunity spaces within which resources can be deployed and acquired' (Skelcher, 2005, p. 95).

From this view, bounded hierarchical systems give way to fluid and multi-level systems when a boundary or its 'jurisdictional integrity' is challenged. This occurs, according to Skelcher (2005, p. 96), in the following ways:

- Vertically, when new policies are introduced by higher-tier governments to add new tiers, restructure existing ones, or transfer authority or responsibility to them;
- Laterally, when a body extends its own boundaries and intrudes into a body that is



operating at the same tier; or

- Polycentrically, a system of governance already exists when there is a rich set of networks and collaborations where existing boundaries are challenged and existing patterns of power are recast.

Central to this research, the idea of jurisdictional integrity has been challenged polycentrically in a recent Supreme Court of Canada decision. The notion of 'interjurisdictional immunity' is a formal legal doctrine in Canada that allows for exclusive jurisdictions to accommodate for other jurisdictions. It is a legal idea that the Supreme Court of Canada has recently criticized in light of the jurisdictional complexity of Aboriginal rights (*Tsilhqot'in v BC*, 2014). 'Aboriginal rights are a limit on both federal and provincial jurisdiction' (s.141), states Justice McLachlin. Jurisdictional integrity is 'premised on the notion that regulatory environments can be divided into watertight jurisdictional compartments', an idea that 'is often at odds with modern reality' (s. 148). The judges state that 'effective regulation requires cooperation between interlocking federal and provincial schemes' (s. 148).<sup>9</sup> It appears as though this ruling may encourage governments (Indigenous, provincial, and federal) to recognize the polycentric nature of the regime within which they operate. Skelcher (2005) describes agents as operating in a more ad hoc way, to fit ever-changing circumstances, and where gaining legitimacy is difficult. Policies are delivered through flexible management under arm's length political supervision.

### Pluri-jurisdictional decision spaces

Aboriginal rights in Canada are a cross-scalar issue for state governments, affecting government laws and policies implemented across all regions, most government agencies, and affecting all levels of government. Decision spaces that include these issues and governments, then, can give rise to unique pluri-jurisdictional spaces of engagement (e.g. Jones et al., 2010). Research on adaptive co-management and resilience provide evidence of the opportunities available in these kinds of systems. Examples include efforts to link and share knowledge systems to manage uncertainty, allow for learning, and build long-term institutional arrangements across Indigenous and state governments (Armitage et al., 2011). Other

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<sup>9</sup> This ruling has important implications for the way Crown governments may treat Aboriginal rights. It also provides additional evidence to support this research. However, the ruling is not considered thoroughly in this dissertation because the it was issued near the end of the writing up phase.

research has shown that multi-level engagement in environmental planning can help to 'reduce biases' when there are value differences and knowledge tied to a particular 'level' and, thus, tied to particular agents, such as Indigenous peoples, the general public, and the Crown (Lebel, 2005, p. 40). Though, analysts must be weary of this research, some of which Nadasdy views as naïvely optimistic (2007, p. 208):

[T]he rhetoric of local empowerment that generally accompanies such processes... often actually serve to perpetuate colonial-style relations by concentrating power in administrative centers rather than at the hands of local / Aboriginal people.

His research on use of Indigenous knowledge in wildlife management in the Yukon details his concern that practitioners' ways of thinking and the planning system itself effectively marginalize and control Indigenous engagement. In an analysis of multi-level governance, then, it is important to look out for uneven distribution of power across space, as scalar politics does, but also to consider inherent value differences and how they conflict with particular interests in a decision space.

Scalar politics goes a long way in creating a framework that may accommodate for Nadasdy's critique. Cox (1998) suggests that local interests created from place-based spaces of dependency are what constitute the tension between actors in spaces of engagement. These and other theories of power and space help to conceptualize and locate decision spaces where Crown governments engage with Aboriginal rights. What is important to draw from Nadasdy's critique, though, is that the historical and ongoing 'colonial-style relations' in planning are difficult to discern without a theoretical and empirical set of tools that are sensitive to them. For example, one of the dominant ways the state relates with Indigenous agents in planning in Canada is to address a general lack of capacity in communities; by emphasizing an impoverished Indigenous society (Alcantara and Kent, 2010), the state may effectively overpower community efforts seeking to regain control over their territory in order to address these (usually related) economic and social problems. It is essential to interrogate these spaces from various vantage points, to examine Indigenous expressions of uneven power distribution, and forcefully *include* Indigenous values and approaches to planning and engagement (Howitt and Lunkapis, 2010). Analyses that are sensitive to colonial-style relations within planning spaces, then, will benefit from examining the third dimension of power involving 'nondecision-making'. That is, observations about inherent value conflicts

that underpin an agreement, despite the possibility of reaching agreement based upon reason (Lukes, 2005). Such a conflict is observable, according to Gramsci, by looking at how agents react to opportunities for escaping a subordinate position. The next section introduces the Indigenous planning literature concerned with Indigenous peoples' engagement in state-defined planning systems, which conceptualizes planning as both a colonial enterprise and as an opportunity for challenging dominant assumptions about resource planning (Hibbard et al., 2008; Nadasdy, 2007; Porter, 2010). Research on Indigenous-Crown relations expressed in planning is a subject that is directly engaged with in the Indigenous planning literature.

### ***Conflict and reconciliation***

This chapter has built an initial theoretical framework for the study of reconciliation in planning. To really understand this social activity, it is necessary to examine the 'forces and processes operating at other scales to shape opportunities for, and constraints on, local action in diverse localities' (Howitt, 1993, p. 33). From here, a guiding question is posed: To what extent are wider shifts in the modern state and scales of decision making supporting or thwarting effective processes of reconciliation in planning? A discussion of the dimensions of power and scalar politics is then presented to begin to conceptualize decision spaces where reconciliation is practiced and to locate them in space. The previous sections considered how decision spaces may be modified by broader forces and processes, while also defining the polycentric system within which Aboriginal rights may find a space to operate. Cox's spaces of engagement is drawn upon to begin characterizing the tension that arises in decision spaces between local interests, constituted through territorially-defined spaces of dependence. The following section builds upon this characterization through a focused examination of conflict in planning. It is posited that when Aboriginal rights are deployed, tensions may arise in planning, resulting in one of several outcomes: (a) it can reveal underlying differences between values and interests inherent to the reconciliation process; (b) it can unsettle the Crown governments' jurisdictional integrity over a particular policy sector; (c) and/or challenge the scalar boundaries that are used to manipulate and coerce planning spaces. Provincial and federal government bodies with competing and overlapping claims to jurisdiction in Canada are implementing the idea of reconciliation through the practice of consultation and accommodation in the state-led planning system (INAC, 2011, p. 8; Province

of BC, 2011, p. 4). State-led environmental planning, then, is a crucial and highly appropriate empirical space for examining reconciliation. It is a critical space of engagement between the state and Indigenous Nations, for uncovering state control, while also providing opportunities to have Indigenous values and perspectives gain influence over state interests.

This section takes a closer look at planning and planning conflict as it is conceived of in planning scholarship and a small body of literature on Indigenous planning. Planning is presented as an ongoing colonial enterprise that is used to erase ‘scales at which Indigenous governance is exercised’ (Cross, 2006 in Howitt et al., 2013, p. 319), a space where the state can impose control over particular issues of interest. It can also be viewed as a space where opportunities are made available to ‘unsettle and complicate the objects and methods of state-directed land and resource planning’ (Hibbard et al., 2008, p. 136), a space for democratic steering through various approaches to conflict. Indigenous planning is first presented, followed by a brief analysis of reconciliation, and ending with a synthesis on planning conflict.

## 1. Indigenous planning

Indigenous planning is a term coined by Ted Jojola (2008; 1998, 2000 in Hibbard et al., 2008) and can refer to several areas of work:

- The practice of planning work with/by/for Indigenous communities (Jojola, 2008);
- University programs that train students to work in the field of community planning with Indigenous communities (e.g. School of Community and Regional Planning at UBC);
- An empirical research focus on the events and processes that lead to and result from Indigenous engagement with state-led planning (Hibbard et al., 2008);
- A critical theoretical engagement with planning thought and practice, notably its complicity in the history of colonialism that persists to this day (Porter, 2010); and
- Indigenous peoples’ practices, interests, beliefs, values, and laws, such as stewardship law or a spatial system of governance (Turner and Berkes, 2006; Berkes, 2009).

In the recently published edited volume titled *Reclaiming Indigenous Planning*, the editors adopt Jojola’s (2008 in Walker et al., 2013, p. xviii) definition:

What distinguishes Indigenous planning from mainstream practices is its reformulation of planning approaches in a manner that incorporates “traditional” knowledge and cultural identity. Key to the process is the acknowledgement of an indigenous world-view.

According to Walker et al. (2013, p. xix), the goal of Indigenous planning is:

[T]he protection of community cultural, social, political, and economic rights and interests; securing self-determined goals related to those rights and interests; and developing and maintaining supportive and productive relations with non-Indigenous communities.

They suggest that Indigenous planning is an ‘emergent paradigm’, yet go on to state that there is a long tradition of social practices that shape human-environment relations (see also Turner and Berkes, 2006; Berkes, 2009). They argue that the purpose of Indigenous planning is to ‘reclaim planning’ as an Indigenous space (Walker et al., 2013, p. xix). Yet, how can a planning system largely based on western traditions and ideas be ‘reclaimed’ for and by Indigenous peoples? Planning is modernist in its roots and has depended upon the belief that ‘[i]mpartial reason could be used as the measure of just actions’ (Young, 1990; Healey, 1997, p. 9). It was conceived of as a ‘rational mastery of the irrational’ (Mannheim in Healey, 1997, p. 9), a belief that cannot be entirely divorced from today’s planning practice. Planning may be a site for change, but it has failed in attending to the genealogy of planning as a colonial practice that continues to function in a way that is implicated in the ‘ongoing colonial settlement of territory’ (Porter, 2010). Indeed, planning and its technologies of cartography and private property rights have helped to bring the ‘most basic colonial spaces’ into being (Harris, 2002, p.xxi; Matunga, 2013). It is used to justify colonial relations in decisions about property to this day (Matunga, 2013). Indeed, even today’s perhaps more ‘enlightened’ mainstream planning process that seeks to ‘accommodate’ for Indigenous interests has the ‘tendency to incorporate Indigenous interests into the dominant, culturally hegemonic legal framing of Western property rights’ (Matunga, 2013; Porter, 2013, p. 292).

Decolonization is also vulnerable to this critique; questions remain as to whether or not ‘planning practices have ever been decolonized’ (Sandercock, 2004b, p. 119). Decolonization may instead occur ‘through many small acts in an ongoing process of reconciliation’ (Kotaska, 2013, p. iii). A more appropriate question than how to reclaim (or decolonize) western planning is the question of how to reconcile western planning traditions and Indigenous

planning traditions. This remains a pertinent question for this research despite important critiques that reconciliation has been appropriated by the state to implement colonial objectives (Coulthard, 2007). This critique is elaborated upon in the section below.

One approach to reconciling western and Indigenous planning traditions is to create new spaces where Indigenous planning traditions are dominant. In the same volume (Walker et al., 2013), Matunga (2013, p. 4) argues that Indigenous peoples were never ‘passive bystanders’ in planning affecting their people and land; rather, the problem lies in the ‘colonial settler-state and its progeny to accommodate it’. Since European arrival, Indigenous peoples have attempted to resist western systems of governance and, today, it is observed that communities have some measure of ‘control’ over planning that occurs internal to the community. This internal planning adopts ‘both customary and contemporary Indigenous practice to implement its decisions’ (p. 21). It is ‘mainstream planning’ that is ‘ultimately controlled by the settler state’ (p. 21). For internal planning to engage with mainstream planning, then, Indigenous values and worldviews ‘must also be externalized to the settler state and its planning apparatus’:

The ability to use Western legal processes adeptly and skillfully, often against the state and “its” national, region, and district planning systems is critical to affirming Indigenous decisions and facilitating the pursuit of any desired outcome (p. 21-22).

What is often overlooked, however, is the need for state planning to ‘create the space within “its” planning for internalized Indigenous dialogue to occur’ (p. 22). Following Borrows (2010), Canada’s planning systems may already provide limited amounts of recognition, resources, and jurisdictional space for Indigenous planning traditions. The location and the conditions under which ‘internal’ and ‘mainstream’ planning might intersect and give rise to these spaces is not clear, however. Some of the analysis in the previous sections of this chapter, such as Cox's spaces of engagement, offer some guidance in locating this intersection. This is a crucial theoretical challenge that this research seeks to address, and the focus of the remainder of this chapter.

The incompatibility of these diverse planning traditions must be interrogated before we may begin to locate these intersections. The values, beliefs, purposes, and interests that give meaning and form to ‘mainstream planning’ traditions and Indigenous planning traditions

are, in many ways, incommensurable. This is where the idea of reconciliation comes in. How can such systems find common ground or coexist in the same planning system? An examination of this might seek to distill the fundamental principles and values supporting each of the diverse and divergent planning traditions. This would be an impossibly large task. While very particular traditions could be traced to describe shifts and changes over time, this would require intensive and focused, ethnographic and historical research. A more appropriate approach, in line with planning and governance research, is a description of the methods and mechanisms of reconciling diverse systems and traditions. A small literature on reconciliation is presented first, followed by a brief examination of thinking around planning conflict and consensus. Both sections are influenced by research on Indigenous planning. This section contributes to this small literature in finding that an examination of scalar configurations of a governance regime provides a fruitful lens for understanding the wider dialectic shaping opportunities and barriers in reconciliation in planning.

## 2. Reconciliation as a purpose of planning?

Indigenous engagement with planning must be considered to offer both transformative and oppressive possibilities (Barry and Porter, 2011). Literature on reconciliation examines what might constitute these possibilities. The literature includes questions of historical and contemporary dispossession and the policies and practises that aim to come to terms with and/or ameliorate its effects. Anishinaabe legal scholar, John Borrows, uses the concept of the 'middle ground' to describe the goal of reconciliation in Canada's legal system. This idea is used not to suggest what the goal of reconciliation ought to be; rather, it is used to offer a critique of the dominant view. This is only one of the many perspectives on reconciliation presented in this section, but offers a configuration of Crown-Indigenous relations that attends to many settings and avoids universalising values and priorities. Indeed, there is an endless amount of these configurations over time, space, and issue, so any theoretical 'middle ground' is likely to be unique for each of these relationships, their perspectives, conditions that surround them, among other things. While not necessarily the intention of the author, the middle ground also implies a tie to territory, of which is the underlying source of these disputes. The concept very clearly implicates 'ground' as inherent to the process of reconciliation. Indeed, ground is central to this shifting relationship. Property and land are not

simply material objects, but come into being through human relations while also constituting them (Blomley, 2002).

Reconciliation is marked by a commitment to closure on a violent history and a new beginning based on trust and healing; generally, it means to render differing world views 'no longer opposed' (Borneman, 2002, p. 282). The idea means that a people who have been denied a voice in history may define the 'truth' in history (Bhandar, 2004) 'while seeking to fashion "a solution that is both workable and just in our own time"' (Foster, 2001, in Egan, 2012, p. 6). This idea has been applied in post-conflict regions like South Africa and Rwanda (e.g. Jessee, 2012; Fay and James, 2010), as well as wealthy former British colonies like Canada, the United States, Aoratorea-New Zealand, and Australia to characterize the policy goal of creating new relationships between the state, the dominant 'settler society', and Indigenous peoples (Gooder and Jacobs, 2000; Ruru, 2012). For the Government of Canada, this idea has become 'the centrepiece of its jurisprudence dealing with Aboriginal rights' (Borrows, 2001, p. 32). It has identified a number of initiatives undertaken to contribute to the goals in question: the 'historic apology in 2008 to former students of the residential school system[,] the subsequent establishment of the Truth and Reconciliation Commission[,]... negotiating Aboriginal self-government and land claims agreements[,] and partnership approaches to economic development' and other issues (INAC, 2011, p. 9).

The notion of reconciliation has particular, albeit vague, meaning in Canadian administrative law. Section 35 of Canada's Constitution Act (1982) protects Aboriginal rights, yet its meaning remains vague. It states simply, 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. Case law, notably *R. v Van der Peet* (1996), clarifies the meaning: 'one of the fundamental purposes of s.35(1) is the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Thus, the Crown's constitutional responsibility to protect Aboriginal rights is to achieve reconciliation. Subsequent court decisions refine these ideas. *Haida v BC* (2004) identifies five activities that guide how reconciliation ought to proceed, including the use of consultation and accommodation to justify potential infringements on Aboriginal rights (Knox, 2010). In practice, consultation and accommodation are 'conveniently' tied to land and resource planning (McDade and Giltrow, 2007, p. 2). The practice of consultation and accommodation



in planning is hotly contested, a matter discussed at length later in this dissertation.

Like the policy and practice of reconciliation in Canada, scholars also contest the purpose and meaning of reconciliation. Blackburn (2007), however, finds that most scholars agree that the idea should include the recognition of difference. Reconciliation should be the bridge that holds Aboriginal rights firmly apart from broader non-Aboriginal objectives that may not themselves be the subject of constitutional protection (Borrows, 2001). How difference might be recognized is disputed. Some call for a 'recognition of a plurality of sovereignties' (Borrows, 2002; Bhandar, 2004) and others for a 'politics of difference' (Addis, 1993; Young, 1990).

Despite much scholarly emphasis on recognizing difference, there is 'no scholarly consensus on how reconciliation can be achieved' (Blackburn, 2007, p.635). Instead, Blackburn (2007, p.635) has usefully identified the following criteria to provide a framework for reconciliation:

1. Justice;
2. Accountability for wrongdoers;
3. The dismantling of hegemonic silences;
4. Greater public knowledge about the past; and,
5. New formulas for the coexistence of differences within a polity.

These criteria touch upon themes that are closely related. The first four themes – justice, accountability, silences, and public knowledge – intersect with ongoing work on developing new formulas for coexistence that are proposed and in use today. This dissertation is largely concerned with new institutional formulas, a focus that relies upon greater public knowledge about the past. There is an urgent need to reflect upon Canadian settler society's lack of participation in reconciliation and, relatedly, the lack of reporting undertaken by the media (Johnson, 2011; Stanton, 2010). Indeed, 'real reconciliation can only be achieved in the minds of Canadians' (Knox, 2011, p. 24).

These formulas for coexistence are discussed in planning literatures. According to Howitt and Lunkapis (2011, p. 129), coexistence is not characterized by 'top-down, state-imposed

development plans'. Nor do particular planning techniques 'produce better plans'. Instead, they argue:

[W]hat is needed in these situations is planning theory that guides - even insists on - engagement with the narratives of connection and belonging in ways that grapple with messy coexistence from the ground up, rather than imagining that coexistence is something that can be planned and governed by state regulation and the imposition of planning technologies from above, as if diverse Indigenous groups and local communities had no interest in their own places.

This focus on place and connection is critical and reminds us of Cox's place-based spaces of dependence and 'internal' planning to Indigenous communities (Matunga, 2013). But the space for these place-rooted activities to intersect with external planning is still not apparent. As suggested above, Borrows (2001, p. 33) offers a useful model. His work focuses on Canada's legal system. He argues that reconciliation should aim to address the 'rift between peoples that needs to be bridged':

On this bridge the parties can then meet in mutual respect and recognition to negotiate the resolution of their differences, while taking comfort that their rights will not be overridden without their consent. Reconciliation should not become a gangplank that forces Aboriginal peoples to step off into the deep waters of colonial objectives, and thus abandon their rights whenever that may be considered necessary to fulfill objectives that are of 'sufficient importance' to the non-Aboriginal community (Borrows, 2001, 33-34).

He calls for more interdependency in reconciliation, emphasizing the notions of 'social cohesion, political stability, and civic peace' (2001, p. 32). These ideas are still meant to promote multiplicities and difference, but also cultivate solidarity; reconciliation is a search for the 'middle ground' (2002; 2001, p.32). This 'middle ground' must be found through the guidance of Indigenous notions of interdependence. In this model, Canadian citizenship is 'under Aboriginal influence' (2002, p. 146). Emphasizing the centrality of land to the identity of Indigenous peoples, he offers the idea that Canada could 'recognize the land as a party to Confederation in its own right' (2002, p. 146, emphasis added). This would require Canadian law, politics, and identity to be influenced by Indigenous ideas at its very roots.

Borrows (2002) contrasts this interdependent model of reconciliation with the prevailing rights-based approach used by Crown governments. Borrows (2002) suggests that this rights-based model might pose a barrier to the goals of reconciliation, by creating an artificial

separation of 'we' versus 'them'. This model 'relies too heavily on a person's legal status' in a way that does 'not cultivate the reciprocal obligations between people that build the larger institutions of the community' (p. 140). This raises the critiques presented above, highlighting the fact that most Canadians don't get involved and most of these processes are not widely reported in the media. Of equal importance is that non-Indigenous Canadians are largely in control of these processes and have influence over the way Aboriginal rights are expressed.

While it is recognized that rights-based discourses have significant limitations, this research focuses on Aboriginal rights as a *tool* to facilitate change so that Canadian society may begin to cultivate reciprocal obligations in the process of reconciliation. In other words, Aboriginal rights can be used to challenge the limits of these rights. Thus far, an analytical framework has been developed to locate decision spaces so that the process of using Aboriginal rights to pursue interests, despite the hegemonic power imposed by the state, may be observed. The next section elaborates on how Aboriginal rights are expressed to give rise to opportunities for gaining resources and jurisdictional space to pursue Indigenous-led goals, and potentially create spaces for internal planning processes (Matunga, 2012). This kind of change-inducing expression of rights relies upon a particular kind of tension in the planning process. Cox defines tension in spaces of engagement as resulting from the meeting of divergent local interests. The planning literature, examined in the next section, adds to this understanding focusing on the tension between values and interests in planning. These ideas are discussed in the next section.

### 3. Observing tension between values and interests: Two planning dimensions

Lukes (2005) idea of latent conflict, or the 'contradiction between the interests of those exercising power and the real interests of those they exclude' (p. 29), is not clearly observable through behaviour and decision outcomes. Planning is selected as a space to observe these contradictions. While decisions may also be observed in these spaces, planning can also allow for observations to be made about how interests and values of Crown and Indigenous political agents are placed at odds, come into conflict, set aside, and/or are (temporarily) reconciled. Planning theory and practice have contributed to a rich discussion on the methods and ideas that describe and explain interest-value tensions. Communicative planning scholarship

(Healey, 1997; Innes and Booher, 2004) and deliberative democracy (Urbinati and Warren, 2008) dominate much of this discussion and, more recently, agonistic approaches are explored (Mouffe, 2000; Hillier, 2002). Each of these are discussed in turn.

#### Communicative and agonistic approaches

Communicative planning is generally thought of as an approach that creates the procedural conditions that are theoretically sufficient to come to consensus agreement. This approach aims to address critiques of the ‘participatory planning process’, such as ‘inequality of time, resources, expertise, and information [that] threaten to render the actual democratic character of these processes problematic, if not altogether illusory’ (Forester, 1988, p. 9). John Forester (1988; 1999; 2009) and others (e.g. Healey, 1997) have been influential in advising on how practitioners and policy makers might create conditions to enhance democratic process and shared power through collaboration, generally working to create Habermasian ‘ideal speech’ situations, and changing the institutional rules and policies to facilitate these processes. It has been argued that this attention to difference in communicative planning has gone too far, leading planners to conceive of their practice as an inherent or universal good and to draw upon these principles to rationalize oppressive policies (Porter, 2010; Yiftachel and Huxley, 2000).

Political scientist, James Tully (1994, p. 180), draws upon ideas of deliberative democracy to theorize a ‘cross-cultural speech-situation’ or ‘middle ground’ that can be created to allow for ‘Aboriginal and non-Aboriginal modes of argument [to be] on equal footing’. He posits that three particular norms must be established in a situation: (a) equality of respective traditions and institutions is recognized, (b) negotiations that respect the forms of negotiation in both cultures, and (c) any agreement is based on consent and not force or deceit. Tully (1995) refers to Bill Reid’s famous sculpture, *The Spirit of Haida Gwaii*, to analogize these ideas. The sculpture shows several worldly and other-worldly characters from Haida tradition, all in a canoe *tluu* that propels them forward, together, as each character vies for their own position in the canoe *tluu*:

The passengers are squabbling and vying for recognition and position each in their culturally distinct way. They are exchanging their diverse stories and claims as the chief appears to listen attentively to each, hoping to guide them to reach an agreement,

without imposing a metalanguage or allowing any speaker to set the terms of discussion. The chief's subjection to the rule of mutual recognition is symbolised by the crests of the crew's nations and families carved in the speaker's staff. Bill Reid has spent decades preparing to portray such a dialogue by recreating the cultural distinctiveness and interrelations of each of the spirit creatures, first by mastering the great Haida artistic traditions of formline sculpture in which they appear and then by learning the myth stories they are telling each other (p. 25).

Tully's interpretation of the work has been useful for illustrating deliberation, multiplicity, and mutual respect and recognition in the planning discipline (e.g. Sandercock, 2004c), while others have highlighted its inherent agonism (Barry and Porter, 2011; Porter, 2013; Wenman, 2013). Mouffe's (2000) notion of agonism acknowledges that disagreements are often irresolvable but everyone has a right to express an opinion. McClymont (2011) equates this idea with 'agreeing to disagree', where the single most important belief that is shared amongst parties is the recognition of value differences. Because of this, agonism will often begin with a critique of the existing conditions that limit parties from achieving an 'ideal speech' situation (or similar). The intent is to avoid unintentionally 'mask[ing] the reproduction of power and injustice' (Young, 2001 in Hillier, 2002, p. 15) and avoid processes that 'evacuate the political in favour of gaining easy, weak, consensual decisions' (also see Swyngedouw, 2005, 2007). The purpose of an agonistic approach is to bring the political back in (Mouffe, 2000). In her critique of communicative planning, Hillier (2010, p. 18) describes it as 'temporarily put[ting] a sticking plaster over what may be deep-rooted underlying conflicts' that 'will not make the conflicts disappear'. What must be recognized in planning, where diverse local interests engage over a decision, is that any agreement is simply 'a provisional hegemony' or stabilization of power that effectively excludes certain agents (Mouffe, 2000, p. 127). Since this analytical framework is based upon Lukes' third-dimension of power, the researcher may observe latent conflict and make these kinds of exclusions apparent.

Both agonistic and, to some extent, communicative approaches to planning are highly appropriate lenses through which to examine underlying value differences inherent to reconciliation. It is argued here that agonism and deliberation are not mutually exclusive and nor are they conflictual ideas. While some view agonism as having a 'properly tragic viewpoint' that sets it apart from communicative action (Wenman, 2013, p. 139), others have observed characteristics of each to be present at different moments in any particular context

(Bond, 2011). Indeed, scholars who engage with theories of Indigenous planning have drawn upon Tully's work to find it 'gestures' towards the agonistic. This is apparent in an Aboriginal rights context, where 'just recognition of Indigenous rights and title in planning must be constituted through a continuing renegotiation of the relational, multiple and mutual moments of coexistence' (Barry and Porter, 2011, p. 174). This is illustrated in *The Spirit of Haida Gwaii* as diverse actors struggle and vie for their own position in a power struggle that may be observed as the canoe *tluu* moves forward and no decision or agreement is yet made. Given that the decision itself is not the focus of analysis in this research, both approaches offer insights on tension between values and interests and are sensitive to wider power dynamics in the process of planning.

In both approaches to planning, difference plays an important role and is examined in the work of Tully (1995), John Forester (2009), and Iris Marion Young (1990). Young has been influential in suggesting that difference can be used as a resource for enhancing public reason and social knowledge (Young, 2000, p. 115; Umemoto, 2001). Tully finds that difference does not have to exclude the possibility of moving 'in unison' in the same direction while also celebrating 'diversity and the vying for recognition' (Tully, 1995, p. 28; Barry and Porter, 2011; Sandercock, 2004a). Forester has provided guidance on the value of rich discussion in the face of complex power relations, suggesting that traditions, values, and interests are tied to identity and are not negotiable in these settings (Forester, 2009). He argues that relationships must cut across 'personality and politics, race, ethnicity and culture' (Forester, 2009; Sandercock, 2004c, p. 139). This work, derived from literature discussing communicative and agonistic planning, provides the foundations for conceptualizing how Aboriginal rights may activate change in the process of reconciliation.

#### The objects of governance

Aboriginal rights can be understood as a tool in the planning process that generates tension between values and interests. Indeed, planning is 'a key arena for the politicization of policy' (Hajer, 2003, p. 4). It is '[f]ar from being strategic and steering' and 'could just as easily be portrayed as supine and subservient to powerful vested interests in the development process' (Allmendinger and Haughton, 2010, p. 809; Yiftachel, 1998). It is a space of engagement where tensions and conflict run rampant, where observations can be made about the collision

of interests and values between Crown and Indigenous political agents. The next chapter examines how these political agents take advantage of conflict and other 'opportunity structures' in planning to gain influence over others and secure their position. However, the quality of the tension and the related structures within a planning spaces are shaped by an important element not yet discussed – the object of governance. Whether the object is a broad issue like climate change, or a decision to develop a ski resort or an 'essential project', these objects determine the character of tension in planning and, in turn, the lens through which we understand reconciliation. In other words, the politics and governance expressed in planning are shaped by what is governed.

Hajer (2003) has observed that citizens are activated and values are more clearly expressed when they are faced with a tangible proposal. That is, the latent conflict described by Lukes (2005) becomes observable when underlying values come into conflict or agreement with an object or proposal. More specifically, the resulting communicative or agonistic approach to planning and the opportunity structures leveraged in the process will depend upon the proposal and how it interacts with values and interests at any moment in time. Drawing upon Jessop's work on governance, Cowell and Murdoch (1999; Cowell, 2007) suggest that there is no general theory of governance, just objects and modes of governance. Analysts must pay attention to two things: (a) the modes of governance or procedural conditions that guide how organizations relate to one another and (b) the material objects being governed. He argues that the objects of governance have an influence on the scalar character of the planning system. Governments may actively negotiate between more networked and democratic steering forms of governance and more hierarchical forms that seek to control development in relation to what is being governed. This is an essential point that is discussed in relation to the cases that contrast planning in the forestry sector to planning in the oil extraction and export sector.

In Canada, Aboriginal rights are almost always a consideration and, at times, treated as an object of governance in themselves, though always considered alongside a planning proposal. These procedural conditions that guide the organizations involved in planning around Aboriginal rights have a particular quality that is described in the Indigenous planning literature, some of which was outlined earlier. Barry and Porter (2011, p. 176) summarize the

quality of spaces 'where Indigenous interests, claims and values are brought forward': they are 'inevitably contested, conflictual, highly circumscribed, ambivalent, agonistic spaces, filled with possibility'. They build upon the work of earlier planning scholars that critically engage with contexts of 'deep differences' like Yiftachel and Sandercock, placing greater emphasis on their fragile and marginal qualities that 'are by no means a guarantee of a radical, democratic ideal'. 'To really understand them', the authors argue, 'we need to see them fully for what they are, how they come to be and how they function' (p. 174).

These spaces are fragile, vulnerable to state control and full of conflict and difference. The conditions under which they arise or are dissolved are examined in the next chapter. This chapter conceptualized the locations of these spaces of opportunity for reconciliation that occur across scales. Spaces of engagement provide windows into conflictual relations over the place-based values of each political agent. This conflict is crucial in observing expressions of values and interests within a dominant system of governance, to observe how scale is used as a tool to manipulate and coerce, or to influence through networks of association.

There already exists a rich foundation from which to build understanding on the reconciliation function of planning, a function that may be expressed as a colonial enterprise or an opportunity to unsettle state-led planning. Planning is a highly appropriate lens to view this function of planning, offering analysts observations on the 'collision' between, sometimes incommensurable, values and interests (Owens, 2002, p. 952; Porter, 2012; Sandercock, 2004c, p. 119), while also an understanding of the broader shifts in governance. In considering the dimensions of power and scalar politics discussed earlier in this chapter, we must be aware of the complex spatial qualities of power dynamics in planning, whether it be used as a forward and democratic steering process or one of control and subversion. Scale is critical to understanding the function of planning, how it interacts within broader governance regimes, and how it modifies the way in which reconciliation changes over time.

### ***Summary and conclusions***

Indigenous planning aims to protect Aboriginal rights and interests, including self-determined goals and good relations with non-Indigenous communities. The process, or way of getting there, according to Walker et al. (2013), is to 'reclaim' planning. This chapter raises questions



about the appropriateness of these goals and methods for achieving them: Are these goals approaching the universalizing tendencies scholars like Tully seek to break down? How can planning be 'reclaimed' if it is implicated in an ongoing colonial history? Planning traditions, as they are characterized in the literature, are predominantly linear and rational; they are used to steer the democratic process and as tools of social control (Flyvbjerg, 1998). In Indigenous-settler contexts, planning has been used as a tool of colonial control (Harris, 2002; Porter, 2010). From a Maori context, Matunga (2013, p. 7-8) describes planning as: (a) facilitating settler governments' desire for 'lands, waters, and resources of Indigenous peoples', (b) imposing 'colonial technologies' such as 'private property rights, surveying, land-use planning, mapping', among others, and (c) enforcing the exclusion of Indigenous peoples from decision, planning, and management processes. Is it possible for the dominant planning regime to be reformulated to accommodate for Indigenous interests and traditions in law and governance?

The analytical framework developed in this chapter provides a lens to observe this possibility, where Indigenous and mainstream planning intersect, values and interests collide, and tensions are raised. The democratic steering function of planning, whether it is navigated using 'ideal speech' situations or more agonistic 'agreeing to disagree', is vulnerable to influence and powerful forces operating at various scales. When Crown reconciliation policy is implemented and decisions are made, values and interests are typically suppressed by hegemonic forces of the state and dominant society. Many scholars adopt lenses that ignore these wider forces and, instead, choose to focus on Indigenous 'participation' within dominant planning systems (Booth and Skelton, 2012; O'Fairchellaigh, 2007). This approach fails to see how 'participation' may function 'to legitimize the state's long-standing assimilationist goals for indigenous nations and lands' (Alfred, 2005; Howitt, 2006). The erasure of cultural difference, according to Taiaiake Alfred (2005), is considered to be a 'legitimate requirement of policy implementation' (Howitt, 2006, p. 8). For example, the treaty process in Canada enforces this erasure of difference through its policy of extinguishment, a policy that is still in force today (Egan, 2012; Howitt, 2006).

This chapter set out to address the following question: To what extent are wider shifts in the modern state and scales of decision making supporting or thwarting effective processes of

reconciliation in planning? Lukes' theory on the dimensions of power emphasizes the importance of considering underlying value differences that are only observable through arenas of conflict, where there are opportunities for agents to escape 'subordinate' positions. Scale is an essential concept for understanding this process and locating where these sites might occur and how agents might gain influence through networks of association (Cox, 1998). Jurisdictional integrity (Skelcher, 2005) also helps us to conceptualize these constructed scales and understand their importance in policy implementation especially where the Crown asserts governance over Indigenous lands. In these contexts, there is clear jurisdictional overlap. The Crown's policy of reconciliation, when put in practice in these situations, is both challenged across scale and jurisdictions and enforced through these constructed boundaries.

One of the goals of this framework is to develop a lens to help define the location and conditions that give rise to these spaces where reconciliation is put in practice. These institutional spaces that grant certain actors more or less influence over the policy process may challenge and unsettle the dominant practice of reconciliation. Matunga (2013) calls for a space to be created for Indigenous planning traditions within dominant planning systems of the state. Barry and Porter (2011, p. 174), on the other hand, draw upon Tully to emphasize a continuous renegotiation of the relational, multiple and mutual moments of coexistence (Barry and Porter, 2011, p. 174). These opportunities are fragile and marginal, vulnerable to wider shifts in governance and scales of decision making. The next chapter will elaborate upon this fragility by identifying and examining the institutional mechanisms available in planning arenas and broader systems of governance that may help to give rise to these opportunities, or present barriers to their occurrence. These institutional mechanisms are examined to understand how they may be used to gain control over the idea of reconciliation.

Before moving to the next chapter, it must be noted that the vast majority of the theories and ideas presented here are written from a non-Indigenous perspective with lessons derived from planning and political theories presented by western scholars trained in western universities. Furthermore, much of the work on Indigenous planning engages in a sympathetic (but arguably paternalistic) approach to 'protecting' (Walker et al., 2013) Indigenous interests and perspectives and very rarely approaches research from an Indigenous perspective or directly

for Indigenous interests. As a result, this area of research and this research framework are vulnerable to several important critiques that are examined in Chapter Four's discussion on Indigenous methodologies. To truly work towards reconciliation, it is essential (at minimum) that Indigenous planning traditions be presented on equal footing. Significantly more work must be done before the scholars are able to accommodate for these perspectives. This is a critical weakness of this research.

## CHAPTER 3. MECHANISMS OF PLANNING CHANGE

### *Introduction*

Modern land and resource planning has been deeply implicated in colonial dispossession of Indigenous peoples in Canada and other English-speaking settler states (Borrows, 1997; Porter, 2010). It has also been identified as an important site for witnessing transformation in these historic relationships (Barry and Porter, 2011; Hibbard et al., 2008). This 'bifurcated record' is beginning to be characterized in the Indigenous planning literature (Hibbard et al., 2008) introduced in the previous chapter. This chapter develops a theoretical framework for examining the mechanisms of change in planning, focusing on both its 'transformative and oppressive possibilities' (Barry and Porter, 2011, p. 173).

The previous chapter builds a framework for locating and tracing the conditions for change, the spaces and relations through which change may occur. The theories examined in this chapter consider the specific mechanisms of change that interact with these spaces. These mechanisms are institutional structures that Indigenous political actors use to get their interests heard or are those that the state may take advantage of to enforce a particular agenda. Policy change theories offer a vocabulary and set of conceptual tools to describe and explain these changes. To conceptualize the potential for transformation in planning, concepts of 'opportunity structures' and 'venue shopping' are used to describe mechanisms within and between spaces, while 'multiple channels of influence' can be used to describe the potential of multi-level configuration of these mechanisms across a planning system. It is posited that planning can provide opportunities to influence the Crown's interpretation of Aboriginal rights and reconciliation, which in turn can have transformative effects upon the planning system. This begs the following questions: what opportunities exist for transformation in the planning system? How does transformation take place?

Transformations are theorized as those changes to planning institutions that reorient the relationship between the Crown and Indigenous peoples in a way that allows Indigenous peoples to 'regain a greater measure of control over their ancestral lands and resources' (Egan, 2012, p. 416). Peter Hall (1993) offers a useful conceptualisation of orders of change in the policy change literature. A 'first-order change' is a small adjustment to a policy instrument

that is isolated from larger systems. A 'second-order change' is a system change in response to dissatisfaction with past policies while the objectives largely remain the same. A 'third-order change' results in a shift in the paradigm where politicians rather than experts play the dominant role. Transformation in this case is similar to Hall's third-order change as power is shifted between political actors. Second-order changes might include changes like the way the Crown practices reconciliation or the way planning venues include or exclude particular types of evidence (e.g. traditional knowledge along with scientific knowledge) in an effort to balance Crown and Indigenous interests.

Over the past few decades in Canada, planning has generally followed this trajectory in ways that have opened up to consider and accommodate<sup>10</sup> Aboriginal interests. In fact, planning creates spaces for the Crown to engage with Indigenous interests through (albeit significantly flawed) consultation and accommodation policies (e.g. INAC, 2011). These policies are some of the central legal mechanisms of 'reconciliation'. The apparent failures of other avenues makes land and resource planning one of the 'more useful' avenues for this reconciliation to take place (Egan, 2012).

The definition of reconciliation adopted by Canada has been criticized by a number of scholars who have argued that the policy is an attempt to reconcile two incompatible ideas: the assertion of Crown sovereignty and Aboriginal rights<sup>11</sup> (e.g. Blackburn, 2007; Knox, 2010). Since reconciliation is interpreted within Canada's institutions and laws, rather than Indigenous systems, the definition of reconciliation adopted by Canada defers, if not explicitly denies, the recognition of Indigenous autonomy and jurisdiction (Bhandar, 2004; Blackburn, 2007; Johnson, 2011, p. 189; McCreary and Milligan, 2013). This denial is expressed in particular ways in planning spaces, where relationships to property (Nadasdy, 2003; Ingold, 2000), the form of the process of reconciliation (Tully in Egan and Place, 2012), and the nature of knowledge (Nadasdy, 2003; Turnbull, 2007) are all interpreted through prevailing modernist planning regimes (Sandercock, 2004a). The ways in which the Crown deploys these mechanisms of reconciliation (Knox, 2010; 2011) are regularly challenged by First

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10 Accommodation is a central idea in Aboriginal law in Canada. It is the one of the 'tools' used by the Crown in combination with consultation as part of reconciliation activities (Isaac and Knox, 2005). Canadian policy suggests that industry is 'often in the best position' to undertake this task by 'modifying the design or routing of a project' (INAC, 2011, p. 20). The responsibility for accommodation, however, rests with the Crown.

11 This definition of reconciliation follows *Van der Peet v. BC* (1996).

Nations in Canada. Indeed, attempts at infringing upon Aboriginal rights where territories remain unceded (notably in the Province of British Columbia) have given rise to important environmental controversies such as the 'war in the woods' forestry conflicts in the 1980s and 1990s, characterized by a series of road blockades and court injunctions in BC (Takeda and Røpke, 2010), and the recent campaign against Enbridge's Northern Gateway pipeline and tanker project (McCreary and Milligan, 2013).

The 'war in the woods' controversy led to a series of new planning spaces, including a cluster of collaborative forestry and land use planning regimes in BC and Haida Gwaii. This forms the basis of the first case study outlined in Chapter Five. And one of the most frequently used planning processes – environmental assessment – has also resulted in displacing development that would have had unacceptable effects on Aboriginal interests (e.g. Morin et al., 2010), though this is rare. Indeed, planning has the potential to obstruct 'essential projects' and 'raise awkward questions about social purpose' – a potential that is viewed by certain dominant interests as a problem and 'a key target for [planning reforms]' (Cowell and Owens, 2006, p. 406). This dynamic is apparent in Enbridge's proposed Northern Gateway pipeline and shipping project, which is considered to be 'essential' for Canada to achieve its national export agenda (Emerson, 2010). Conflict resulting from opposition campaigns led by environmental groups and Indigenous political actors are identified by some (e.g. Oliver, 2012) as the rationale for introducing what others see as some of the most 'regressive' changes to Canada's environmental planning laws since the 1980s (Gibson, 2012, p.179; Doelle, 2012). Some policy analysts suggest these changes may reduce federal government oversight on reconciliation in environmental planning processes (Doelle, 2012, p. 12). This controversy forms the basis of the second case study, outlined in Chapter Six. The next chapter introduces these two planning case studies, along with the research design.

This chapter is organised into three sections. The first section begins with an examination of the literature theorizing transformations in planning that draws heavily upon existing frameworks employed in the Indigenous planning literature. The second section draws upon conceptual tools in the policy change and planning reform literatures to raise the Indigenous planning frameworks explored earlier to the institutional level. This theoretical work begins to develop a vocabulary to describe how planning reform and planning transformation might

take place. The third and final section considers literature on reconciliation to add conceptual substance to the largely process-based policy change and planning reform literature.

Reconciliation is presented as a normative goal and an alternative to the definition presented by the Crown.

### ***A note on the relevance of these theories to certain geographies***

The term 'indigenous' is used in many contexts around the World. While some authors expand similar theorization to places like Israel, Palestine, Kurdistan (Yiftachel and Fenster, 1997), Bolivia (Beneria-Surkin, 2004), or Malaysia (Howitt and Lunkapis, 2010), this work is deeply rooted in British Columbia (BC). BC was once a series of independent nations, later a colony of Great Britain, and is now a Province of Canada. While the geographical histories of this place are distinct from those of the rest of Canada (as outlined in Chapter Four), there are important similarities between BC, the rest of Canada, the United States, Australia, and Aotearoa-New Zealand. These similarities are outlined by Porter (2010, p. 3-5) to rationalize why she uses these geographical boundaries in her work: Britain was central to the colonial occupation and administration that, at a similar time, sought the development of largely autonomous colonies that relied upon a policy of 'cultivation and manipulation of local allies and collaborators', considered to be an essential tool of control (Blue, 2002 in Porter, 2010, p.4). So, the dispossession that was borne by Indigenous populations is the result of a particular kind of colonial administration. These places also share histories of continuous struggles against this process in order to regain control over their rights and their future. This theorizing on Indigenous planning, then, may not be easily applied in other contexts, for the above reasons. It is also important to caution against using these ideas to support a 'perceived loss of dominance' by those who inhabit dominant society in any locale, such as the arguments put forward by radical white supremacist groups in Great Britain or even dominant white settler society descending from British ancestry in Australia or Canada (Moreton-Robinson, 2005, p. 21).

### ***1. Research on planning change in relation to Aboriginal rights***

In the previous chapter, some of the literature on Indigenous planning is used with to

understand how scholars in this area understood the purpose of planning. Some of this work is critiqued for its focus on 'protecting' Aboriginal rights through a misdirected goal of reclaiming a foreign planning system. The literature is challenged to consider the process of reconciling two planning traditions, for a coexistence in planning, where equal jurisdictional space for Indigenous planning traditions is created within the dominant planning system. Power, scale, and governance are used to frame the locations where change may occur. This chapter is concerned with the *mechanism* of change available within planning that can be leveraged by various political actors in ways that influence reconciliation.

There is 'a tension between the modern state's attempt to accommodate rights within existing institutional and legal arrangements and Indigenous aspirations for a more fundamental reconfiguration of their political and spatial relationships' (Barry and Porter, 2011, p. 171). This tension has shifted and unsettled these existing institutional and legal arrangements in response (Hibbard et al., 2008; Howitt and Lunkapis, 2010; Lane and Cowell, 2001; Porter, 2010). In Canada, and especially along British Columbia's coast, Aboriginal rights and campaigns with environmental groups have led to establishment of new rules of procedure and institutional venues that have transformed policy and socioecological trajectories (Cashore et al., 2001; Pralle, 2003; Smith and Sterritt, 2010). However, the Indigenous planning literature, and a more applied literature on environmental assessment with Indigenous peoples in Canada, present a less optimistic view, offering a number of practical and theoretical challenges impeding these transformations.

Leonie Sandercock (2004a, p.95; 2004b) points out three of these challenges. First, planning is predominantly viewed as a western invention that ignores the much longer history of planning traditions that existed in pre-colonial times. Many Indigenous peoples have long traditions of managing environmental values in relation to resource use and extraction activities (e.g. Jones et al., 2010; Turner and Berkes, 2006) with a related, long and complex planning and legal tradition (e.g. Borrows, 1997; 2010). Second, Indigenous knowledge is not valued by planners because of their own (western) training and the assumption that previous dispossession and displacement of Indigenous peoples have resulted in the erosion of this knowledge. And, third, the call for a more inclusive and culturally sensitive planning practice is often naïve and does nothing to help to rectify past wrongs.



The more applied critical environmental impact assessment (EIA) literature offers important empirical insights on Indigenous peoples' encounters with such assessments – likely the most common site of Indigenous-Crown planning conflicts over land and resources in Canada in the last two decades (Haddock, 2010). It is also the subject of one of the two in-depth cases examined in this research (see Chapter Six). A summary of these critiques is presented in Table 1, below, along with additional insights from the literature on Indigenous planning and law. These related bodies of literature offer critical insights on the oppressive and stagnant nature of planning institutions as well as potential opportunities and mechanisms for change.

One of the critiques identified in Table 1, the potential for 'incompatible world views', is complicated by the fact that Indigenous territories are subject to overlapping and competing claims to jurisdiction. The notion of 'traditional knowledge' is often adopted in planning and impact assessments in Canada. Voluntary guidelines exist for considering this knowledge in impact assessments subject to federal legislation (CEAA, 2010). According to these guidelines, there 'is growing recognition – both in Canada and abroad – that Aboriginal peoples have a unique knowledge about the local environment, how it functions, and its characteristic ecological relationships... [It] is increasingly being recognized as an important part of project planning, resource management, and environmental assessment' (CEAA, 2010, p. 1). Nadasdy (2003) views its inclusion in planning as a politically expedient strategy to support development interests. He argues that this kind of knowledge cannot be meaningfully integrated in the way environmental assessments take place today; it is impossible for impact assessment practitioners to distill or compartmentalise knowledge so that it fits within an impact prediction framework (p. 143). Indigenous knowledge, he explains, requires years of experiential learning to acquire, something that cannot feasibly be undertaken by those involved in the decision process within the time allotted for an impact assessment. While this is true, other kinds of knowledge that require decades of training and experience are used in planning systems as well. As staff and experts learn from communities, and begin to understand the basic qualities of this information, there appears to be a potential for using this knowledge in productive ways.

Furthermore, the courts have been clear to point out that while they hear 'oral tradition', they reject 'assertions about broad concepts embodied in oral tradition' unless it is confirmed by

'findings based on *other* admissible evidence' (Delgamuukw v. BC, 1997 in Cruikshank, 2000, p. 64, emphasis added). This means that moral or spiritual arguments that guide approaches to governance and decision-making in Indigenous communities are admissible to impact assessments so long as they are supported by other kinds of evidence. Typically, the other kinds of evidence that is used to support 'oral tradition' is scientific evidence. There are significant limitations to using scientific evidence in this context as science does not openly purport to support moral or spiritual codes (Gieryn, 1983; Turnbull, 1997). The effect is that Indigenous knowledge is considered only by stripping away any Indigenous-defined moral and ethical codes from the impact assessment process (Cruikshank, 2000). This is convenient for the state because policy frameworks expressed through the Crown's jurisdiction may be underpinned by their own moral or principled arguments that shape the impact assessment method or decision criteria, such as that of unfettered economic growth. Such codes may compete with Indigenous moral codes and are not subject to the same scrutiny at Indigenous knowledge. Collaboration in decision-making, then, may be the only route available for any meaningful consideration of traditional knowledge (Nadasdy, 2003). This dilemma becomes evident in the Enbridge assessment process described in Chapter Six.

Much has been written on the transformative possibilities of planning, and much of this writing relies heavily upon case studies on direct action, communicative models of planning, and the adoption of legalistic rights arguments (Hibbard et al., 2008). This consideration points to a key argument raised throughout: *planning is a contested site that has 'both transformative and oppressive possibilities'* (Barry and Porter, 2011, p. 173; Hibbard et al., 2008). These dual possibilities are hinted at in the brief introduction to the Indigenous planning literature above (e.g. Hibbard et al., 2008; Sandercock, 2004a) and echoes a dialectic evident in the scalar politics literature that sees wider forces have influence on, and being affected by, local phenomena (Brenner, 2001; Howitt, 1998). Transformative possibilities are defined above as those changes to planning institutions that reorient the relationship between the Crown and Indigenous peoples in a way that allows Indigenous peoples to 'regain a greater measure of control over their ancestral lands and resources' (Egan, 2012, p. 416). This democratic steering function of planning was placed in contrast to that of development control in the previous chapter. It is theorised that the state's decision to impose development control may be a reaction to engagement in planning for the purpose of

transformation. One such reaction may be planning reform, which is a discourse characterized as 'speeding up' and 'streamlining' planning processes to avoid 'unnecessary delays' (Owens 2004; Wolsink, 2006). Chapter Five further refines this idea to the BC context in a history of planning in BC and Haida Gwaii. The next two sections begin to develop a framework that can be used to examine the *mechanisms* that give rise to these possibilities for moving towards reconciliation, what are called 'mechanisms of reconciliation'. These offer insight on the character and durability of potential change.

CHAPTER 3. MECHANISMS OF PLANNING CHANGE

Critique theme	Summary of critique
<b>Title claims must be 'settled' for EIAs to work</b>	Many argue title must be 'settled' before fair decisions over property disposition can be undertaken (Berger, 1977; Shapcott, 1989). Yet the state sees 'settlement' as achieving 'certainty' over title and extinguishment of rights (especially through treaties) – a policy that is disputed by many First Nations (Alfred, 2005; Egan, 2012; Paci et al., 2002). Others (Isaac and Knox, 2005) argue that law today gives us necessary 'tools' to address a territorial dispute (e.g. guidelines, regulations, consultation/accommodation, etc.).
<b>Potential for incompatible world views</b>	First Nations acting as stewards of their lands, can reflect their values, practises, cosmologies, and social systems (Paci et al., 2002; Shapcott, 1989). Such knowledge is not easily 'incorporated' into EIA frameworks (Usher, 2000) and can easily be misrepresented or misused (Stevenson, 1996). Yet, 'traditional knowledge studies' may be adopted as a politically expedient strategy to support development interests (Nadasdy, 2003).
<b>Ignores past injustice</b>	To many, a central goal of reconciliation is achieving justice for past dispossession (Blackburn, 2007; Shapcott, 1989). Yet, case law and state policies assert that consultation and accommodation activities allow the state to infringe upon Aboriginal rights through EIAs (Paci et al., 2002), effectively perpetuating colonial relations while providing the appearance of justice (Shapcott, 1989; also see Irlbacher-Fox, 2009 on this quality in the treaty process). The government views decision-making forums as inappropriate for considering historic infringements, and consultation and accommodation is only required when present decision will likely cause an additional infringement (CSTC v. BCUC, 2009) <sup>12</sup> . Yet, the process of consultation and accommodation to justify infringing on Aboriginal rights can undermine the potential for future recognition of past dispossession (Egan, 2012).
<b>Limits to accommodation<sup>13</sup></b>	Despite some flexibility in larger EIAs that accommodate for languages, oral evidence, and other procedural modifications, EIA places greater importance upon western law and science. The state will rarely engage with First Nations in any meaningful way to determine the rules of EIA (e.g. terms of reference), accommodate First Nation decision timelines, consider First Nation values and laws, share final decisions in a transparent way, fully consider cumulative effects, or provide adequate funding to get fully involved (FNEMC, 2009; Galbraith et al., 2007; Haddock, 2010; Carrier Sekani Tribal Council and Takla Lake First Nation, 2007 in Rutherford, 2009). In addition, the agencies and panels responsible for conducting EIAs have no authority to accommodate for infringement on title (Carrier Sekani Tribal Council and Takla Lake First Nation, 2007 in Rutherford, 2009).
<b>Lack of First Nation control</b>	Some view 'the creation of our own mechanisms of change based upon the values, beliefs and systems of our original teachings' as the 'only avenue' available for preserving indigenous identities (Clarkson et al., 1992 in Paci et al., 2002, p.121). Yet, the state appears unwilling to create joint EIAs in non-treaty areas (Paci et al., 2002), despite some 'best case' examples of voluntarily co-developed EIAs (e.g. the three-tiered approach by the Taku River Tlingit for the

12 Carrier Sekani Tribal Council v. British Columbia (Utilities Commission), 2009 BCCA 67

13 Accommodation is a legal tool used by the Crown in combination with consultation as part of reconciliation activities. Industry is 'often in the best position' to undertake this task by 'modifying the design or routing of a project' (INAC, 2011, p. 20). Responsibility rests with the Crown.

Critique theme	Summary of critique
	Ruby Creek Mine EA in 2006-2007; FNEMC, 2009).
<b>Disagreement over duties</b>	Many see Aboriginal rights as justifying shared decision-making, not just consultation (Haddock, 2010, p.72). Title is viewed as encompassing 'the right to exclusive use and occupation' of land 'held pursuant to that title for a variety of purposes'. Yet, state sees 'no ultimate duty to reach agreement' and EIAs do not allow First Nations 'veto over what can be done with land' (Taku v. BC, 2004 <sup>14</sup> , in Haddock, 2010, p.72).
<b>Compromising positions</b>	While many First Nations reject the authority of the state to make decisions through EIAs, First Nations will often conduct their own EIAs (Shapcott, 1989). This includes working within western science and legal traditions to bolster their position (Pinkerton, 1983).

Table 1. Environmental impact assessment critiques related to Aboriginal rights in Canada

Appendix F provides a history of EA in Canada and BC

## 2. Critique of reconciliation law and policy

The planning literatures outlined above and in the previous chapter offer some description of the character of change. Transformation is theorized as the change to planning institutions that reorient the relationship between the Crown and Indigenous peoples in a way that allows Indigenous peoples to 'regain a greater measure of control over their ancestral lands and resources' (Egan, 2012, p. 416). The reconciliation literature relies heavily upon evidence from policy and law and provides an initial set of mechanisms of change, or 'mechanisms of reconciliation'.

In some very particular ways, the idea of reconciliation is similar to that of sustainability in policy and planning literature and practice. The idea is adopted as a broad policy objective for diverse issues, policies, and jurisdictions, which have created mechanisms and spaces for debating values and evidence related to sustainability in public view. The principle of reconciliation has genuinely good qualities that are (I argue) worthwhile pursuing. Its interpretation and application in place and in relation to particular objects of governance, however, result in very diverse institutions and processes of governance. It is unsurprising, then, that reconciliation is subject to important criticism. Engle (2010) and Knox (2010; 2011) examine how a rights-based interpretation of reconciliation, an approach taken in Canada

<sup>14</sup> Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 SCR 550

(Borrows, 2002), offers opportunities, and presents important barriers, for Indigenous political actors in seeking transformative change.

BC-based lawyer, Tony Knox (2010; 2011), closely examines the pivotal Supreme Court of Canada case, *Haida v. BC* (2004), to offer lessons about reconciliation. Knox (2010; 2011) identifies five legal mechanisms in Justice McLachlin's decision that are available to the Crown for pursuing reconciliation:

1. Treaty negotiations;
2. Justifying infringement based on consultation and, where appropriate, accommodation;
3. Creating rules and regulations associated with adequacy of consultation and Aboriginal claims;
4. Negotiation (rather than litigation); and,
5. Changing common law in ways that relate to Aboriginal rights protected in s.35(1) of the Constitution.

All of these *legal mechanisms of reconciliation* can influence planning practices. Over ten years after this decision, government policy, law, and internal staffing and organization of agencies have been dramatically changed (Kotaska, 2013). These mechanisms are tied to existing government processes and that are fulfilled by particular agencies. Environmental assessments, for example, are required when a project might negatively affect environmental values and Aboriginal rights. When an assessment takes place, though, the mechanism of consultation and (where appropriate) accommodation are triggered (McIvor, 2013) where justification for Aboriginal rights infringements (if any) must be considered. This policy is described in detail in Chapter One (Illustration 2 on page 8).

Engle (2010) presents an alternative view of this rights-based approach to reconciliation, drawing upon the United Nations Declaration on the Rights of Indigenous Peoples, to identify the point at which Indigenous rights are deferred or come into conflict with Crown interests. She first distinguishes between rights based on culture such as sets of beliefs and practises tied to a particular identity, and those rights based on self-determination. The latter might range from the right of secession or independence as a nation-state, to significant legal and

political autonomy within existing states or a basic human right. In the debate over whether or not to include self-determination in the Declaration, parties agreed to include this idea only if the new article made clear that the Declaration will not be construed to authorize or impair the sovereignty of nation-states. This tension between Indigenous rights to self-determination and the sovereignty of the nation-state is raised by other scholars studying Canadian policy. They argue that this policy seeks to reconcile two inherently incompatible agendas: Aboriginal rights and the sovereignty of the Crown (Blackburn, 2007; Borrows, 2001).

The incompatible nature of these agendas is made more significant because more power is granted to the Crown. It is crucial to understand that the courts made an arbitrary decision to adopt the assertion of sovereignty made by the Crown rather than the assertion made by Indigenous peoples (Bhandar, 2004). In effect, the Crown and the courts have had great influence over the definition of Aboriginal rights and reconciliation. Who controls the definition is important (Egan, 2012). Questions of reconciliation are interpreted and modified within western systems of law and planning rather than Indigenous systems. Engle finds that debates about self-determination have endured over time. Since this aspect of Aboriginal rights has been left unreconciled, it is widely held that 'the human right to culture provides a secure and relatively uncontroversial means by which to protect the rights of [I]ndigenous people[s]' (Engle, 2010, p. 6). She observes that this 'right to culture' continues to be the 'dominant discursive and legal vehicle for making [I]ndigenous claims' rather than that of self-determination (p. 7). So, the act of excluding self-determination from the discussion leads to a reliance on the right to culture. This right, however, is not sufficient and 'in many ways fails to attend to ongoing needs for – or claims by [I]ndigenous groups to – economic and political autonomy' (p. 6).

Engle draws upon Povinelli's 'invisible asterisk' metaphor that signifies a provision that 'hovers above every enunciation' of Indigenous law (p. 133). The provision is compliance with values of western culture. This compliance allows for pluralism to occur, as it is viewed as 'an expression of minimum standards' that 'act to qualify tolerance for [I]ndigenous customs' (p. 134). She goes on to argue that this asterisk is 'often articulated through the discourse of human rights to counteract or temper the right to culture' (p. 134), referring here to universal human rights. This argument is extended in this framework, replacing human rights with the

'sovereignty of the Crown', where the adoption of this western vantage point (i.e. rights encompassed by Crown sovereignty, expressed in western terms) does not directly address the tension raised between Aboriginal rights and Canadian society. Following Engle's logic, any resolution or reconciliation is ultimately *deferred* to 'another stage', such as another institution or time period. Thus the asterisk 'generally limits the right to culture at the moment a cultural practice' violates this Crown interest.

In other words, reconciliation may function more like the 'gangplank that forces Aboriginal peoples to step off into the deep waters of colonial objectives' (Borrows, 2002, p. 33-34). The process is more of a reconciliation *to* the Crown, implying Indigenous peoples must be submissive to the Crown's authority (Bhandar, 2004; Nicoll, 2004, in Egan, 2012, p.231). And while early case law has recognized that pre-existing Aboriginal rights have their own logic that are based on Indigenous culture, case law contends that such rights can be articulated in common law, or expressed in a 'modern form', to be carried into the future (Blackburn, 2007; *Calder et al. v. BC*, 1973, para 200). In turn, 'Aboriginal rights bear a greater burden of accommodation in order to produce this compatibility' (Blackburn, 2007, p.631). This accommodation practice has 'deferred, if not explicitly denied' the recognition of Indigenous peoples' political autonomy (Johnson, 2011, p.189).

Another barrier facing reconciliation in planning is the 'arbitrary' adoption of a western vantage point (Borrows, 2002) across all facets of legal and policy processes and institutions in Canada. Environmental assessment and land use planning are just two of these processes guided by this vantage point. These institutions only consider certain kinds of evidence, guided through very specific rules including those defining an authentic identity (claims to Indigeneity)(Borrows, 2002). For example, the Truth and Reconciliation Commission and the treaty process are considered examples of Canada's efforts at 'pursuing reconciliation objectives' (INAC, 2011, p.9). The Commission was set up to recognize injustices of violence and abuse and, critics suggest, only through *their* rules do 'claims' or 'allegations' of these injustices become 'truths' (Johnson, 2011, p. 189). Furthermore, BC treaty negotiations exclude any consideration of the history of colonialism or past wrongs (Egan, 2012), allowing the Crown to 'conceal [its] own culpability in the present' (Sundar, 2004, p.157). As outlined above, environmental planning institutions operate in similar ways, excluding past injustices



(including past environmental impacts), often excluding questions about title, and offering few adjustment to the conventional planning model (McCreary and Milligan, 2013; Porter, 2010).

### **3. Conceptualizing 'mechanisms of reconciliation'**

The legal mechanisms of reconciliation outlined in the previous section are identified as alternatives to litigation that are intimately related to Canada's planning system. Drawing from case law, Knox (2010; 2011) outlines these five legal mechanisms: treaty negotiations, consultation, regulations on consultation, negotiation, and legislation. The utility and effectiveness of each of these legal avenues vary. The treaty process, for example, is a process that has lost legitimacy for many First Nations and it not engaged with in a meaningful way. Consultation and accommodation processes, however, are engaged with more regularly than the treaty process; similarly, litigation and civil disobedience are considered by some to be a more fruitful avenue than the treaty process (Egan, 2012; Takeda and Røpke, 2010).

Consultation is required in almost all planning processes affecting land and water in Canada. In environmental assessments and the permitting process that follows, a significant amount of resources and space are allocated for the Crown to consider Aboriginal rights. In consultation, and the other legal mechanisms, the right to culture is typically used as a proxy to protect Indigenous rights, over and above self-determination (Engle, 2010). Engle (2010) argues, these less powerful cultural rights are only protected if they do not directly conflict with state agendas; thus, the right to self-determination is essential for a 'middle ground' to be reached.

Borrows (2002) cautions against this rights-based approach to reconciliation that Canada has adopted. He suggests that it relies too heavily upon institutions rather than giving the responsibility to individuals and citizens. Yet institutions are constituted by individuals and citizens. The literature on institutional dynamics and planning suggest that while institutions appear impermeable to change, there are opportunities for citizens to have influence over them. This chapter draws upon these literatures to further conceptualize these legal mechanisms of reconciliation. While law may underpin the legal and institutional 'openings' in the state to address reconciliation, what is done when these openings is what affects the nature of this change.

## Lessons from planning

One less widely noted function in planning is the way Indigenous peoples *use* state-led planning structures to find 'strategic moments of opportunity that result in the recognition of [I]ndigenous rights' (Hibbard and Lane, 2004, p.103; Lane and Cowell, 2001). These political opportunities are structures and institutions manifested by the state that can be used by Indigenous peoples to re-shape their relations with it (Hibbard and Lane, 2004, p.103). Indeed, they are more than just the legal openings identified above. In this sense, planning is a way for Indigenous political actors to modify the quality of evidence, redefine the problem, and shape the planning process itself in ways that can result in important transformations (Barry and Porter, 2011).

Planning, then, offers a fruitful space for examining mechanisms of that might lead to these changes. Communicative planning (Healey, 1997; Innes and Booher, 2004) and agonistic approaches (Mouffe, 2000; Hillier, 2002) were considered in Chapter Two to examine power and tension between values and interests in planning. This chapter is centrally concerned with *mechanisms* that lead to changes in the dominant planning system and methods for beginning to reconcile the two planning traditions that constitute this system. Institutional structures and dynamics that might trigger oppressive and transformative qualities of planning are examined in Friedmann's transformative or radical planning and insurgent planning. This work examines how 'groups directly confront the institutional bases of oppression' (Friedmann, 1987; Sandercock, 1998; Lane and Hibbard, 2005, p. 174).

Friedmann and Kuester (1994 in Jojola, 2008, p. 42) are also identified as the founders of Indigenous planning. At its inception, the authors pronounced 'ideals that called for a radical re-examination of contemporary planning practice through long-term learning, the empowerment of community voice, and the advocacy of culture and tradition'. However, the authors adhere to a number of specific values, like community empowerment and cultural empowerment, that may not reflect the values and priorities within the locality where planning is practised (Alexander, 2003). They present practitioners with ideals of how planning 'ought' to be practised, an approach that is vulnerable to making claims for a universal planning practice. Further, they do not systematically examine institutional mechanisms for change. The ideas presented are also general in nature so that those who

draw upon these ideas may use them in a way that suits a particular situation or context (Alexander, 2003).

Returning to Mouffe's notion of agonism, transformation results out of the act of disagreement and conflict. Agonism makes irresolvable disagreements apparent, there is a fundamental agreement to disagree (McClymont, 2011), so that action can be taken to move forward and modify institutions and policy arrangements. Consensus, then, is 'the temporary result of a provisional hegemony, as a stabilization of power, and always entails some form of exclusion' (Mouffe, 2000, p.127). While this approach may be 'receptive to the multiplicity of voices, the plurality of values and the complexity of power structures' (Mouffe, 2000, p.128), actors must be able to take advantage of other spaces and scales when the planning space is no longer suitable (Metzger, 2011, p. 195). The institutional change literature is useful for conceptualizing how actors might take advantage of other institutional spaces in order to influence a policy idea, like reconciliation. In this literature, the concept of 'policy' is a rather broad concept that is not limited to formal rules adopted by a government, but encompasses informal practice and institutions like planning. Thus, the concern for change in the policy idea of reconciliation refers to change in the way the idea is implemented in practice, the way planning traditions are recognized and given jurisdictional space in Canada's planning system, and the terms agreed upon in all facets of the institutional relationship between a First Nation and the Crown.

Three concepts within this policy and institutional change literature are introduced in the following paragraphs, along with a concept from a smaller literature on planning reform. First, 'venue shopping' is adopted to conceptualize strategies used by Indigenous political actors to move from one institutional space to another. Second, political 'opportunity structures' are used to conceptualize the way Aboriginal rights create influential political spaces within planning events. The logic of appropriateness and planning reform are used to examine state responses to these political strategies and the durability of potential transformations.

#### Adding policy change ideas to refine the legal mechanisms of reconciliation

The reason for selecting these four concepts is important to explain. Some of the most influential work that has come out of the institutional dynamics literature has been developed

around Sabatier's (Sabatier and Jenkins-Smith, 1993) advocacy coalitions, Hajer's discourse coalitions (1995), and Kingdon's policy streams (1995) models. Each of these approaches may be used to examine transformative and oppressive changes in the context of this research and can provide some utility. This research, however, places most emphasis on institutions and the way political actors engage with powerful state-led institutions than Sabatier's, Hajer's and Kingdon's work. This frame of analysis not only better conceptualises the research problem, but also attends to a broader shift in planning thought. Barry (2012, p. 214) points out that the 'institutional turn' in planning has started to shift 'away from the study of individual collaborative processes towards the analysis of interactions with the larger governance system'. The analytical framework developed in Chapters Two and Three focuses on how changes in governance systems, or a suite of institutions, may constrain Indigenous-led actions (e.g. Lane and Cowell, 2008), how engagement with state-led planning institutions may influence and change the planning system, and how shifts in institutional structures may reconfigure state-Indigenous relations and bring about collaborative planning systems (e.g. Barry, 2012). Along with the literature on scale developed to locate spaces of engagement in the previous chapter, the institutional dynamics literature is drawn upon to help raise the analytical lens from within a planning space to a broader system of governance, or the institutional level, so that attention can be paid to the way opportunity structures are accessed and planning reforms take place. From this perspective, we may consider opportunities for transformation by looking at the entire planning system composed of venues operating across multiple scales (e.g. technical decision process, the courts, civil disobedience, etc.). A brief examination of the ideas of Sabatier, Hajer, and Kingdon provides an introduction to institutional dynamics literature, and then used to justify the selection of the four key concepts introduced in the last half of this selection.

Sabatier has offered influential ideas in institutional dynamics, drawing upon a critique of Lasswell's (1951 in Sabatier and Jenkins-Smith, 1993) 'stages heuristic', which conceptualises policy change as a linear and rational progression. Sabatier argues that the model is flawed, offering no explanatory power and ignoring exogenous events and policy learning processes (1993). Drawing from earlier ideas proposed by Hecló (1974) on the role of large scale exogenous change and tension amongst a variety of actors engaged with the policy problem, Sabatier proposes the advocacy coalition framework. The focus here is on 'policy subsystems'

where groups of actors from different institutions (e.g. multi-level government agencies) interact over a particular policy issue. Advocacy coalitions are groups of people who share basic values and perceptions of a policy problem and are influenced by external factors such as money, expertise, and legal authority. In any policy analysis, aggregating values and beliefs to institutions is nearly impossible (there are too many) but aggregating to coalitions is more feasible. Using a decadal time scale to provide temporal boundaries for analysis, it is often possible to identify two to four coalitions that sharing core values and beliefs that harden over time, with allies and opponents remaining relatively stable over such a period.

Hajer (1995, p. 62; 2006) presents an alternative approach for understanding coalitions. In his discourse coalition model, Hajer focuses on linking ideas or story-lines between actors engaged in policy disputes. Instead of sharing core values and beliefs, actors identify with a set of 'narratives on social reality', providing them with 'symbolic references that suggest a common understanding'. These references act like a 'metaphor', where the act of 'uttering a specific element [of a story-line] effectively reinvokes the story-line as a whole'. Unlike Sabatier's coalitions that are shaped by money, expertise, and legal authority, discourse coalitions place greater emphasis on the way a story-line gains permanence when more and more people accept the story-line. Discourse coalitions, then, are an ensemble of sets of story-lines, the actors who utter them, and the practice in which these utterances take place. Policy discourses become more permanent in two stages: (a) when a discourse dominates the policy domain and society in what Hajer terms 'discourse structuration' and (b) when a discourse solidifies in an institution in what he terms 'discourse institutionalisation'. These ideas have been useful to this research in shaping the analytical approach used to analyse the empirical data. Thus, Hajer's ideas are raised again in the research methods section in Chapter Three. Furthermore, both Hajer's and Sabatier's ideas are brought into Chapter Six of the dissertation to consider the role of coalitions in the controversy over planning reforms introduced by the Government of Canada in 2012. Indeed, many factors were important in the policy change that took place at this level. However, Sabatier and Hajer consider coalition relationships rather than institutional mechanisms as a primary vehicle for change. The four concepts selected for this framework make the focus on institutional reconciliation possible.

Kingdon's (1995) 'policy streams' model does, however, provide further grounding for these

four concepts. His model has been equally influential for scholars interested in policy change. Rather than adopting coalitions as a central concept, Kingdon focuses on the exogenous *conditions* necessary for policy change. In his model, there are three separate streams that can facilitate or impede the process of getting an issue on the policy agenda. Briefly, the three streams are:

- (a) The policy problem and its recognition;
- (b) Potential solutions such as expert policy proposals; and,
- (c) Political will, constituted from national mood or public opinion among other factors.

When these 'separate [policy] streams come together at critical times', 'policy windows' are opened up. A window may open when 'a new problem captures the attention of government officials and those close to them' (p. 168). These open windows are highly unpredictable and tend only to last as long as the attention of government decision makers and officials.

All three of these theories offer insights on how institutions like planning may impose certain rules and procedures that 'make some outcomes possible and other outcomes unlikely' (Kingdon, 1995, p. 230; 2003). The complexity of the policy process means that concentrating on any single force, such as a social or structural one, is not productive. Rather, argues Kingdon (1995, p. 230; 2003), scholars should 'do more work on specifying the conditions under which and the ways in which policy making works from the top down or the bottom up'. This research focuses on the way in which policy is shaped through planning events. While earlier research has focused on the role of coalitions in creating opportunities for change in BC (e.g. Crist, 2012; Smith and Sterritt, 2010), this research uniquely characterizes the conditions created through the institutions themselves, their relationship to wider events and forces, and the opportunities made available by Indigenous rights. For these reasons, Hajer's and Sabatier's ideas play a smaller role in the analysis. Kingdon's work is more useful, and has already been used to consider separate case analyses in BC and Haida Gwaii (Cashore et al., 2001; Mitchell et al., 2010). The central concepts chosen for this research have been selected to characterize the conditions under which change occurs in a planning setting where reconciliation is being pursued. The first order concepts of power and scale are presented in

the previous chapter to characterize the relationship between analyses of planning and addressing big questions about governance related to reconciliation. This chapter focuses on second order concepts, specific mechanisms of change that operate within these broader relational power dynamics. How exactly are opportunities created to shape policy through structures and processes made available by government-led planning events? And, how are these opportunities modified over time or through processes of development control? Four analytical concepts selected to address these questions: (a) venue shopping; (b) opportunity structures; (c) logic of appropriateness; and, (d) planning reform. The specific rationale for selecting each of these ideas is presented below.

#### (a) Venue shopping

Political actors may decide to seek out new institutional arenas, more receptive to their issues, in a process referred to as 'venue shopping'. Rough (2011) defines policy 'arenas' as spaces where sets of formal and informal rules are established for determining who is included, who is excluded, and the procedure for achieving a decision. While these arenas have conventionally been considered 'a neutral container for discussion', which neither inhibits nor facilitates change, a number of important studies have demonstrated that such arenas can function as a space to enhance public engagement with complex policy issues (e.g. Dudley and Richardson, 1996; Grove-White, 1991 in Rough, 2011). Indeed, political actors may seek out certain institutional spaces that grant more favorable meanings to their interests (Baumgartner and Jones, 1991; Dudley and Richardson, 1996).

The concept of 'venue shopping', first proposed by Baumgartner and Jones (1991), provides a useful tool for examining this kind of strategic action. In their seminal paper, the authors argue that one way for actors to have their issue heard is to 'search for a more receptive political venue' (p. 1050). Each time a new venue is sought out, the issue must be redefined to suit the new venue. With a change in venue, more attention is given to the issue, leading to further venue shifting. Strategies for venue shopping can benefit from mobilization of new actors but other factors are key, including the culture or ideology of the political organization accessing the venue (Pralle, 2003) as well as the political environment, available resources, type of issue pursued, and stage in the decision process, among other factors (Constantelos, 2010). In some circumstances, political actors may have 'little choice but to search for an

alternative venue when significant barriers prevent their meaningful participation in others'. This process is characterized as 'settling for a venue rather than shopping for one' (Pralle, 2003, p.255). Actor decisions may also encourage stability, when policy actors strategically decide not to venue shop (Pralle, 2003).

Venue shopping has been employed to understand how Indigenous political actors have sought out the courts in an attempt to change the way in which the Crown views Aboriginal rights, resulting in dramatic spillover effects for provincial forestry policy in BC (Cashore et al., 2001). Other examples of this strategy can be identified in case studies presented in the Indigenous planning literature. Hibbard and Lane (2004) offer examples of political demonstrations and blockades that were used to achieve co-management regimes or legal settlement to generate monies that were then used for land use management activities. Barry (2012, p.225) looks at the influence of the courts in creating 'new spaces of opportunity' for developing 'government-to-government' decision-making regime in Coastal British Columbia. Others highlight the importance of direct action and the media during an election campaign to leverage opportunities to establish new collaborative resource management regimes (Takeda and Røpke, 2010). The notion of 'opportunity structures' provides us with a complementary conceptual tool to understand why actors might seek out particular venues and how some venues might be more successful than others.

#### (b) Opportunity structures

Political opportunity structures are 'configurations of resources, institutional arrangements and historical precedents for social mobilization' (Kitschelt, 1986 in Cowell and Owens, 2006, p.404; 2011). These structures can be used to facilitate or, in some cases, constrain social movements and other political outcomes (Kitschelt, 1986 in Cowell and Owens, 2006). They can be compared across case studies to distill some of the factors that might lead to transformation (Kitschelt, 1986). The structures can also operate in ways that are endogenous or exogenous to the institution in question (Constantelos, 2010). This concept has been applied to planning (e.g. Cowell and Owens, 2006; 2010; Inch, 2009; Newman, 2008) and attends to the dual possibilities of planning as both 'transformative and oppressive' (Barry and Porter, 2011).



Indigenous rights have been granted significant attention in the Indigenous planning literature (Hibbard et al., 2008) and can be viewed as a type of opportunity structure. In Canada, Aboriginal rights (including title) trigger certain legal duties that the Crown must honour when decisions may impact these rights (Isaac and Knox, 2005; INAC, 2011), as outlined in Chapter One. There are a number of characteristics of these duties that are useful for understanding how they function like opportunity structures in planning and, thus, how we might best capture them in an analytical research framework. More details on this are provided in Chapters Four, Five, and Six. In practice, BC and Canada have adopted consultation and accommodation policies in an effort to fulfill the Crown's legal duties and to meet their broader reconciliation policy objectives (INAC, 2011, p. 8; Province of BC, 2011, p. 4). These policies are an integral part of government land use planning practice, tied to a diverse range of government decisions. Notably, those decisions affecting land and resource use that may affect these rights. While the Crown's legal duty is tied to the Crown itself (i.e. it is not a statutory duty), the practice of consultation and accommodation is usually tied to statutory decisions (McDade and Giltrow, 2007).

The federal structure of Canada's governing institutions, specifically the overlapping and multilevel nature of statutory decision points, have important influence over the practice of consultation and accommodation. For example, Canada is responsible for fish and marine transport, so any infringement upon a right in relation to these responsibilities requires the relevant federal government ministry to respond within their defined statutory authority. Land and resource planning usually falls under provincial government jurisdiction. The provincial and federal governments both take responsibility for aspects of water quality, economic development, species conservation, and 'protecting' Aboriginal rights. Both levels of government also have their own environmental assessment legislation and other statutory and ad hoc arrangements for marine and climate planning. In short, these opportunity structures exist within a series of overlapping and multilevel planning decision points. In planning and environmental assessment, a single window consolidates many of these separate decisions points so consultation and accommodation activities apply to a whole project (INAC, 2011; McDade and Giltrow, 2007). Baumgartner and Jones (1991) suggests that venues, like each of these decision points, each have a unique character. Following this logic, we can say that each decision point is unique in its way in which the Crown undertakes its

duty. Kitschelt (1986, p. 58) suggests that case studies may be compared to demonstrate how opportunity structures influence actors' choice of strategies and their effects. Chapter Three considers how the case study method is adopted in this research to compare opportunity structures.

The venues that have been subject to the most research occur within the same federal level jurisdiction, though increasing attention has been paid to other levels (Constantelos, 2010). Indeed, it must be assumed that most venue shopping benefits from the 'multiple channels of influence' offered within plural liberal democracies (Constantelos, 2010, p. 461). While earlier theories on policy change posit that these kinds of overlapping and multilevel systems allow for those who oppose change to resist it in a variety of locations (Bardach, 1977 in Pralle, 2003), more recent thinking suggests that this structure is more amenable to creating opportunities for change (Baumgartner and Jones, 1991; Pralle, 2003). Literature on the planning reform process – conceptualised as speeding up or streamlining planning processes – is used in the next section to examine how the state may modify or close down opportunity structures and how this might, in turn, affect venue shopping strategies within a complex overlapping and multilevel planning system.

Opportunity structures even within a single planning venue may also function to *constrain* political efforts (Kitschelt, 1986). These constraints may be placed upon Indigenous political actors. Critics argue that reconciliation, or the related vocabulary of 'mutual recognition... [.] promises to reproduce the very configurations of colonial power that Indigenous peoples' demands for recognition have historically sought to transcend' (Coulthard, 2007, p. 439; Barry and Porter, 2011; Tully 1995). This discourse of recognition dominates Canadian policy on Aboriginal rights, characterized by recognition of a right to self-determination or a right to benefit from land and resources. Dene<sup>15</sup> political science scholar, Glen Coulthard, argues that these politics are 'profoundly asymmetrical and non-reciprocal... either *imposed on* or *granted to* [Indigenous peoples] by the colonial-state and society' (2007, p. 439, emphasis added). These politics are not sufficiently 'sensitive to the claims and challenges emanating from... dissenting Indigenous voices' (2007, p. 447).

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15 Dene is a broad category of Indigenous peoples who inhabit the Northwest Territories and Nunavut in northern Canada and share the same northern Athabaskan language.

### (c) Logic of appropriateness

The concepts of venue shopping and opportunity structures provide a sense of how planning might be used to influence reconciliation and related policies. Policies are often identified as institutions and, thus, may be conceptualized within institutional theory. From a broad conceptual level, this dissertation aims to shed light upon the relationship between the dynamics of planning institutions and the strategic behaviour of political actors in the process of reconciliation. Much of the Indigenous planning literature has relied upon existing planning theories (Hibbard et al., 2008). This research raises the analytical lens from within a planning space to the institutional level in order to examine the way opportunity structures are accessed and any potential relationship to planning reform. While the discussion on venues above provides some insights on what is meant by institutions, further conceptualization is needed to understand the next key concept of 'opportunity structures'.

Drawing from March and Olsen (2006) and Peters (2005, p. 29), institutions are defined as a collection of related 'rules and routines that define appropriate actions' in relation to 'roles and situations'. 'The process involves determining what the situation is, what role is being fulfilled, and what the obligation of that role in that situation is' (p. 29). Institutions 'are defined by their durability and their capacity to influence behaviour of individuals for generations' (Peters, 2005, p. 29). They 'provide vocabularies that frame thought and understandings and define what are legitimate arguments and standards of justification and criticism in different situations' (March and Olsen, 2006, p. 691). Institutions are constituted by formal and informal rules, where 'old institutionalism' was centrally concerned with the role of bureaucracies, legislatures, legal systems, and firms as drivers of collective social behaviour, following the work of Veblen and Weber (March and Olsen, 1984 p. 734). These kinds of institutions have 'receded in importance' under 'new institutionalism', where these traditional institutions are simply 'arenas' where 'more fundamental factors' drive political dynamics (March and Olsen, 1984, p. 734). Today, policies, laws, and social norms are all important institutions. It is important to distinguish between institutions and organizations because institutions exist as an ideational entity, while organizations are composed of material resources and personnel though may be constrained by (or facilitated by) institutions (Peters, 2005).

Within this framework, then, planning arenas function more like traditional or formal institutions like the courts or Parliamentary committees. Empirical institutionalists 'argue that the structure of government does make a difference to the way policies are processed and the choices which will be made by governments' (Peters, 2005, p. 20) among other actors. Such is the case in using the concept of venue shopping to understand actor behaviour, where the characteristics of potential venues influence actors' decisions to seek out new venues (Pralle, 2003). Existing membership in other institutions also influences this choice. Actors associated with multiple institutions, then, 'have to choose among competing institutional loyalties as they act' (Peters, 2005, p. 26).

This is where March and Olsen's (1989) 'logic of appropriateness' comes in. This logic assumes that those interacting with an institution 'will think more about whether an action conforms to the norms of the [institution] than about what the consequences will be' for their own self (p. 29). This is placed in contrast to opportunity structures that are used by political actors to seek out their own interests in ways that may not be aligned with that of the rules and routines of the institution. Indeed, this strategic behaviour may violate an institution's 'logic of appropriateness' characterized by March and Olsen, who suggest that 'it is necessary to understand the processes through which rules are translated into actual behaviour and the factors that may strengthen or weaken the relation between rules and action' (2006, p. 693). To examine this process, we must study processes such as interpretation of rules, attention directing, 'validation of evidence, codification of experiences into rules', and resource distribution (March and Olsen, 2006, p. 694).

What is important to note, though, is that 'even the most thoroughly developed institutions will leave many areas of behaviour open to interpretation by individual members' (March and Olsen, 1989, p. 30). The rules of Aboriginal rights in planning is a good example of an institution that is left open to interpretation (Egan and Place, 2012). Like other institutions, then, interpreting the appropriate way of undertaking consultation and accommodation of Aboriginal interests 'require[s] some means of monitoring behaviours and reinforcing dominant views about appropriateness' (Peters, 2005, p. 30). Other theorists argue, however, that the idea of appropriateness is 'rather vague' (Peters, 2005, p. 31). The planning reform literature offers a set of concepts to sharpen the idea of appropriateness and better reflect the

empirical focus of this research.

#### (d) Planning reform

Planning reform appears to be a logical enforcement mechanism for acts of perceived deviance from institutional appropriateness. Extreme cases of deviance, or certain 'exceptional' cases, are important for creating 'the common law within organizations [like government] that define what is really appropriate and what is not' (Peters, 2005, p. 31). This offers grounds for conflict, where different people read what is 'appropriate' in different ways – a tension between incompatible agendas and worldviews that makes this concept highly appropriate in an Indigenous planning context.

Authors have observed how planning can function to 'obstruct "essential projects" and raise awkward questions' about the purpose of the proposal in question (Cowell and Owens, 2006, p. 406). Such 'awkward questions' have the potential to link interests of Indigenous political actors with those expressed by the Crown in ways that come into conflict with one another. The linkage that takes place through planning can influence the way actors might view a particular planning venue. Actors may use this information to decide if they should seek out a new venue to take better advantage of opportunity structures like those provided by Aboriginal rights. Actions like venue shopping, raising questions about the social purpose of a development, or questioning if the planning process is itself as an imposition on Aboriginal rights might be viewed as outside of the appropriate use of any single planning venue or system. According to the logic of appropriateness, when the dominant view of appropriate use is violated, the state may act to enforce this view. An enforcement mechanism could include planning reform.

A number of scholars have offered critical theories of the process of planning reform (also referred to also as modernisation or streamlining), much of which is considered within a UK context (Allmendinger and Houghton, 2010; 2012; Cowell, 2012; 2007; Cowell and Owens, 2006; 2010; Inch, 2012; Metzger, 2011; Tewdwr-Jones et al., 2012). Planning reform has been characterized as seeking to 'deliver growth more efficiently' while also taking on board sustainability, climate change, and social justice issues (Allmendinger and Haughton, 2012, p. 93). The government rhetoric of planning reform focuses on 'integration' of policy making

institutions and is often conceived of as a pragmatic response to an accumulation of 'contradictory' or 'redundant' programs that lack coordination (Stead and Meijers, 2009). Reforms include new venue rules, disqualifying some actors from speaking, excluding certain issues from debate (Marres, 2005, in Metzger, 2011), modifying the meaning of some issues, moving planning decision points to higher or lower scales of government, and speeding up decision timelines (Cowell and Owens, 2006). Cowell and Owens (2006) have traced how UK planning reforms under a New Labour government changed or eliminated opportunity structures that were previously available. This finding suggests that planning reform may have important effects on the options available to political actors who venue shop and, thus, the nature of planning change in the future. Such a process does not go unnoticed. Planning reforms in the UK 'have scarcely been consensual' and the ensuing conflicts have 'arguably exacerbated reaction' (Cowell, 2012, p.15).

As outlined in the previous chapter, it is clear that planning systems are not static. They are the sum of planning traditions, power dynamics and conflict that operate relationally between scales and across space. Planning not only has as a 'strategic and steering' function, but also a less democratic one that is 'subservient to powerful vested interests in the development process' (Allmendinger and Haughton, 2010, p. 809; Yiftachel, 1998). The objects of governance, such as those that are high on the government agenda, will have a very important influence on the modes of governance that establish the procedural conditions for planning and decisions around these objects (Cowell, 2007; Jessop, 2002).

Drawing from the above arguments, it is theorised that government reforms may actively target opportunity structures that are used by political actors. As suggested by Cowell (2012), conflict may erupt as a result of these reforms. Conflict has an important role to play in shaping power dynamics and providing opportunity for change, as outlined in the previous chapter. It is also important for shaping venue shopping strategies: (1) conflict may expanded and/or be displaced to alternative venues, sometimes to different scales and modes of planning, sometimes facilitating the effectiveness of opportunity structures in the original venue; (2) conflict may be shielded from other venues so actors may be limited in their ability to shift venues; and (3) conflict can be reduced.

*(1) Expansion / displacement:* Inch (2012) argues that planning reforms aimed at 'closing

down' a space do not necessarily destroy political energies. Instead, they may generate a 'range of displacement effects whereby conflict is channelled in different directions' (p. 533; Allmendinger and Haughton, 2010; Metzger, 2011; Owens and Cowell, 2011). In his research, Inch observes that politics that were once managed by higher orders of government are displaced to local-level planning venues. He argues that conflict at this later stage and lower scale in the policy process may require more time and resources to adequately address a conflict than at the policy development stages. Dealing with this conflict by centralizing power and authority and denying rights to citizens, he argues, has the potential to create 'a generation of NIMBYs' [not-in-my-backyard], or citizens disillusioned with planning (Inch, 2012, p. 520).

This displacement occurs across temporal and spatial scales of governance. However, displacement may also occur across different modes of governance. That is, certain industry sectors or policy issues will be treated differently than others. In the UK, national policies aimed at expanding wind energy and other renewables have been tied to planning reforms (Cowell, 2007). In Canada, major projects and pipelines have recently been afforded greater federal-level state control (Doelle, 2012). Despite this control, there remains a kind of 'territorial struggle' between planning arenas operating at different scales that may result in wider effects on the policy process (Dierwechter, 2008; Cowell, 2012; Inch 2012). For example, the federal government may grant certain powers to provinces and, in turn, provinces may grant powers to local authorities. Other issues exhibit jurisdictional overlap between provincial and federal governments (e.g. offshore oil and gas and major projects in BC). According to Borrows (1997, p. 418), Indigenous governments 'live at the margins' of this legal imagination, 'caught between the peripheries of competing political jurisdictions'. The Haida Nation, for example, operates as government with jurisdiction for all of Haida Gwaii. While their work may be continuous and integrated across all related parts of the environment, they work with the provincial and federal governments that have segregated authority (Jones et al., 2010).

According to Baumgartner and Jones (1991), the act of venue shopping may expand or displace conflict as well. Those who lose the policy debate in one venue might move venues and change the roster of participants to gain traction over the policy issue. Sympathy might be

gained by 'concerned outsiders' or an increase in media coverage. And, finally, decision makers from another venue might attack existing institutional arrangements to expand their jurisdiction.

*(2) Shielding political issues:* Some venues may not be receptive to a particular policy issue, effectively shielding an issue from rival interests (Dudley and Richardson, 1996, p. 64). Since each venue has its own character and is more or less receptive to certain policy issues (Baumgartner and Jones, 1991; Dudley and Richardson, 1996), some issues may not 'travel' to other venues very well (also see 'policy mobilities' such as Peck and Theodore, 2010). It might also be the decision of the political actor to avoid the venue shopping strategy, perhaps due to lack of resources or available options (Pralle, 2003).

*(3) Neutralizing political issues:* Baumgartner and Jones (1991) outline how elites in a planning venue can reinforce their advantageous positions by keeping alternative policy issues off the agenda or use various manipulative frames to achieve the same objective. However, a central struggle lies in the problem definition. How is the problem defined in the venue? If planning reforms change the rules of a venue, then this may have important effects on the way an issue is received in a venue. A political issue can also be neutralized in this way by expanding the purpose of a venue to include other objectives, like economic growth. This may function to dilute the policy purpose (Cowell and Owens, 2006, p. 416) and, possibly, the political energies associated with it.

### ***Summary and synthesis: Theoretical propositions***

Recent scholarship on Indigenous planning has offered important insights on the way planning has been, and continues to be implicated in dispossession and colonialism (e.g. Barry and Porter, 2011; Hibbard et al., 2008; Porter, 2010). In Canada, planning is used by the Crown as one of the most frequently arenas for implementing its policy of reconciliation. The approach has raised important criticisms of the purpose and aims of reconciliation, confirming the colonial qualities of planning. Despite, or perhaps because of, these criticisms, consultation is often used to leverage resources and create more jurisdictional space for Indigenous political actors to have their interests heard in policy implementation and regain some control over their lands. Other potential mechanisms of change are available in these



spaces of engagement that can influence broader policies, the process of reconciliation, and the spaces themselves. For these and other reasons, planning provides a highly appropriate lens for examining the scalar complexity and inherent unevenness of the reconciliation process. It is posited that while these spaces operate in ways that *tend* to be colonial and function as a process for implementing resource development agendas, certain conditions and mechanisms *are* available in planning systems that can be used to open up opportunities for changing the way in which reconciliation is implemented across this system.

A set of propositions have been developed out of the analysis presented in Chapters Two and Three to guide this research. Unlike previous work in Indigenous planning that has focused on communicative planning theories to explain transformative change, this research considers the nature of the institutions themselves (following Barry, 2012). The previous chapter examined broader questions of power, scale, and governance to consider the conditions that set the stage for planning, the possibilities for change, and the immense challenges. The policy change literature offers a useful vocabulary for broadening the character of the legal mechanisms of reconciliation identified in Canada's law. The propositions distilled from this thinking are outlined below.

1. Planning is a contested space that has particular functions and qualities that limit its utility to serve as a venue for reconciliation. The mode of planning is influenced by the objects it governs and may not align with goals of reconciliation. (Notably, it serves to guide decisions using evidence and opinion and also serves an expressly political function. It is characterized by its unevenness and value conflicts.)
2. Consultation in planning is likely the most common decision space used by the Crown to implement Canada's reconciliation policy. The space is created by the Crown and, so, begins on uneven ground. Several mechanisms of reconciliation are available in Canada's planning system that may be used to shape its implementation, with important implications for resource development and planning policies. The posited functionality of these mechanisms is described below.
3. Spatial and temporal scale is an essential tool for influencing the function of these mechanisms. In fact, a rights-based approach to reconciliation relies upon a strong tie

to place that directly challenges the approach to implementing reconciliation policy today.

The posited functionality of the mechanisms of reconciliation are as follows:

1. Actors may venue shop to seek out alternative venues and opportunity structures in order to have their interests heard. Legal mechanisms triggered by Aboriginal rights may function like opportunity structures in planning venues. These strategies have both transformative and oppressive possibilities.
2. When Indigenous and Crown interests are encountered in planning spaces, they may either (a) come into conflict and actions may violate the Crown's view of appropriate use or (b) come to an agreement that defers reconciliation to another venue or time period.
3. When the dominant view of appropriate use is violated, planning reform may be used as an enforcement mechanism. Reforms not only enforce appropriate use but may also modify the structure of planning institutions in ways that can affect the potential for actors to venue shop and exploit opportunity structures in the future.

March and Olsen (2006, p. 700) remind us that '[c]hange is not likely to be governed by a single coherent and dominant process'. The propositions above highlight the complexity of research on institutional change where there is a multilevel and overlapping planning system involving competing Indigenous, federal, and provincial perspectives. The next chapter builds upon this framework to construct a research methodology that attends to this complexity.

## CHAPTER 4. CASE STUDY RESEARCH AND HAIDA GWAI

### *Introduction*

Occasional moments have arisen during my PhD research, where I have been working with Indigenous communities in south-east Australia on environmental planning issues, which have stopped me dead in my tracks. Every one of them has initiated an 'aha' moment, requiring a deep questioning of the path I was following. Every one of them has constituted a profound challenge to me as a person, shedding light on how my own perceptions and values were powerfully embedded in my research design (Porter, 2007, p. 104).

Through the course of this PhD research, a series of experiences profoundly challenged my own personal identity and values, a process that radically shaped this research design. The resulting, rather messy research process is described in this chapter. These experiences were unexpected, especially since I have worked with, what I had thought to be, similar communities and in similar contexts in the past. This kind of personal transformation took time to grapple with and to reflect upon, then more time to figure out it would shape a new research methodology. Time was also required to find a new set of literatures to conceptualise the revised research problem and help articulate this research experience.

The objective of this chapter is to describe and justify the research process and methodology. Much of this chapter examines the changes made to the methodology throughout the process. Influenced at first with social research methods used in non-Indigenous contexts, the accumulation of 'aha' moments experienced in 'the field' led me to seek out literature on research in Indigenous communities in Canada and the Indigenous planning literature outlined in Chapter Two. (I was unaware of either of these literatures for the first half of my PhD.) The research methodology was also influenced by the opportunity available to witness the unfolding of Enbridge Northern Gateway events in Haida Gwaii in early 2012. These two separate research experiences converged in mid-2012 and led to the research design described in this chapter.

The theoretical arguments for the dissertation are generally concerned with similar lines of inquiry posed in the Indigenous planning literature. Drawing upon literature on scalar politics, reconciliation, and institutional dynamics, it is posited that while these spaces operate in ways that *tend* to be colonial and function as a process for implementing

development agendas, certain conditions and mechanisms are available in planning systems that can also be used in ways that open up opportunities for changing the way reconciliation is implemented across this system. Planning is tied to mechanisms for influencing the Crown's interpretation of Aboriginal rights and reconciliation, which (under certain conditions) can be used to have transformative effects upon the planning system. The veracity of these claims will be examined through this dissertation, guided by the following research questions: *What opportunities exist for reconciliation to take place within the planning system? To what extent are wider shifts in the state and scales of decision-making supporting or thwarting effective reconciliation in planning? What is the character and durability of these changes?* The mechanisms of reconciliation are conceptualized in drawing upon the policy change literature, focusing on the concepts of venue shopping, opportunity structures, logic of appropriateness, and planning reform.

The chapter provides a methodology to ground these ideas in a set of empirical case studies. It is organized into four sections. The first section outlines the case study research design and justification for its adoption. The second section describes two in-depth case studies chosen for this research and justifies their selection. The third section presents the research methods and explains how they are used to observe the planning case studies and analyse the evidence. This final section discusses the challenge and appropriateness of using a discursive design with guidance taken from Indigenous research methodologies. The final section offers insights on the challenges and benefits of undertaking research on an event unfolding in 'real time'. A number of complex ethical issues were faced throughout the research process and are also discussed in this chapter.

## **1. Designing case study research**

Gerring on the 'case study paradox': 'although much of what we know about the empirical world has been generated by case studies... the case study method is generally unappreciated' (2007, p. 8).

Gerring defines the *case* as a phenomenon or unit that has a spatial boundary and can be observed, while the *study* 'attempts to elucidate certain features' of the phenomenon (2007, p. 19). A case bounds the phenomenon or unit of study to define 'what' is to be studied. A case can be studied in several ways. It is valued for its intensive, rich, and detailed descriptive

qualities that allow researchers to consider important contextual information (Flyvbjerg, 2011). At a basic level, case study research provides opportunities to observe several dimensions of a phenomenon. These observations may be accumulated all within a single case (within-case) and / or across more than one case (cross-case) to be compared. In any single case study, it 'is common to combine several cases' and, thus, allow for a research design that includes both within-case and cross-case approaches to examine the observed case dimensions (Gerring, 2007, p. 27). This is the approach taken here.

Indigenous planning research has tended to apply a case study research design, often drawing from in-depth case studies in one place. This place-rooted design may be partly due to the fact that empirical observations rely upon intensive and time consuming research methods that are often considered to be more appropriate in Indigenous research contexts. Turnbull (2007, p. 140) highlights the 'challenge created by multiple incompatible ontologies and perspectives'. He suggests that this challenge 'is well known to researchers working with Indigenous knowledge and geography' and requires a lot of work to avoid subsuming knowledge 'into one common ontology'. No easy answer exists for how to address this challenge. Porter (2004) suggests that researchers attempt to reconfigure power hierarchies such as researcher subjectivities or recognizing the researcher as a learner and a participant as a teacher. Research can also be oriented in support of an Indigenous community's political struggle, usually regaining control over land and resources (also see Johnson et al., 2007 and Sundberg, 2013). Scholarly collaborations or community-based research offers one approach to address these concerns. Research can also bring social benefits (e.g. training, jobs, etc.), especially if building long-term relationships in communities is feasible (Castleton et al., 2012). Further discussion on these challenges, and the way in which the selected research approach addresses them, are discussed later in this chapter.

In-depth case study research addresses some of the aforementioned challenges. Intensive research methods can be more sensitive to the nature of political struggles or community needs and focus research efforts in one place. And even though a researcher may be limited to direct observations taken from a single locale, several discrete cases in one place may be delineated, examined over time, and compared. For these reasons, this research develops an intensive, cross-case study analysis in one locale: Haida Gwaii. This research design is

composed of two elements that make it particularly well-suited to understanding the range of institutional dynamics of interest to this research: (1) a series of cross-cases to offer contextual insights on the character and durability of Indigenous planning transformations that have occurred throughout the history of Haida Gwaii and BC and (2) two divergent, in-depth cross-cases on Haida Gwaii to offer insights on reconciliation in the planning process and the causal mechanisms of change. The cases and the justification for selecting them are described in the next section.

## 2. Selecting the cases to study

Two divergent, in-depth cases on Haida Gwaii were selected. In addition to this, a series of historical cases on Haida Gwaii and BC were also selected. A description of these cases and the justification for selecting them are described in the following paragraphs.

*1. Multiple, historical cases:* A series of historical planning events highlight three distinct configurations of Indigenous-Crown government relations to demonstrate how these relations have changed over time in relation to planning. These configurations are: (a) moving people onto Indian Reserve lands and outlawing the 'Indian land question' (mid-19<sup>th</sup> century to 1927); (b) creating barriers and opportunities to challenge this dominant view through the rise of natural resource planning (1960s to 1980s); and (c) the rise of Aboriginal rights and planning controversies (1980s to 2004). Over a dozen separate cases are described, alongside broader policy precedents, political movements, and historic events that situate these cases and the two in-depth cases described below.

These cases provide a descriptive history of the long term planning transformation that has taken place in BC and Haida Gwaii, while also offering a starting point or 'baseline' for reflecting upon the meaning and magnitude of the changes in the two in-depth cases. Specifically, they demonstrate a relationship between (1) how planning has been used by Indigenous peoples in BC and Haida Gwaii to have their interests heard, and (2) how the rules and routines associated with these institutions have been dramatically transformed over the past century and a half. This descriptive history offers some insights on the character and durability of the transformations described in the three planning configurations identified above. Since these are not in-depth cases, they offer few details of venue shopping strategies,

opportunity structures, and planning reforms and, thus, little information on the specific factors that might influence the character and durability of these changes. The two in-depth cases offer more insights on these factors.

*2. Two divergent, in-depth cases:* The two in-depth cases are selected for a more intensive study. Many observations are accumulated in each case in order to understand the 'mechanics' or processes that influence planning change. Observations made 'within-case' may 'shed light on a larger class of cases' (Gerring, 2007, p. 20), such as other, similar Indigenous planning events. The selection of *two, divergent* in-depth cases, allows for observations of these mechanics to be compared across cases as well, to shed light upon the qualities of venue shopping, opportunity structures, appropriate use, reconciliation, and planning reform. Both cases have been encountered on Haida Gwaii. The Council of the Haida Nation (CHN) and the Crown in the right of Canada and BC are the central political actor groups involved in both cases. The CHN is the government body representing the Haida Nation, the 'rightful heir to Haida Gwaii' whose 'culture is born of respect' and 'intimacy with the land and sea and air around us' (CHN, 2000a). In the first in-depth case, the Province of BC is working with the CHN in a collaborative land use planning and management regime while the Government of Canada begins to negotiate their terms within this arrangement. In the second in-depth case, a controversial environmental assessment process is undertaken for a pipeline and shipping project proposed to introduce oil tanker traffic around Haida Gwaii. The CHN remains strongly opposed to the proposed project. At the same time, the Canadian government consults with the CHN on the project through an independent panel review process while also publicly touting the project as 'essential' to fulfill a priority federal government economic policy, and simplifying the decision process part-way through the process.

The first in-depth case is the strategic land use plan and collaborative management regime. The regime was established out of institutional arrangements and events (leading up to and unfolding out of) the 2009 *Kunst'aa Guu – Kunst'aayah* The Beginning Reconciliation Protocol agreement struck between the CHN and the Province of BC. The agreement rests upon the central idea that both parties 'agree to disagree' over who holds rights to the ownership, sovereignty and jurisdiction over Haida Gwaii. It also establishes collaborative political,

strategic, and operations decision tables. The agreement is the legal mechanism for implementing a multi-level, collaborative, and strategic land use plan that was struck only after two important events: (1) the 2004 *Haida v. BC Supreme Court of Canada* decision that altered Indigenous-Crown relations and land policy across the country, and (2) the Islands Spirit Rising road blockade that occurred at the same time as the provincial election campaign (Takeda and Røpke, 2010). The present decision-making regime excludes certain important areas of governance, such as major projects, but affords the Haida Nation greater control over much of their land and resources. While the plan itself only applies to the top two-thirds of the islands, the spatial boundaries of the case extend across the country. Indeed, the events that started out on Haida Gwaii have had long-term and durable influence on Canadian and international law and policy. Two other Haida Gwaii planning cases are briefly reviewed: the NaiKun offshore wind environmental assessment and a collaborative marine use planning process. Neither are extreme cases, but both include pertinent background information on recent planning experiences in the marine environment involving the Government of Canada and aspects of venue shopping that are not present in the other cases. They also demonstrate linkages that are central to understanding the planning reform process presented in the second in-depth case.

The second in-depth case is the environmental assessment for the Enbridge oil pipeline and tanker project that erupted into a national controversy in 2012. The Government of Canada defined the project as necessary to fulfill a national economic policy priority. An opposition campaign was formed around the planning event, resulting in a backlash from government and some of the most significant changes to environmental planning institutions in decades (Doelle, 2012). The narrative for this case ends in March 2013 at the cross-examination phase of the process<sup>16</sup>. This was an important moment in the planning process – participants debated their disagreement over the meaning of the rules of procedure and how they have been interpreted.

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16 This is part of the final phase of the process. Once this phase is complete, the Panel deliberates and writes their recommendations report. The report, issued in December 2013, recommended that the federal government approve the project subject to 209 'required conditions', many of which focus on the risks posed by the project to the marine environment. The Minister is expected to make a final decision in June 2013. More details on the process are included in Chapter Four. While the PhD cannot include this final decision and what unfolds from it, the study focuses on the arguments presented in the oral hearings and how the institutional rules and procedure are interpreted and contested in the questioning phase.



These two planning events are extreme or deviant cases; not typical ones. These kinds of cases can be more informative than representative ones because 'they activate more actors and more basic mechanisms in the situation studied... [Indeed,] it is often more important to clarify the deeper causes behind a given problem and its consequences' than to find a generalization that would be provided in a typical case (Flyvbjerg, 2011, p.306). Such cases may offer 'the force of example' or lessons that are transferable to other cases and are arguably just as valuable as generalizations (Flyvbjerg, 2011, p. 305). The variation or divergence between the cases is also useful here. In both cases, the CHN engages in venue shopping strategies. The first case yields a conciliatory arrangement that has the potential for further transformation and the second case results in significant planning reforms that may shape the planning space and mechanisms of change in the future. Any relationship we might observe between, for example, venue shopping strategies and planning reforms in the first case, then, can be compared to the venue shopping strategies in the second case. So while this case study design might offer more clues about the causal relationships within each case and across a broader class of cases (Gerring, 2007, p. 56), they may also shed light upon the nature of the conditions and mechanisms of change themselves, such as the mechanisms of reconciliation implemented by the Crown.<sup>17</sup>

The cases are also selected for their relevance to the phenomenon under consideration. The two in-depth cases offer extreme examples of planning change, appearing on either end of what might be conceptualised as a range of changes between transformative and oppressive. They are selected to achieve more than one research purpose. Specifically, the in-depth case studies are intended to:

- Document the unevenness, the tension, and the conflict around implementation of policies that might arise through the mechanisms of reconciliation;
- Reveal some of the underlying mechanisms of (transformative and oppressive) planning changes in an Indigenous planning context; and

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<sup>17</sup> The analysis of policy change has its own methodology literature. Howlett and Cashore (2009, p. 35) point out that 'there is widespread acceptance that any analysis of policy development must be historical in nature and cover years or even decades or more'. They argue that such analytical design is not necessarily required 'before meaningful [explanatory] conclusions can be drawn' (p. 43).

- Explain the relationship between broader shifts and scales of governance and the function of planning and mechanisms of reconciliation.

To address these objectives, a set of research methods have been carefully selected to ensure they are appropriate for the methodology and theoretical framework described above and in the previous chapter. Each of these methods is described and justified below.

### **3. The research process and methods**

In addition to carefully identifying and justifying the case selection, the research methods used to collect and interpret information must be described and justified. This section summarizes the research process first, then describes each discrete research method and its limitations. All of these are considered in relation to their suitability for examining institutional change in an Indigenous planning context.

A number of discursive approaches have been employed in Indigenous planning research, such as interpretive textual analysis (Barry and Porter, 2011), while others adopt methods that resemble those used in political ecology (e.g. Yiftachel and Fenster, 1997). Since the literature is rather nascent (Hibbard et al., 2008), very little guidance exists on appropriate methods or methodologies<sup>18</sup>. Instead, a small body of literature referred to as 'Indigenous methodologies' is used to justify the research methods used here: participant observation, interviews, document review, and a form of critical discourse analysis.

#### **Indigenous methodologies**

We maintain that the primary purpose of ethics guidelines (for academics wishing to carry out research with Indigenous peoples) should be to work in collaboration with those Indigenous communities that choose to be involved in research, in order to assist them in the protection of their rights and security (Indigenous Peoples Specialty Group of the AAG, 2010, p. 2).

Castledon (2012, p.163) advocates research that is committed to 'respect, relevance, reciprocity, and responsibility'. This follows Smith's (2006, p. 9) 'decolonizing methodologies' approach that calls for research that is 'more respectful, ethical, sympathetic and useful'. In this approach, research works towards 'developing relationships based on trust; challenging

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<sup>18</sup> For important exceptions, see Porter (2004; 2010).

conventional research paradigms; creating avenues for Indigenous peoples, communities, and organizations to determine the level of involvement they want to take in research processes and outcomes; and developing stronger ethical guidelines' (Castledon, 2012, p. 163). While these methodologies are largely written by and for non-Indigenous researchers, this research is committed to a strong set of ethics that very much reflect my own positionality. Box 1 offers more insights on the way my own identity has influenced the research methodology.

It must be pointed out, then, that institutional and policy change theories have been built upon western paradigms. The long history of institutions and governance that can be traced within Indigenous histories and practices (Berkes et al., 2000) are excluded from this literature. Institutional and policy change theories do little to observe these overlapping and competing ontologies (Turnbull, 2007); indeed, they tend to objectify policy and attempt to offer universalizing theories for policy change (Zittoun, 2009). Calling on others to draw from the teachings of the Indigenous peoples, Sundberg (2013, p. 7-8) considers lessons from the communities she conducts research with and for - the Zapatistas - to identify two main steps for developing methodologies concerned with decolonization: (1) locate knowledge in relation to how we know what we know in ways that allow the researcher to reflect upon their privilege of 'sanctioned ignorance' that has allowed colonial silences to be perpetuated; and, (2) learn to know the other, respecting the multiplicity of life worlds and autonomy, rather than simply learning 'from' or 'about' the other.

**Box 1. Researcher commitment to the idea of reconciliation**

The decision to adopt an Indigenous methodology is important from my perspective. A 'special burden belongs with those who have both benefited from injustice and are favourably situated to ameliorate its effects' (Young, 2004 in James, 2009). As a Canadian of Scottish-English-German ancestry, I acknowledge the injustices that were suffered and the privilege granted to my ancestors who benefited from settling upon Anishinabek lands. Most notably, the benefits accrued over the disagreement between the Anishinabek over the terms of the Longwoods Treaty (1818-1822)<sup>19</sup>, which includes the present and ongoing dispute over title to their lands (Richmond, 2013). The research process has allowed me to develop some tools to begin a personal reconciliation process. Research on diverging perspectives of what reconciliation means and the various avenues for achieving a more respectful relationship have helped me better understand my own position as a researcher, citizen of Canada, settler, and human being.

Jones et al. (2010, p. 5) have highlighted a set of Haida principles that they apply to a marine use planning process on Haida Gwaii, one of which is used in a similar way in this research. The Haida principle that was used to shape the research methodology is *Isda ad diigii isda* – Giving and receiving – Reciprocity. This practice is considered 'essential' in interactions with each other and the natural world. 'We continually give thanks to the natural world for the gifts that we receive'. To grasp the meaning of this guiding principle requires intensive training in Haida ways of knowing that is not possible within the confines of a single PhD. Indigenous ways of knowing are based on a complex fabric of 'stories, values, social relations, and practices' (Nadasdy, 2003, p. 127). This research is very much embedded within a conventional western social research paradigm, interested in a rather specific phenomenon concerned with the disciplines of geography, planning, and policy studies. Even though the methodological framework attempts to attend to multiple, conflicting ontologies, the Haida principle has been distilled to its essence and has lost most of its meaning. Nadasdy (2003, p. 127) critiques this distillation process, suggesting that the process can advantage certain people and interests over others. The process of distilling this particular Haida principle, however, was led by Haida citizens trained in both scientific and Haida ways of knowing. The concept was distilled for use in a marine planning process that was undertaken in a collaborative setting. This research, on the other hand, is an independent PhD project and does not offer a collaborative opportunity with Haida community members. Thus, the concept is adopted without direct Haida oversight. However, efforts have been made to undertake a community peer-review of this research, affording some oversight. The tension between

<sup>19</sup> The Treaty established two reserves in exchange for payment to share the land with British settlers. In the 1820s, one of the reserves was taken away. The 2013 Big Bear land claim agreement gives back this tract of land with compensation, but does not address the broader title dispute (Richmond, 2013).

Haida ways of knowing and western research traditions is raised in a recent collection of scientific studies on Haida Gwaii. The studies highlight the recent 'convergence and a reconciliation of science with [Haida] histories': 'Scientists are still trying to figure out how the sun and the moon got up there, and while they have theories, give them time and they will come back to us. And we can tell them, because it was told' (Guujaaw, 2005, p. xiii).

This (distilled) principle of *Isda ad diigii isda* – Giving and receiving – Reciprocity – is applied to guide the ethical practice of this research. Since significant amounts of information and guidance have been received from residents of Haida Gwaii, this research is designed to 'give back'. The research design addresses this objective in two central ways. First, the original research design included a plan to develop a reciprocal relationship on Haida Gwaii, following the tenets of community-based participatory research (Castledon, 2012) and community-based research (Markey et al., 2009). The research was originally developed to find an opportunity to partner with an organization in a way that would provide a service and/or a 'deliverable' with instrumental value to the organization. This partnership would shape the research question and process in a way that better reflects the values and interests expressed on Haida Gwaii. When it was decided that a collaborative design was not feasible, a research project in addition to the PhD was undertaken instead (a detailed description of this research path is given in Appendix A). The separate project is called 'A Conversation on Research' and involved collecting and summarizing on-island values about research, and reviewing existing research on environmental planning that has been written using evidence collected from or about Haida Gwaii, including published articles, books, and unpublished theses. A brief document summarizing this information has been disseminated and a public discussion on research was held in May 2011. The document has been revised to include ideas raised in this public discussion. The document was made publicly available on the internet<sup>20</sup>, along with most of the original research that was reviewed (with authors' permission). A detailed description of this project is included in Appendix B.

The second way the research design observes the principle of reciprocity is through the adoption of narrative and discourse research methodologies. The narrative methodology has two dimensions that offer qualities of 'giving back': (1) the development of narratives on two

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<sup>20</sup> The URL to access this document is: <https://sites.google.com/site/researchhaidagwaii/home>

in-depth cases will function as useful historical records and (2) the development of a suitable research design (i.e. one that hopes to 'assist' in protecting rights (Indigenous Specialty Group of the AAG, 2010)) could only be conceived of after drawing upon narratives shared by research participants. In essence, the discursive methodology has allowed for reflection upon and refinement of the research design to develop a methodology with instrumental value<sup>21</sup> that attends to the values expressed by Haida Gwaii residents.

The research design was shaped as conversations and interviews revealed stories about Haida Gwaii and values expressed by the people living there. During the first three visits to Haida Gwaii, it slowly became clear that the case selected for the original research design - the NaiKun offshore wind environmental assessment – was not in line with a unified set of Haida Gwaii values. Much of the evidence collected in the interviews between 2010 and 2012 highlighted a deep division in the community that was exacerbated by the proposed offshore wind project. When the topic of the NaiKun wind farm was raised in group settings, such as at a weaving group I had joined, women who had been chatting away like good friends only a few minutes before started to engage in serious debate over the merits of the project with the express objective of convincing the other that they were right. Much was riding on these opinions since a vote was scheduled over the business deal for the project, viewed by some as a proxy for Haida approval.

For those who were interested in sharing and talking more, I was often mistakenly viewed as an ally to the opposition of the project. I was presented with research and evidence that the opposition had collected to build a case for why the project should not go ahead. In my interviews there was a lot of anger directed towards other members of the community who supported the project, with citizens blaming leaders for 'being bought off by the company'.<sup>22</sup> Many leaders and citizens were also critical of the way the Haida Nation engaged in consultation with their own citizens:

The meetings were small and not advertised well... It felt like 'consultation' with government<sup>23</sup>.

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21 At this stage, this instrumental value is theoretical. Only time and concrete feedback from those who might read and consider this work will offer insights on this. It is expected that each empirical chapter will be rewritten into a much shorter summary document that will be of interest to more people.

22 Interview 25 with Haida leader.

23 Interview 23 with Haida citizen.

There is still a lot to learn in terms of consultations for NaiKun itself, but I think we committed many of the same mistakes as the federal and provincial governments on consultations before. We'd walk into the meeting and say, 'this is really good for you, you should buy into it'<sup>24</sup>.

Furthermore, much of the evidence offered to explain this division was attributed to particular clan histories and certain ways of interpreting Haida laws. These debated histories and laws are not widely published or often shared with outside researchers and rightly so. Without a careful and focused analysis of these ideas, they may be misinterpreted or even perceived as a weakness of the Haida Nation. None of this evidence presented to me has been used because, as suggested above, this research intends to respect and honour the ideas and values presented by the Haida Gwaii community.

Some of these central ideas and values honoured here are expressed through the ongoing dispute with the Crown over title to Haida Gwaii. Most research on Haida Gwaii can be interpreted as supporting either the Crown or the Haida side of this dispute. It is my own political position to respect and honour the case presented by the Haida Nation and be critical of the case presented by the Crown. This is a personal decision that has a basis in my own identity and position, as explained in Box 1, above.

The evidence collected for the NaiKun case did not appear to dwell upon this dispute and, instead, the focus was on the industry-Nation relationship. Interviews focused on corporate social responsibility and community expectations for 'doing business' in Haida Gwaii:

[NaiKun soon] realized that you don't knock on someone's door and tell them how to do business. You knock on their door and ask, how can we do business with you?<sup>25</sup>

This kind of industry-First Nation best practice has developed over the past decade (e.g. Gibson and O'Faircheallaigh, 2011). From the evidence collected on NaiKun, critiques could be directed at the absence of the Crown in what is meant to be part of its reconciliation process (also see Krupa et al., in press):

First Nations in general, have their rights and title ignored. But industry has made clear the consultative process... Industry can take a lead... but government should be out in front... Ideally with government, the company sits down with local leadership.<sup>26</sup>

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24 Interview 2 with Haida leader.

25 Interview 25 with Haida leader.

26 Interview 18 with Haida leader.

The Crown simply acted as a final arbiter to grant or deny NaiKun permission to develop, and consultation and accommodation were effectively undertaken by NaiKun. This a far cry from the idea of the 'middle ground' offered by Borrows (2002) in the previous chapter. It is also an approach that appears to function well for the Haida Nation in seeking economic development, but offers limited insights on questions of planning transformation and reconciliation. It is my own identity, as a European settler descendant and Canadian researcher, that gives me reason to focus on the notion of reconciliation rather than economic development or industry best practice. Box 1, above, presents these ideas.

In a large number of early interviews and conversations, I was told stories of the history and politics of Haida Gwaii, including Haida oral histories of long long ago *K'aaygang.nga* and more recent forestry and fishery conflicts. Many stories led up to the new BC-Haida collaborative land use regime, articulated in interview and document quotations presented in Chapter Four. From these perspectives, the regime signals a turning point in the history of this place from a history of conflict with the Crown to one of cooperation. These experiences shaped the research design, pulling me towards the land use regime case and pushing me away from the NaiKun offshore wind farm case. The specific narrative method selected for this research is outlined in the next section.

### Observation through narrative and discourse

Stories are central to the history of civilisations and a shared part of what it means to be human. They are also an important type of discursive methodology that have gained some favour in planning theory through the work of John Forester (1993; 2009; 2012) among others (e.g. Sandercock, 1995; Throgmorten, 1992). Experiential knowledge is privileged in stories, where listening, interpreting, and meaning is sought after rather than 'truth' or some sort of abstract or objective reasoning (Sandercock, 1995). Tully (1995) offers a useful description of the utility of storytelling in epistemological exchange:

By listening to the different stories others tell, and giving their own in exchange, the participants come to see their common and interwoven histories together from a multiplicity of paths. Nurturing a reflective awareness of the diversity of cultural perspectives is a major function of Aboriginal storytelling (Tully, 1995, p. 27).

Research that adopts this approach, then, has the potential to attend to the overlapping and



competing ontologies inherent to Indigenous geographical research (Turnbull, 2007). The approach also observes the complex theoretical boundaries of 'reconciliation', which also seep into the research methodology. Narrative is an approach that can seek out a 'middle ground' through which the researcher and the researched may view one another.

As a tool for researchers, narrative can be useful for understanding planning practice. Forester (1993; 2012) uses what he calls 'practice stories' that aim to describe real narratives of planners doing planning in way in which reveal the 'micro-politics' of planners' speech (2012, p. 14). It is the analyst's responsibility 'to listen carefully to practice stories to understand who is attempting what, why, and how, in what situation, and what really matters in all that' (1993, p.186). Narrative is also appropriate for case study research. Flyvbjerg (2011) suggests that a well-written and richly detailed story of the case study, with a beginning, middle, and end, can allow the reader to interpret and conclude without being entirely guided by ideas brought forward by the author. Such an approach may also go a long way to give readers some freedom in bringing their own epistemologies to reading the case studies.

Chapters Four and Five present the case studies in narrative form. Since case study narrative construction requires an accurate description of the case itself, accuracy of the evidence is ensured by sharing the empirical chapters with range of participants who have been involved in the case study events.<sup>27</sup> Through this process, 'respondents are confronted with the findings' while also functioning as a kind of empirical 'check' to ensure the author's analysis 'made sense' (Hajer, 2006, p.74). Indeed, field work like this offers a 'powerful disciplinary force' for researchers; subjects can 'talk back' if a variable or interpretation is wrong (Geertz, 1995, in Flyvbjerg, 2011).

Narrative can also be a powerful tool for understanding institutional change. These and other kinds of discourses have gained increasing attention in institutional theory and policy studies, but remains at the margins (Zittoun, 2009). Instead, policy analysts often treat policy as a 'factual' object, as though laws and institutions 'can be observed independently from participants' (Zittoun, 2009, p. 66). The use of discourse and ideas offers 'a useful corrective

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<sup>27</sup> Numerous key informants have reviewed segments of the case study narrative and few have offered feedback. It is expected that the final empirical chapters will continue to be presented and circulated to a number of key informants following final submission.

to the limits' of institutionalist approaches, criticized for their 'static and overly deterministic' characterization of institutions and explanations, 'and a tacit acknowledgement' of the limits of these approaches in explaining policy change (Schmidt, 2008, p. 304).

Discourse and narrative, then, are highly appropriate subjects for observing planning reform and transformations in an Indigenous planning context. These phenomena cannot be easily or appropriately observed by simply tracing 'factual' decision points over time. Rather, institutional change requires consideration of context, defining who says what, and the way political actors make sense of change. An examination of discourse, then, allows analysts to observe institutional change and, equally, institutional durability. The process and methods used to observe discourse are described below, followed by a description and justification of the specific discursive analytical methods used to interpret and find meaning in the observed discourse.

### ***Research tasks, access, and methods of observation and analysis***

#### Research tasks

The research process loosely follows Hajer's ten steps to 'doing discourse analysis' (2006), with important variations. The tasks undertaken to complete this research are provided in Table 2, below. The research methods used to complete these tasks are described in the next sections.

#### Access

Three steps were taken to access information on Haida Gwaii. First, two 'gate keepers' were identified through a personal contact in March 2010, several months prior to the first visit. After a few telephone conversations and emails explaining my intentions, they offered me access to others living and working on Haida Gwaii and directed me to important background information, while also offering advice on doing research on Haida Gwaii. The second step taken was gaining formal permission to undertake research in Haida Gwaii. A formal proposal was submitted to the Secretariat of the Haida Nation<sup>28</sup> in April 2010. There remains no formal

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<sup>28</sup> The staff of the Haida Nation.

protocol for permitting research through the Council of the Haida Nation nor either Band Council<sup>29</sup>. Yet the act of seeking permission was welcomed by participants and was a familiar practice to the researcher.<sup>30</sup> And while the University of Cambridge does not explicitly require this kind of permission either (though does require an ethics self-assessment), other universities' ethics boards whose students were conducting human research on Haida Gwaii (e.g. University of British Columbia) do require that formal permission is granted by the Indigenous government prior to initiation of research. It is also a best practice research standard for geographical research (Indigenous Peoples Specialty Group of the AAG, 2010). The proposed research was approved by the Council of the Haida Nation Executive Committee in August 2010, one month prior to arrival. The final approach to access required time to build relationships, such as 'drinking tea' with people in their homes (Castledon, 2012), joining formal and informal group activities, or spending time at popular social spaces.

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29 Old Massett Village Council and Skidegate Band Council function like a 'village government... [and] are responsible for the well-being of the communities'. They are also 'accountable to... the Constitution of the Haida Nation' (CHN, n.d.).

30 The author has sought permission twice to undertake human research in the Northwest Territories, subject to their *Scientists Act* (1988).

## CHAPTER 4. CASE STUDY RESEARCH AND HAIDA GWAI

1. Desktop research	Preliminary document review to develop: (a) chronology of events for two case studies, (b) insights on policy setting, demographics, and history of Haida Gwaii, BC, and Canada.
2. Exploratory conversations	In-person conversations with over a dozen <sup>31</sup> individuals over a four week period in Haida Gwaii and Vancouver in September 2010 to: (a) 'test' the research design, (b) gather information on cases, and (c) develop relationships. Detailed notes were taken and typed into a digital file. All informants were guaranteed anonymity to encourage openness of discussion.
3. Detailed document review	Intensive review of documents from October to December 2010 to prepare for Task 4. As the research shifted focus, more documents were reviewed as late as March 2013. Some documents reviewed were no longer relevant and excluded from analysis.
4. In-depth interviews and conversations	Over a six month period, starting January 2011, over two dozen <sup>32</sup> individuals were interviewed in Haida Gwaii and Vancouver to develop coherent narratives of the two primary cases. Individuals were identified through a purposive snowball sampling technique <sup>33</sup> . All interviews were recorded and transcribed verbatim immediately following the interviews. Transcripts were shared with participants with only a few edits received back. Informed consent was achieved through verbal agreement, though paper consent forms were offered along with a summary of research objectives, contact information, and my commitment to ethical research. Notes were taken during approximately half of the conversations, about a quarter of which required some follow-up (via email or conversation) to confirm accuracy.
5. Direct observation	In the time spent on Haida Gwaii <sup>34</sup> , notes were recorded on a daily basis to reflect upon informal observations and conversations to develop new insights on the research problem and refine the lines of inquiry. Four full days were spent observing the Enbridge oral hearings in Haida Gwaii in early 2012. I witnessed the Panel hear most <sup>35</sup> of the 71 residents provide their local or traditional knowledge and experience as evidence for the decision-making record. This technique afforded access to the hearings beyond the detailed transcripts taken by the Panel's secretary, such as performance, a sense of the emotions, and informal discussion between participants in the room.
6. Write case study narrative	Case narratives were written, drawing upon evidence and analysis using methods below. These went through many edits, with final versions presented in Chapters Four and Five.
7. Case study interpretation	The interpretation process took place as field was taking place and afterwards, but the writing process offered the best opportunity for analysis. Most writing took place between

31 More conversations were undertaken, but they were set aside after the research design shifted focus.

32 While 35 interviews were conducted, only a little more than half were considered to have some relevance to the final research design. Out of these 35, 10 interviews were conducted over the phone.

33 A large list of individuals involved in each case was developed for those living on Haida Gwaii. A large number Crown government, consultant, and industry players were engaged (i.e. interview or conversation) for NaiKun, but only a small number of these representatives were engaged over the other cases. Because of the controversy surrounding the Enbridge case, though, no government or proponent representatives were engaged for this, with the exception of one telephone conversation with National Energy Board staff prior to the initiation of the review process in early 2010. However, most of the information collected for the Enbridge derives from documents and observation.

34 Visits to Haida Gwaii took place: September 2010; January, February, and May 2011; and March 2012. In September, 2012, I returned to teach an undergraduate course credited through the University of British Columbia and spent considerable time engaging with individuals involved in both cases.

35 I arrived on the morning flight and missed the very beginning of the first hearing in Old Massett.

8. Participant reflection	<p>July 2011 and July 2013. In addition to the dissertation, a number of conference papers and presentations were prepared, as well as two journal articles, and numerous draft chapter sections.</p> <p>Feedback on preliminary research findings was solicited from research participants throughout the last half of this four-year PhD. Two public meetings were held in 2012 to present preliminary findings. More than one meeting was held with several participants to discuss the work in progress. As well, draft written work and parts of draft case study chapters were shared with participants to ensure accuracy of the case study information. Discussions were also held with a handful of participants on the interpretation of the case study, where they were asked if they recognized the patterns I have identified.</p>
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Table 2. Research tasks, October 2009 to July 2013

Methods of observation

### a) Interviews and conversations

This research used interview and conversation methods, relying heavily upon Forester (2009; 2012) and Hajer (2006). Gathering what Forester calls 'practice stories', it was assumed that more knowledge about different and overlapping first-hand experiences (rather than opinions) offered a better understanding of each planning case. So, an action-based story of the planning events was gathered. In other words, interviews and conversations were designed to solicit how a participant acted in a planning situation, rather than soliciting speculation on how they responded and why. This follows Forester's (2012, p. 15; 2009) advice to seek out naturalistic inquiry: 'Ask your interviewees not what they think about changing the world but how they've acted in real cases to do it'. This approach responds to Flyvbjerg's (2011) advice: well-written case studies give the reader a sense of experiencing the way institutional change unfolds as each planning event progresses with minimal researcher interpretation.

This approach is not evident in the two main case studies selected and described in Chapters Four and Five. Because many of the interviews focused upon the NaiKun wind farm case, there was very little verbatim interview evidence that was more useful than the documentary evidence available for the selected cases. Instead, these interviews functioned more to shape the research design (as outlined above), and much of the primary evidence for the two main case studies is derived from observation and a large number of conversations. (The quantities of these are described below.)

A standard interview guide was developed at the beginning of the interview process, but was modified for each respondent and as the interviews progressed. This original guide is included in Appendix C. In many instances, the questions were shared prior to the meeting. A 'responsive interviewing' technique was used (Rubin and Rubin, 2005), where the interviewer learned from the respondent as the interview progressed and identified more relevant lines of inquiry than the original series of questions. Self-reflection is important here to identify gaps in questioning and avoid any potentially leading questions. When the respondent's meaning was not obvious, probing and clarifying questions were posed (e.g. 'What do you mean by that?' or their response was repeated back in the interviewer's words). Interviews ranged from 20 minutes to over two hours and took place in offices, cafés, and private residences.

To gain insights into the day-to-day participation in each planning event, face-to-face conversations were held with a large number of individuals (40+). Conversations were formal and informal, but were most valuable in generating observations on how respondents interacted in each conversation (Woodside, 2010, p. 190). Specifically, actors corrected or confirmed language and ideas presented to them on the research problem, a particular line of inquiry, and interpretations or arguments used to summarize preliminary findings. These conversations were also held in groups three times: (1) on the proposed research in Old Massett in September 2010; (2) on the broader conversation on research (that included a summary of the research) in Old Massett in May 2011; and, (3) on preliminary findings in Old Massett and Skidegate in March 2012. A number of one-on-one conversations were also held near the end of the research process to fill in very specific knowledge gaps and to reflect upon research conclusions. Some of these conversations were more formal and involved emails confirming the content of the discussion. In these instances, I asked permission to cite the conversation as a personal communication. Near the end of the research process, conversations were preferred over formal interviews. At this time a number of relationships were forged with informants so that conversations were more accessible. Interviews were viewed to be time consuming and cumbersome for both parties. It was also at this time when the focus of the research shifted away from NaiKun to the two cases selected for this research. Thus, more of the primary evidence collected on the selected case studies was collected through conversations rather than interviews. An aggregated list of participants is included in

Table 3 below. Many participants spoke to all cases and the broader context, so the participants are not separated by case study.

<b>Participant category</b>	<b>Number of participants</b>	<b>Participants interviewed</b>	<b>Participant conversations (approx)</b>
Band council staff or politicians	3	1	2
Haida Nation staff, politicians, matriarchs, or chiefs	18	7	11
Informed residents	17	7	10
Provincial government	8	3	5
Off-island informants	12	5	7
Not used (includes federal government, private companies, or other)	22	12	10
<b>Total</b>	<b>80</b>	<b>35</b>	<b>45</b>

Table 3. List of research participants

Given the political nature of the original case (the NaiKun offshore wind review), participants were assured they would not be identified through the research process. This allowed for more frank discussion in some cases. While many participants were happy to be on the record, all participants are treated the same throughout the dissertation to better ensure anonymity for those participants who did not want to be identified.

As the conversations and interviews were completed, they were analyzed. Analysis took place during these interactions, during transcription, and upon re-reading each transcript. This is a 'naturalistic' form of inquiry, when a researcher always asks 'what is going on?' and 'how does this differ from the prevailing theories or ideas?' (Melia, 1996). This approach evolved out of grounded theoretical approaches that have shaped some of the other methods outlined in this Chapter, such as the case study selection process. It also offers the researcher greater

flexibility to redefine the research plan and ask new questions as more is learned. Such is the 'naturalistic' form of ethnographic inquiry, which has long roots in anthropology and sociology. More information on the discursive analytical methods are outlined below, and the final section highlights the benefits of this method for undertaking research on a topic unfolding in 'real time'.

In this research, interviews were used to piece together a description of events for the original research case (NaiKun) and to direct the scope of the research narrative. Since the original research case was discarded, the interviews were most valuable in shaping the research design rather than in providing a data set. As outlined above, the decision to select the final two cases rather than NaiKun was determined in part through initial analysis of the interviews. Chapters Four and Five do not include many original quotations for this reason. Instead, more and more was learned about the two selected cases through observation, conversations, and documents. Indeed, documents provided a very detailed description of events, including important 'sites of argumentation' (Hajer, 2006, p. 73), and are used throughout the empirical chapters.

#### **b) Document review**

Verbatim records of public meetings, written correspondence, policy speeches, and journalistic pieces can provide glimpses into human action and interaction that make up planning events. Hajer (2006, p. 73) points out that documents may help a researcher begin to define discursive structures and identify 'sites of argumentation'. Documents may include technical reports, policy and legal documents, and news reports among others. Such documents provide not only a basic understanding of the planning and policy process, but also access to the ideas and positions that might be deployed when arguments unfold. The sites themselves can also be accessed through documents, such as verbatim transcripts of hearings, and letters or correspondence that directly address technical and persuasive arguments. Analyzing arguments in documents allow analysts to observe 'what is being said to whom, and in what context'; 'in uttering statements people react to one another and thus produce meaning interactively' (Hajer, 2006, p. 72).

The review process for the Enbridge case resulted in hundreds of newspaper articles,



hundreds of thousands (or more) of pages of technical process documents and scientific studies, predictive models, maps, and verbatim transcripts of all public hearings. Perhaps of greatest value to this part of the research were the spaces where the Council of the Haida Nation were able to put forth their arguments to the federal environmental assessment Panel. In the final phase of this decision process, the CHN was able to question the Enbridge experts and present counter arguments to those presented by the company, critically examining the way the planning problem is framed. Most of the empirical work for this case study in Chapter Five rely upon documents and observation. A selection of key documents reviewed are presented in Table 4 below.

CHAPTER 4. CASE STUDY RESEARCH AND HAIDA GWAIH

Case study	Documents
Multiple historical case studies related planning change and Crown-Indigenous relations in Haida Gwaii and BC	<p>The New Relationship Agreement signed by the Province of BC and the leadership of the First Nations Summit, the Union of BC Indian Chiefs, the BC Assembly of First Nations</p> <p>Province of British Columbia (2010, May 7). Updated procedures for meeting legal obligations when consulting First Nations.</p> <p>Indian and Northern Affairs Canada (2011, March). Aboriginal consultation and accommodation: Updated guidelines for federal officials to fulfill the duty to consult. Ottawa: Government of Canada.</p> <p>Council of the Haida Nation. (2010). Constitution of the Haida Nation.</p> <p>Council of the Haida Nation. (2002). Haida Statement of Claim.</p> <p>Lee, Lynn. (2012, September). People, land &amp; sea: Environmental governance on Haida Gwaii. Prepared for Action Canada Northern Conference, Haida Gwaii.</p> <p>Tennant, Paul. (1990). Aboriginal people and politics: The Indian land question in British Columbia, 1849-1989. Vancouver: UBC Press.</p>
Case 1. Strategic land use & co-management	<p>Council of the Haida Nation &amp; Province of British Columbia (2007, September 13). Haida Gwaii Strategic Land Use Agreement.</p> <p>Council of the Haida Nation &amp; Province of British Columbia (2010, Dec). Haida Gwaii Land Use Objectives Order.</p> <p>Council of the Haida Nation &amp; Province of BC. (2009). Haida-BC <i>Kunst'aa Guu Kunst'aayah</i> – The Beginning – Reconciliation Protocol.</p> <p>Council of the Haida Nation (2005, April). Haida Land Use Vision Haida Gwaii <i>Yah'guudang</i> [Respecting Haida Gwaii].</p> <p>Council of the Haida Nation. (2001-2013). Haida Laas News of the Haida Nation.</p>
Case 2. Enbridge Joint Reivew Panel	<p>Government of Canada (2012, April 17). Responsible resource development: Jobs, growth and long-term prosperity (Economic Action Plan 2012).</p> <p>Oliver, J. (2012, January 9). An open letter from Natural Resources Minister Joe Oliver. The Globe and Mail</p> <p>Joint Review Panel for Enbridge Northern Gateway Project (2012). Hearings held at Old Massett Community Hall and George Brown Recreation Centre in Skidegate.</p> <p>Joint Review Panel for Enbridge Northern Gateway Project (2013, March 11). Cross-examination hearing held at Chances, Prince Rupert.</p> <p>Joint Review Panel for Enbridge Northern Gateway Project. (2012-13) Various procedural directions.</p> <p>Council of the Haida Nation. (2007). Towards a Marine Use Plan for Haida Gwaii.</p> <p>Council of the Haida Nation. (2001-2013). <i>Haida Laas</i> News of the Haida Nation.</p> <p>Various (2009-2013). Newspaper articles.</p> <p>Various (2009-2013). News releases from environmental, First Nation, and government organizations.</p>

Table 4. List of key documents reviewed

### **c) Participant observation**

The method of observation adopted in this research is most accurately described as participant observation. On this method, Agar (1997, p. 1157) points out that much of what we want to know about the world lies in the day-to-day activities of people; 'the only way to access those activities is to establish relationships with people, participate with them in what they do, and observe what is going on'. The method reveals unexpected actions, surprises that are not easily explained and requires the analyst to build context for the action, to find out why it makes sense (Agar, 1997). While ethnographic forms of research have been implicated in 'making settler space' in Haida Gwaii (Grek-Martin, 2007), it also helps bring about those paradigm shifting 'aha' moments (Porter, 2004) necessary for personal and professional growth and empirical discovery.

For the two main case studies, much primary evidence was collected using this method. Chapter Four relies upon documents that were interpreted and discussed in numerous public meetings and events, as well as in the numerous lectures and guest presentations observed and facilitated in the course co-taught in Haida Gwaii. Chapter Five relies upon information collected at four days of oral hearings attended on Haida Gwaii for the proposed Enbridge project.

### ***Method of analysis: Critical discourse analysis***

It is widely held that language does not simply reflect the way in which we view the world in a neutral manner, but actively shapes the world and how we come to know it. Therefore it is possible to explain why something might happen by examining 'argumentative structure in documents and other written or spoken statements as well as the practices through which these utterances are made' (Hajer, 2006, p. 66). Discourse analysis views 'language [as] a central vehicle in the process whereby people are constituted as individuals and as social subjects'. Since 'language and ideology are closely imbricated, the close systematic analysis of the language of texts can expose some of the workings of texts and, by extension, the way that people are oppressed [or presented with transformative opportunities] within current social structures' (Mills, 2004, p. 133-134). This method is relatively well-established for studying institutional change and other social phenomena (e.g. Fairclough, 1996; Hajer, 1995).

The specific approach adopted is often referred to as 'critical discourse analysis' following Norman Fairclough (1995 in Mills, 2004), with roots in Foucaultian discourse analysis (Mills, 2004). This approach assumes that discourse analysis may bring about multiple meanings and any single utterance can have multiple interpretations. Such an analytical approach, then, is vulnerable to subjectivity. When interpreting language, 'it is only really self-consciousness that distinguishes that analyst from the participants' under analysis (Fairclough, 1996, p. 167). It is important, then, to triangulate findings by connecting discursive analyses of language used amongst a discrete group of people (e.g. in interviews or public meetings) with broader use of language (e.g. in media or policy speeches).

While no single method of analysis exists, Fairclough (1996, p. 163) advises that an analyst be guided by a general line of questioning: 'What is going on?'; 'Who is involved?'; 'In what relations?'; and, 'What is the role of language?' This interpreting exercise can then be used to explain an institutional dynamic. This is done by examining how a particular interpretation is reproduced to constitute a social practice. The explanatory power comes in when (a) discourse is shown to be part the process of social practice, (b) there is evidence on the way social structures determine discourse and (c) the reproductive effects are shown to act cumulatively on those structures, 'sustaining them or changing them'. The focus of this research, then, is on the process by which discourses shape planning institutions. Specifically, *how do competing interpretations of 'reconciliation' shape social processes and practices that characterize planning institutions? And, how do these struggles shape these competing interpretations?*

The method for analyzing discourse that is present in the primary and secondary sources identified for this research, then, requires techniques for categorizing argumentative structures and practices that link these utterances to actors and place. The distinct features are already partly categorized by the speaker or writer (Forester, 2012), so clues can be picked up on to identify useful categories for analysis. In this research, much of this analysis took place as the research was undertaken. As more information was collected, the central points of contention were identified. Once these were identified, the data was scanned again to look for more examples of these points of contention. Each scan brought about further refinement of the exact nature of this contention.

While the researcher is familiar with the expert language used in these kinds of planning spaces, it was important to carefully consider each utterance. For example, it is commonly known that phrases like 'honour of the Crown', 'duty to consult', 'traditional practices', 'cultural values', and 'Aboriginal rights' all signal the broader notion of 'reconciliation' within a Crown planning context. Yet other phrases and ideas were raised by other actors in the context of the planning event, such as oolichan or candlefish to signal dispossession of a fish species lost in many rivers when the land was disrespected. These signals have been identified in key documents (and others). When deemed to have value to the analysis, phrases were highlighted in the digital text and saved in a searchable reference management software (called Sente). Many of these phrases and ideas are referenced in Chapters Four and Five.

### ***Researching policy in real-time***

As outlined above, the cases selected for this research changed as the research unfolded. Stories shared by research participants moved the research focus away from the NaiKun offshore wind case and toward the Haida-BC collaborative land use case. This initial shift is due, in part, to the fact that initial findings were unhelpful in their contribution to a set of shared values held by residents of Haida Gwaii, as explained above. The Enbridge case also became a focus of this research near the end of the PhD process (2012) when policy rhetoric surrounding the project became highly divisive and a series of new environmental laws were introduced to Parliament. Appendix A provides more details on this shift in focus. The research design, and specifically the decision to focus on the Enbridge environmental assessment, is very much a product of the policy changes unfolding as the research was taking place, in real-time.

There are several advantages to conducting policy research in real-time. Evidence is produced as the analysis takes place, allowing the researcher to collect information directly from the site of its production, through direct observation. Interview participants will have recently experienced the event in question, allowing them to recall events with greater accuracy. It could be argued that this does not allow sufficient time for an informant to do their own interpretation of events – a rich source for synthesized information (Forester, 2012). Researching a current event also allows the researcher to engage in topical policy discussions

that may, in turn, feed back into the policy process (Davies, 1999).

Research commonly focuses on objects of analysis that are dynamic and changing, yet literature on policy and planning case studies will often examine a 'complete' event, one that has a clearly defined beginning, middle, and end (e.g. Flyvbjerg, 1998; Forester, 2009). Similarly, many argue that research on policy dynamics must be undertaken over long time scales, like ten years or more, to get a suitable understanding of the causes of policy change (Howlett and Cashore, 2009; Sabatier, 1993). Others, however, have pointed out significant disagreement exists over what constitutes a credible historical boundary for demarcating these kinds events (Howlett and Rayner, 2006).

Despite this disagreement, it is suggested here that this kind of real-time policy research may benefit from employing a flexible research design that approaches a research question within carefully crafted yet broad research boundaries to accommodate evidence that might meet more than one research objective.<sup>36</sup> This research employed this approach using the following methods: (1) information was collected on several policy and planning events on Haida Gwaii throughout the research process; (2) the events had a number of possible foci of analysis that could have been well suited for shedding light on the broad research interest in planning and policy change on Haida Gwaii; and (3) fortuitous timing allowed observations to take place on a series of pivotal events on Haida Gwaii for the Enbridge case in 2012 just as the divisive policy rhetoric was escalating.

In-depth case studies appear to be well-suited to the demands of this kind of research as well. Collecting information in one place, where histories and actors overlap, offers a rich suite of research topics to choose from. Even still, there is a chance that the evidence will not adequately address any suitable research objectives. It is the responsibility of the researcher to ensure that there is a range of research options, no matter what the outcomes of the policy process.

## **Conclusion**

In addition to the adoption of a careful research design, the Haida principle of *Isda ad diigii*

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<sup>36</sup> The author is indebted to Dr. James Palmer and Professor Susan Owens for this idea.

*isda* – Giving and receiving – Reciprocity (Jones et al., 2010) offers important practical and ethical guideposts for this research. Specifically, the commitment to 'giving back' is expressed in the research design as follows: (a) documenting the cases in Chapters Four and Five; (b) completing a 'conversation on research'; (c) using narrative and discourse as methods; and, (d) selecting cases that allow for reflection upon the shared values and interests expressed on Haida Gwaii. This was a difficult process and required the synthesis of a number of 'aha' moments that challenged my views and assumptions as a person and a researcher. The decision to focus on the Enbridge case, however, was decided part-way through the research for a number of reasons explained above. In the end, the cases exhibit important contrasting elements around the approach used by the government to address reconciliation in planning. The two in-depth cases selected, provide extreme, contrasting examples of planning change. The intensive, cross-case study design provides the boundaries of the empirical world examined in this research. Indigenous and discursive methodologies provide guidance on selecting the most appropriate set of methods to observe and analyze the bounded cases.

The second case, presented in Chapter Six, is a federal-level environmental assessment for the Enbridge oil pipeline and tanker project that erupted into a national controversy. It includes a series of oral hearings that took place in Haida Gwaii in 2012. The first case, presented at the end of Chapter Five, describes the strategic land use plan and collaborative regime established out of institutional arrangements and events leading up to and unfolding out of the 2009 *Kunst'aa Guu – Kunst'aayah* agreement between the Council of the Haida Nation and the Province of BC. Two small cases are introduced to provide contextual information on marine planning while also highlighting institutional linkages between planning reform and the Enbridge impact assessment.

The changes to decision-making over much of Haida Gwaii in the past decade are dramatic and described in this dissertation. The changes made over the past century and a half are even more dramatic and are briefly touched upon in Chapter Four. This longer history also describes the character and durability of these much longer-term changes to decision-making regimes over land and resources and offers a baseline for examining the changes presented in the two in-depth case studies. Each of these smaller, background cases are represented by very different configurations of Crown-Indigenous relations, characterized in three phases:

(a) moving people onto Indian Reserve lands and outlawing the 'Indian land question' (mid-19<sup>th</sup> century to 1927); (b) creating barriers and opportunities to challenge this dominant view through the rise of natural resource planning (1960s to 1980s); and (c) the rise of Aboriginal rights and planning controversies (1980s to 2004). The next chapter presents these in narrative form.



## CHAPTER 5. REMAKING PLANNING SPACE

### *Introduction*

In Cole Harris' *Making Native Space* (2002), the historical geographer traces the way today's Indian Reserve maps were made in British Columbia (BC). This map-making was the first major state-led planning exercise and provides the basis for much of the present disagreement over property rights. He shows how the most powerful actors in BC made few attempts at reconciling the competing real and imagined geographies encountered while undertaking this task. The consequence has been that Indigenous peoples who have a long history of use and occupation across BC were confined to small spaces of reserve land to make room for incoming settlers. Many tools were used to facilitate this dispossession. One of the central techniques used by the state to make decisions around this dispossession has been to set up formal decision-making venues, like public inquiries or parliamentary committees. Today, these venues can take the form of modern spatial planning processes, which continue to rationalize and impose state-defined rules for considering (property) title. Indeed, it was posited in Chapter Three that while these spaces operate today in ways that *tend* to be colonial and function as a process for implementing development agendas, planning can provide opportunities to influence the Crown's interpretation of Aboriginal rights and reconciliation, which in turn can have transformative effects upon the planning system.

Planning represents an important venue for challenging existing power structures and modes of reasoning (Ellis et al., 2009; Friedmann, 1987; MacCallum, 2009). Even though institutions of planning determine admissible evidence, define the policy problem, and influence the venue itself, engagement with them may have significant emancipatory effects (Barry and Porter, 2011). A crucial critique of planning, however, concerns its modernist world view that favours the values of the dominant society over those of Indigenous peoples (Porter, 2010). This chapter traces the way planning institutions have taken on these dual possibilities (transformative and oppressive; following Barry and Porter, 2011). The two empirical chapters, Chapters Five and Six, describe these possibilities as they have taken place in British Columbia and Haida Gwaii. It becomes clear that there is an increasing reliance placed on these planning venues to inform the reconciliation process. Indeed, planning becomes the preferred venue for engaging with the Crown.

The first half of this chapter examines a series of small cases and related events to understand the character and durability of changes that have been made to planning and decision-making regimes over the past century and a half. Each of these smaller cases is represented by a very different configuration of Crown-Indigenous relations, characterized in three phases: (a) moving people onto Indian Reserve lands and outlawing the 'Indian land question' (mid-19<sup>th</sup> century to 1927); (b) creating barriers and opportunities to challenge this dominant view through the rise of natural resource planning (1960s to 1980s); and (c) the rise of Aboriginal rights and planning controversies (1980s to 2004). These cases also function as a baseline from which the two in-depth case studies have emerged from: (1) the collaborative land use regime that makes up the last half of this chapter, and (2) the Enbridge pipeline and shipping project review presented in Chapter Five. While both of these cases emerge out of the same histories and set of institutions, they offer sharply contrasting examples of how reconciliation is expressed in the planning process.

The second half of the chapter considers a single in-depth planning case encountered on Haida Gwaii. It consists of the events leading up to the co-managed strategic land use planning and management regime that repositions the Haida in relation to the Province of BC, requiring the Crown body to acknowledge and respond to the title dispute. The planning venue itself is perceived to have a variable degree of legitimacy as an avenue for achieving reconciliation with the Provincial Crown government. The wider events and forces that this regime is embedded in has helped to unsettle planning institutions across Canada. This particular regime offers a strong case for demonstrating a turning point in how rights are interpreted and used in planning. Yet, two other examples, the NaiKun offshore wind environmental assessment and the federal collaborative marine use planning process, both rising out of the same broad governance structure and occurring around the same time, offer less favourable outcomes. These other examples are briefly described at the end of this chapter and offer a segue into the second in-depth case of the Enbridge environmental assessment in Chapter Five.

The first half of this chapter relies heavily upon the works of Paul Tennant (1991) and Cole Harris (2002) who offer a more complete picture of the political and geographical history of British Columbia. Christie Harris (1992) provides a useful historical narrative that is well-suited for understanding Haida Gwaii context in this regard. The modern Haida Gwaii

planning venues are succinctly presented by Lynn Lee (2012) in her summary paper, which addresses a number of additional planning venues not included here.

### ***A brief history on state-led planning spaces***

#### Setting the context

Haida oral histories of long, long ago, *K'aaygang.nga*, recount Haida arrival to Haida Gwaii, demonstrating 'a continuing relationship with the land and the sea' (Kii7iljuus and Harris, 2005, p.138; Lee, 2012). An introduction Indigenous history in British Columbia, however, typically begins with reference to Aboriginal rights and the Royal Proclamation of 1763. Referred to as the 'Magna Carta of Indian rights in Canada', this document states 'that Indian people hold rights to unceded land in their possession throughout British dominions in North America' (Harris, 2002, p.14-15). The policies that followed the Royal Proclamation, however, were in line with what '[m]ost whites assumed' was necessary: 'Native people would have to be assimilated into what they considered civilized society' (Harris, 2002, p. xxiv). The first Act of the BC Legislature denied Chinese and Indians the right to vote and, later in Canada's Parliament, amendments were made to the *Indian Act* banning potlatches<sup>37</sup> (1884) and prohibiting Indians from paying lawyers without express permission (1924; Tennant, 1990). The collective mindset of settler society in the mid-nineteenth century, argues Harris (2002), directly influenced the politics of dispossession.

These views were perpetuated in the absence and altered state of First Nations after a series of smallpox and other epidemics spread across the province between the 1830s and 1860s, killing over half of the BC population. Most of the dead were First Nations. The Haida were one of the worst hit, forcing the population to occupy two small communities - only 15% of their previous settlements (Hume, 2012; MacDonald, 1989). Illustration 3 on the next page identifies a small proportion of important village sites on Haida Gwaii. This figure also shows the modern settlements and main roads on Haida Gwaii that support the more than 4,000 Haida<sup>38</sup> and non-Haida residents (BC Stats, 2012).

37 Potlatches are an 'essential part of the social, legal, economic and political systems of all coastal First Nations'. The ban 'changed the entire fabric of society, pushing the interconnected celebrations for pole raisings, the naming of new chiefs, house building, and more underground. The ban wasn't lifted until 1951, affecting several generations' (Ramsay, 2011, p.4).

38 A little less than half of the population identify as Aboriginal according to the 2006 Canadian Census (BC Stats, 2012), most of which would self-identify as Haida.

From the 1870s '[u]ntil 1996, the Canadian government, in partnership with a number of Christian churches, operated a residential school system for Aboriginal children' that aimed to 'kill the Indian in the child' (Truth and Reconciliation Commission, n.d.). Over 150,000 children were placed in these schools and around 80,000 survivors are alive today. Subsequent public inquiries 'have documented the emotional, physical, and sexual abuse' and deaths experienced by these children. Even with these immense challenges, First Nations used whatever avenues possible to get the 'Indian land question' on the government agenda (Harris, 2002, p. xxiv).

One of the most widely used tools aimed at reconciling competing claims to land in Canada were treaties. They were used by the Crown to recognize the possibility of pre-existing title, but also aimed to extinguish title in areas with high resource values (Harris, 2002). With some important exceptions, the last time government policies recognized the potential existence of Aboriginal title was by the mid-19<sup>th</sup> century, when treaties were no longer the prevailing policy in BC (Harris, 2002).<sup>39</sup> No treaties exist for more than 80% of the provincial land base. Instead, these areas have been subject to competing claims to sovereignty. It was '[i]n 1853 [when], without Haida consent, the British claimed sovereignty over Haida Gwaii', declaring it the Colony of Queen Charlotte Islands due to the perceived American threat from increased trade (Lee 2012). Rather than gain agreement through treaty, the state decided to map small parcels of their territory as 'Indian Reserves'.

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<sup>39</sup> A series of treaties were signed in BC between 1850 and 1854 (referred to as the Douglas Treaties), however, treaties were signed in other parts of Canada until 1923.

CHAPTER 5. REMAKING PLANNING SPACE

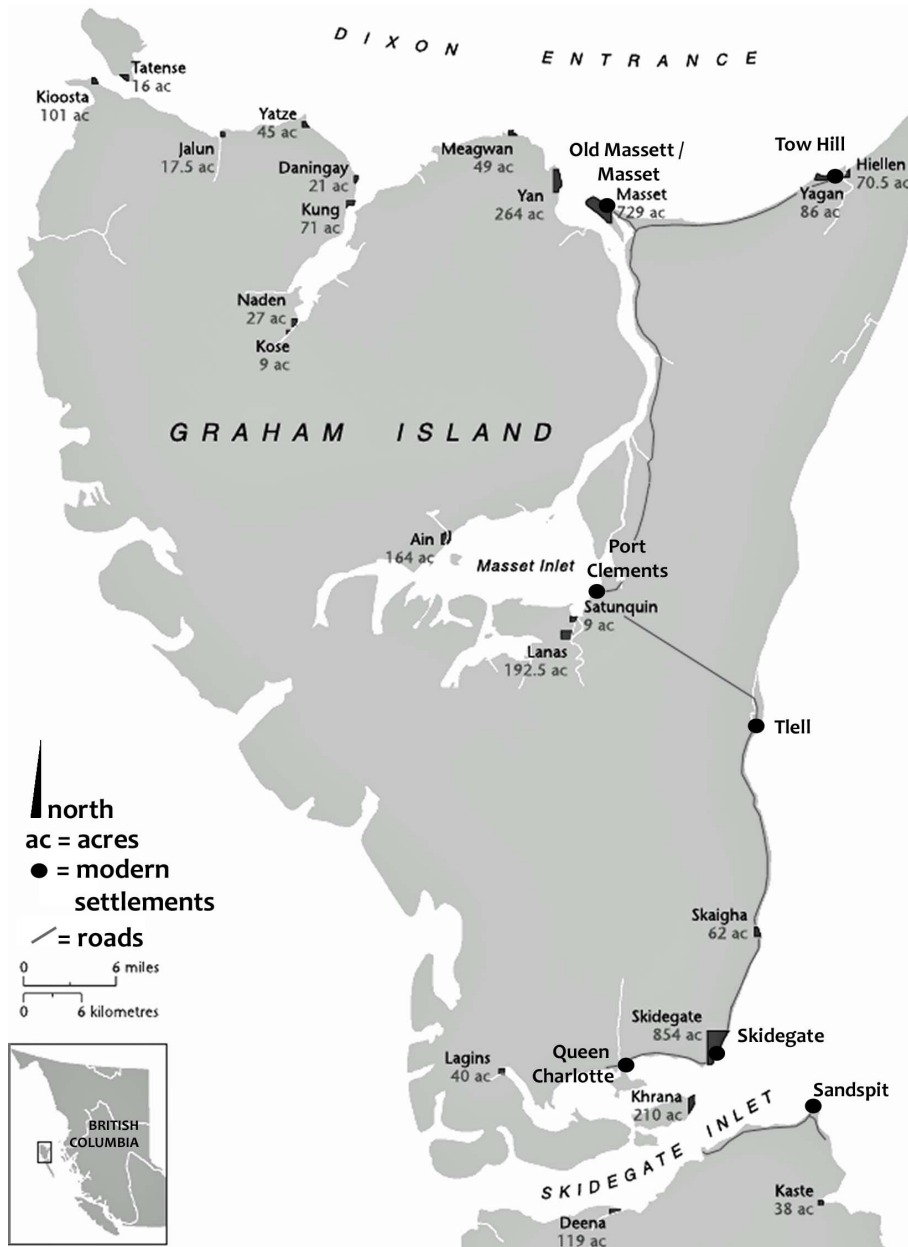


Illustration 3: Indian Reserves with old village names and modern settlements

Adapted from Harris, 2002, p.214

Today, there are stark differences in social and economic indicators between Aboriginal and non-Aboriginal populations in Canada, such as education levels, health and well-being, adequate housing, criminal incarceration rates, and economic indicators like income and employment (Alcantara and Kent, 2010). Residential schools, and the trauma and abuse that continue to be experienced today as a result of these atrocities (Truth and Reconciliation

Commission, n.d.), are often blamed for these differences (e.g. Government of Canada, 2008). However, 'colonial legacies' play an important role since they confine Indigenous identities and aspirations to definitions chosen by the state (Alfred, 2005, p. 600). These legacies include institutionalized state practice or even the social and economic indicators used to measure these differences that do not adequately capture health and well-being or community economies unique to each community.<sup>40</sup>

#### a) A space to talk about (reserve) land

Mapping BC's Indian Reserves<sup>41</sup> began before the Colony of BC entered the Confederation of Canada in 1871. Most of the reserve lands were demarcated by the end of the 19<sup>th</sup> century, drawing upon an 'impoverished view' of Aboriginal title that limited land allocations to 'postage stamp' sized areas (Tsilhqot'in Nation v. BC, 2007 in Egan, 2012). Illustration 3 shows the small proportion of land allocated as Indian Reserves on Haida Gwaii. This planning task, and others following, according to Harris (2002), functioned, in part, to silence dissent and quell the possibility of war. This was made possible, in part, by the military backing that ensured this policy function was met when it was deployed by the responsible state commissioners visiting each community.

These and other early planning-like institutions established by the state (either the Province or Canada) were used to collect information and make decisions about land. While the institutions were designed to very narrowly consider reserve lands, Indigenous participants used these venues to voice concerns over their inherent rights to their territory. One of these institutions was the McKenna-McBride Royal Commission of 1912-1916. Many participants were concerned over the size of reserve lands and its suitability for agriculture and fishing, well within the scope of the commission mandate. When the Royal Commission arrived on the BC coast, however, the concerns were different. According to Tennant (1990, p. 97), the 'primary concerns were aboriginal title and the need for treaties'. In examples where participants expressed this concern, the Chairman is noted for abruptly cutting off the speaker (Tennant, 1990, p.97) and threatening jail time for contempt of court (Harris, 2002, p.232).

<sup>40</sup> These indicators do not capture the unique aspects of community life that are valued in some Indigenous communities in Canada, such as cultural and spiritual education and apprenticeships, or wealth generated through bartering and food harvesting, among many others.

<sup>41</sup> An Indian Reserve is specified under Canada's Indian Act as a 'tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty, for the use and benefit of a band' (s.2(1)). A band refers to a Band Council as defined in Chapter Three, Footnote 33.

Some communities boycotted the hearings 'because title was being ignored', while individuals in other communities attended the hearings expressly to speak about title (Tennant, 1990, p.97). The Crown's view of appropriate use for this venue appears to be violated (Peters, 2005). While the repercussions of this violation appear extreme (jail time), the long-term outcome is the creation of a written record of concerns raised over title.

In a notable statement given to the Royal Commission in 1913 in Massett on Haida Gwaii, Chief Alfred Adams conveyed the collective dismay felt by the Haida when strangers started to come to the islands. He said, these visitors would 'stay a few days, put a stake in the ground and go away... We tried to make ourselves believe we were in our own country, but we are more and more reminded that what we supposed was ours, is said on many cases to belong to men who never saw these islands' (quoted in Harris, 2002, p. 213). In both Massett and Skidegate hearings, the Chair pointed out the Commission's mandate near the beginning of the proceedings: 'the right which you speak of... we have nothing to do with the question of Indian title... We have no such power and no such authority' (Council of the Haida Nation, 2001, p.7).

Similar conditions were placed upon a joint Senate-Parliamentary Committee held in Ottawa between 1926 and 1927. The Member of Parliament who sought to set up the forum appealed to the Prime Minister by asking that a committee be struck 'to hear representatives of the Indians' to study the dispute over land. He felt that it was 'desirable to satisfy and quiet the Indians', to have any questions over land 'settled' (Tennant, 1990, p. 104). In 1927, the committee functioned to address this request, recommending that fundraising for land claims by Indian organizations should be a criminal offence. The recommendation later became law (Tennant, 1990).

#### b) A space to talk about natural resources

The last quarter of the twentieth century gave rise to new institutions to consider resource extraction activities taking place in Indigenous territories, effectively creating new venues for expressing grievances over title. Before this time, resource extraction went largely unplanned, facilitating the systems of governance used by the Province of BC and Canada as outlined above. In Haida Gwaii, the resettlement of Haidas to the two communities of Old Massett and Skidegate meant that the 'natural resources previously managed by Haidas... was more easily

accessible to industrial developments and resource extraction by the settlers' (Lee, 2012, p. 4). Whaling, shellfish, and mining were prolific after the 1900s, but it was the logging and fishing industries that intensified with the adoption of new technologies in the mid-20<sup>th</sup> century. Between 1979 and 2004, it is estimated that the value of the wood exported from the islands was worth a total of \$4.5 billion, with government revenues at \$780 million (Gowgaia Institute, 2007). These and other activities were undertaken with little consideration for public concern or Aboriginal rights. This changed in the 1960s and 1970s with public outcry over the environmental impacts of this development and the political activity of First Nations. In some areas of BC, notably along the north and central coasts, First Nations organized politically and had some effect on government policies (Tennant, 1990). By 1960, the federal government had given the right to vote to Aboriginal citizens across Canada (1960) and the earlier bans on potlatches and hiring lawyers were deleted from legislation (1951). The first generation of BC First Nation high school students graduating in the 1960s were touted as the 'first generation... to have extensive first-hand familiarity with day-to-day details of white society'; they would become the leaders of the First Nations movement in BC (Tennant, 1990, p.140).

By the 1970s, these politics were more established and new planning institutions were opened up to consider resource development affecting Indigenous territories, effectively creating a series of new political opportunity structures. A number of public inquiries, later rolled into the environmental impact assessment process<sup>42</sup>, were established that allowed for Indigenous people to present their ideas in public as part of formal decision-making over their lands. The most famous occurred in the Northwest Territories in 1974: the Mackenzie Valley Pipeline Inquiry (referred to as the Berger Inquiry, named after Justice Thomas Berger who led the Inquiry). Berger interpreted the scope of work for the Inquiry quite broadly (Berger, 1977, Appendices, p.4), including evidence on potential social and environmental effects collected through formal community hearings. These hearings were covered by the media and broadcast to the general Canadian public, offering an important opportunity for Dene and Inuit citizens to broadcast their concerns over title to their lands (Stanton, 2012; Togerson,

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42 The first iteration of EIA appeared in 1974 as part of the Environmental Assessment Review Process (Rees, 1980). In 1995, the Canadian Environmental Assessment Act was adopted (Gibson, 2012). These laws apply to project-level planning. The Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals and other strategic level assessments are used across the country, though are often used informally (Noble, 2009).



2003). Berger's decision (1977, p. 200) highlighted their concerns: 'No pipeline should be built now. Time is needed to settle native land claims, set up new institutions, and establish a truly diversified economy in the North'. The Inquiry was touted as setting 'an international standard for critical and cross-cultural assessment' of a proposed development (Gibson, 2002, p. 152), while also helping to shift the way Indigenous peoples are positioned within the wider cultural ethos of Canada (O'Malley in Stanton, 2012, p. 96).

Another Inquiry was held in 1976 in BC over the proposed West Coast Oil Port. Led by Dr. Andrew Thompson, hearings were held across BC to assess potential impacts of establishing a marine tanker route and terminal at Kitimat on BC's northwest coast. Thompson heard from numerous people, such as George Manuel, a well-known Indigenous leader in BC: 'the Indian people are the owners and have jurisdiction over marine resources on the west coast and hence, claim our rights to manage, control and protect these and other resources from supertankers' (Thompson, 1978, p.31). Others spoke of their dependence upon salmon, herring, and oolichan (fish) for their identity and well-being, and as a food resource. They also spoke of their dispossession from the ocean as fisheries were being destroyed by Ottawa's mismanagement<sup>43</sup>. A number of environmental groups and First Nations campaigned against the proposal, including those on Haida Gwaii (May, 1990). The Inquiry was never completed and the proposal was eventually withdrawn.<sup>44</sup>

### c) Making spaces to talk about rights in planning

These early public planning and decision-making venues provide a new avenue for the expression and recognition of Aboriginal rights in BC. From the 1980s to today, this function in planning has become increasingly institutionalized. Much of this change occurred through Crown courts evolving out of disputes over forestry planning and decision processes and related road blockades. The 1973 Calder decision<sup>45</sup> on Nisga'a title issued by the Supreme

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43 Many of the comments published in Thompson's report (1978) were the voices of experts and white community members speaking about the ways and interests of the 'Indians'.

44 There is competing evidence for reasons why the proposal was withdrawn. The proponent stated they pulled out to support the TransCanada pipeline that was eventually constructed to the south coast in Vancouver (Thompson, 1978). Greenpeace activist Rex Weyler (2004) claims that they didn't think it was publicly viable following a boat collision between a company-sponsored cruise vessel and a zodiac blockading the channel full of Greenpeace and Tsimshian anti-pipeline activists. And, finally, Environment Minister Len Marchand announced in March 1978 that Cabinet sees no need for the project due to the risk of oil spills and the marginal benefits to Canada (Calgary Herald, 1978).

45 Calder et al. v. Attorney-General of British Columbia, [1973] SCR 313

Court of Canada was the first case that recognized title had existed in BC where treaties had never been signed. This decision led the federal government to publicly state that they recognized Aboriginal title and, in 1976, set up a new office to negotiate land claims. In its early form, the modern treaty process was considered to be less than satisfactory - Canada would only negotiate one treaty at a time and did not compel the Province to get involved (Tennant, 1990).

Despite these small gains in Ottawa, the Province of BC continued to deny the existence of title and a new wave of activism emerged in the 1980s. This time, road blockades were erected to stop companies from engaging in resource and construction activities, each with the intent 'to protect the lands and their resources until the claim was settled' (Tennant, 1990, p. 207). The first blockade was set up in 1983 by the Kaska-Dena to slow down timber activities in their territory, then the Nuu'chah'nulth blockaded a logging road on *Opitsaht* Meares Island a year later (Tennant, 1990). After this, 'activists fought valley-by-valley' culminating in 1993 when over 900 people were arrested in Clayoquot Sound (Smith and Sterrit, 2010, p.133).

These blockades were covered widely in the media and gained public support, moving Aboriginal rights to the top of the government agenda. A series of court injunctions relating to these blockades were held in an effort to 'curb the Province's authority over non-reserve lands pending land claim settlement' (Tennant, 1990, p. 208). This venue shopping between road blockades and the courts has led to a series of decisions that have altered 'the nature of property rights throughout the country' and led to dramatic policy changes that spilled over to a number of resource sectors, such as forestry (Cashore et al., 2001, p.138).

Only after the New Democratic Party formed a government in 1991 did the Province officially recognise and take responsibility for Aboriginal title. At this time, the BC Treaty Commission was assembled with joint funding from the federal and provincial governments. This continues to be the central process for negotiating settlements today. In the twenty years of its existence, however, there have been only three modern treaties struck in BC, one of which was negotiated outside of the BC Treaty Process, and only 60% of BC First Nations have opted to enter negotiations (Egan, 2012).

Arguably the most emblematic of the forestry conflicts that influenced these and other changes occurred on Haida Gwaii. It was also one of the earliest. In 1985, 'First Nations elders and youth stood, with environmental groups to blockade logging trucks' at Athlii Gwaii Lyell

Island at the peak of logging activities (Smith and Sterrit, 2010, p.133). This island is located in the southern third of Haida Gwaii identified for protection by islanders in 1974. The blockade was part of a struggle to protect this area, now known as Gwaii Haanas (see Illustration 4), and gained wide support from churches, scientists, celebrities, and the general public through extensive media exposure (Gill, 2009; May, 1990). The activism eventually led to an agreement to protect the area in 1993. A collaborative management arrangement was struck that committed 'to work together to protect the cultural and environmental well-being of Gwaii Haanas', while allowing for disagreement over sovereignty, ownership, and title (Lee, 2012, p.7). The arrangement extended to the marine environment around Gwaii Haanas in 2010.

These events have had important implications for the way planning in BC and Haida Gwaii allow for the expression and recognition of title. The next section continues this examination by focusing on a single, in-depth planning case on Haida Gwaii. The description of this case demonstrates that planning has continued to increase in importance as a space for addressing the original title dispute, with the help from venue shopping to access the courts and road blockades, and wider political and cultural change. It is also evident that not all planning events offer the same kinds of opportunity structures. A venue is granted more or less authority by the Crown to address issues relevant to title or it is granted more or less legitimacy by Indigenous governments for a fair dealing over these issues. These claims are examined in contrasting the in-depth case with two additional small cases presented at the end of this chapter. The next case offers the story of a modern, collaborative land use planning regime that has been greatly influenced by the events described above.

### ***Case 1: Collaborating with the provincial government***

The land use planning process on Haida Gwaii was made possible, not only because of the wider changes outlined above, but also because of the pivotal court decision issued in 2004. The case resulted from a decision by the Haida Nation to access the courts in response to a 1999 dispute over the renewal of the largest forestry tenure on Haida Gwaii (Tree Farm License 39). The Haida Nation argued that the the Province did not have authority to issue the license where Haida title applied (Takeda and Røpke, 2010). This action resulted in a game-

changing Supreme Court decision<sup>46</sup>. The decision upheld the Crown's duty to consult and accommodate Aboriginal interests (outlined in previous case law<sup>47</sup>), adding that the Crown's duty exists even if these interests are not yet proven. The case also clarifies that while third parties like industry do not have such a duty, the Crown may delegate certain procedural aspects through decision processes such as environmental assessments (Isaac and Knox, 2005). It also adds that 'provincial legislation [is] to be used to fulfill their obligation to First Nations rather than to avoid their obligation' (Takeda and Røpke, 2010, p. 184-185). This case has had a very important effect on planning policy and practice, and Indigenous-state relations across BC and Canada (Egan, 2012). Specifically, Aboriginal consultation and accommodation was incorporated into formal provincial and federal policy, a practice that is now tied to a large number of overlapping and multi-level land and resource planning decision points (INAC, 2011). As argued in Chapters Two and Three, consultation and accommodation can offer important opportunities that may be used by Indigenous political actors to have their interests heard. This becomes evident in the following paragraphs.

The year following the court decision, BC offered the Haida Nation a settlement that would have given the Haida clear rights to over 20% of the Haida Gwaii land base (200,000 ha), substantially more than other treaty settlements in BC (CHN, 2007). This offer was rejected by the Haida Nation. The President of the Council of the Haida Nation (CHN), Guujaaw, maintained that the treaty offer was a very bad deal for the Haida (CHN, 2007; Takeda and Røpke, 2010, p.185). By this time, the Haida Nation had already launched their title case against BC and Canada. This case seeks compensation for 'unlawful occupation' of Haida Gwaii and related damage for interference 'with Haida occupation and enjoyment of Haida Gwaii and which have resulted in loss of biological diversity and caused degradation to terrestrial and marine ecosystems of Haida Gwaii' (CHN, 2000b, p.4). The case was placed in abeyance in 2008, functioning as a 'back up' if their other strategy fails. The other strategy is ongoing negotiations with the Province and Canada over shared planning and decision-making over the land and waters of Haida Gwaii (Jones et al., 2010)<sup>48</sup>.

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46 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511

47 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010

48 The negotiation table referred to here is formalized in Haida and Provincial law through the 2009 *Kunst'aa Guu Kunst'aayah – The Beginning – Reconciliation Protocol* agreement. Two working groups with the federal government were established with the federal government in 2013, a year after the Title Case was taken out of abeyance (CHN, 2013, p. 5).

This shared planning process for a large part of Haida Gwaii started in 2001, before the Supreme Court issued its decision in 2004. The process was 'co-managed and co-chaired by the Council of the Haida Nation' and offered greater control over the planning process in a way that 'implicitly acknowledged' the Haida as a 'sovereign authority' (Takeda and Røpke, 2010, p. 182). The process was guided by deliberations amongst a multi-stakeholder group<sup>49</sup> within an ecosystem-based management framework and a set of Haida ethics and valued elements outlined in the Haida Land Use Vision (2005). The Haida principle *Yah'guudang* is central to this document and generally refers to:

[R]espect and responsibility, about knowing our place in the web of life, and how the fate of our culture runs parallel with the fate of the ocean, sky and forest people (CHN, 2005, p. 4).

This principle can also be considered to exist at the 'foundation of ecosystem-based management' (CFN, 2009 in Jones et al., 2010, p. 5), 'a concept that has permeated land management discussions worldwide' and has been adopted by the Council of the Haida Nation in planning activities; ecosystem-based management concerns biodiversity, intrinsic ecosystem values, future generations, and democracy (CHN, 2005; Price et al., 2009, p. 495; Takeda and Røpke, 2010). The vision document also highlights destruction of historic industrial activities and identifies a series of new Haida protected areas.

As the stakeholder group convened, the newly elected Liberal government dramatically reformed a series of resource planning laws between 2002 and 2004. One of these reforms gave new permission for forestry license holders to transfer licenses without government oversight (Takeda and Røpke, 2010). This had significant effects on the land use planning taking place on Haida Gwaii. '[O]ne week before the collaborative planning process was to conclude its last meetings', Tree Farm License 39 was acquired by Brascan Corporation without any consultation with the Haida. Soon after the transfer occurred, the Province also allowed logging in areas identified to be preserved for cultural cedar use in the Haida Land Use Vision. Two blockades went up in 2005, blocking forestry operations for Tree Farm License 39 and the Provincial Ministry office on Haida Gwaii responsible for forestry.

The BC Liberals were about to enter an election and the Tree Farm License deal was not yet secure, so both industry and the Province were in a vulnerable position (Takeda and Røpke,

<sup>49</sup> The group was a '29-member Community Planning Forum... representing the Haida, the Province, local government, labour, minerals, tourism, environment and community interests and the logging industry' (Lee, 2012, p. 10).

2010). Political manoeuvring and national media coverage also pushed the issue to the top of the provincial policy agenda. The blockade also had support from the other Haida Gwaii communities, all of which were in the midst of agreeing to participate in a collaborative governance table with the Haida Nation. The protocol agreements commit all local governments on Haida Gwaii to respect the 'hereditary responsibilities and the relationship of the Haida people to Haida Gwaii'. The table also invites community members to participate 'in talks regarding conciliation of Crown and Haida aboriginal title' (Lee, 2012, p. 10).

Combining the political opportunities with this public support, negotiations between the Haida Nation and the Province resulted in what is described as 'a very good deal' for the Haida (Takeda and Røpke, 2010, p. 186). The deal included 'interim protection for all fourteen Haida protected areas, cultural and archaeological cedar stands and bird nesting habitat' identified in the Haida Land Use Vision, a large volume of forest tenure (120,000 cubic metres per year), and '\$5 million as preliminary compensation for resources extracted from the Islands' (Takeda and Røpke, 2010, p. 186). Three years after, the Haida Gwaii Strategic Land Use Agreement was signed by the Council of the Haida Nation and the Province (2007). It was considered to be 'fully consistent' with ecosystem based management and the Haida principles that were originally aspired to (Takeda and Røpke, 2010, p. 186). The final plan has increased protection of Haida Gwaii to over half of its land base. Illustration 4 shows the extent of the land base protected through the land use agreement.



Illustration 4: Locations where modern planning regimes apply on Haida Gwaii

Adapted from CHN, 2007; Gamache and Ritter, 2011; NaiKun, 2009; PNCIMA, 2013a

Around the same time, The New Relationship agreement was struck between the Province and First Nation leaders in BC. It commits to establishing 'processes and institutions for shared decision-making about land and resources'. Draft legislation was proposed to bring the tenets of The New Relationship into law, but was rejected in 2009 (Wood and Rossiter,

2011). Instead, ad hoc 'reconciliation protocols' have been negotiated with various First Nations in BC, alongside other related initiatives. In 2009, the *Kunst'aa guu Kunst'aayah* was struck between the Province and Council of the Haida Nation, to initiate the implementation of the land use plan within a broader collaborative decision framework. The agreement passed through the BC legislature as the *Haida Gwaii Reconciliation Act* and the Haida House of Assembly as *KaayGuu Ga gaKyah ts 'as- Gin 'inaas 'Iaas 'waadluwaan gud tl 'a gud giidaa* (*The Haida Stewardship Law*) in 2009, formalizing the agreement for both parties.

The relationship brings the Province and the Haida to three, multi-level decision tables. According to one Haida leader, this agreement offers 'the chance to get to the independent state'<sup>50</sup>. The agreement sets up the Haida Gwaii Management Council, a decision table made up of half Haida and half provincial appointees. The Management Council is responsible for strategic level policy implementation, including the task of defining the maximum volume of trees allowed to be cut per year and developing plans and guidelines for stewardship around numerous environmental, social, and cultural values across the land base. In addition, all development applications that would have previously gone to the Province and the Council of the Haida Nation separately are now reviewed by a cooperative Provincial and Haida technical table, referred to the Solutions Table. Final decisions rests with respective decision makers (Peet, 2012). A political negotiation table, referred to as the 'Parties' to the agreement, also meets and offers guidance to the planning and operational levels and can amend the terms to the agreement and legal orders followed by the Management Council and the Solutions Table.

The implementation of shared decision-making is still underway and very new. In early 2013, the Province has not given any authority for the Solutions Table to make decisions over major projects, such as intra-provincial pipelines or projects that require environmental assessments like large mines or infrastructure projects<sup>51</sup>. Furthermore, the Province may only 'grant' those areas of jurisdiction that they have powers for. The Government of Canada is responsible for much of the ocean environment, including fisheries and marine

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<sup>50</sup> Interview 14.

<sup>51</sup> Source: Appendix E - The Streamlined Process for the Review of Applications, in the *Kunst'ah guu - Kunst'aayah - Reconciliation Protocol Decision Making Framework Implementation Plan*; personal communications with provincial staff and member of Haida leadership on 3 Jan 2013 and 6 Feb 2013, respectively. It is also the case that fin fish aquaculture is not to be considered at this table because of the Haida ban on this form of aquaculture (personal communication with provincial staff on 5 Sep 2013).



transportation. While the Government of Canada has sat with the Province and the Haida in this process, the President of the Haida Nation has stated that Canada was given 'no mandate to negotiate' anything substantive at the table (Joint Review Panel or JRP, 2012a, para 12414).<sup>52</sup>

In 2012, the Haida Gwaii Management Council issued its first major decision, setting the total allowable timber cut at 47.8% of the previous year's cut<sup>53</sup>. This decision is viewed as a major milestone in the centuries of work undertaken by the Haida to regain control over decisions affecting Haida Gwaii (CHN, 2012). Following this, the Management Council is developing a 'Haida Gwaii forestry management strategy' that aims to '[maintain] ecological integrity and [support] a sustainable Haida Gwaii economy' (CHN and the Province of BC, 2009, Schedule B, S.2.3). Despite these major historic successes, the decision table is faced with many implementation challenges. Notably, the Solutions Table process can still result in a divergent decisions issued by the Province and the Haida Nation. Many view this as a challenge to be addressed, but the Haida have imposed their own enforcement measures to deter a developer's activities on Haida Gwaii, which can be equally effective as those measures imposed (or not imposed) by the Crown.<sup>54</sup> As well, some view the number of decisions that fall to the Management Council as too few, and hope for more decisions to take place in this higher order venue.<sup>55</sup> The former President of the CHN sums up a dominant view of the challenges being faced as this new regime is being implemented: 'it's easier to fight than get along' (CHN, 2012, p. 3).

While this new planning regime was taking shape, another collaborative planning process was initiated for the marine environment. This time, the planning process involved Canada. The marine planning process is described briefly below along with the NaiKun offshore wind farm environmental assessment. These small planning cases usefully link the land-based, strategic decision process, presented in the first in-depth case above, with the water-based, project-

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52 At the time of writing Canada recently re-engaged with the Haida with new committees are being formed, though this appears to be outside of the "Parties" political table established out of *Kunst'aa Guu – Kunst'aayah* (CHN, 2013).

53 The cut is set at 929,000 cubic metres (CHN, 2012).

54 At this time, threats or real blockades, negotiated agreements with industry proponents, legal threats or real challenges provide some of the approaches the Haida use to enforce their decisions that seem to deter development activities in a similar way as the threat of fines or revoking provincial permits (e.g. Secher, 2014). These enforcement activities have yet to be tested in provincial or federal courts, so it is unclear how Haida-led enforcement may be upheld or challenged by parties enforcing provincial and federal laws.

55 Personal communication with member of Haida leadership on 6 Feb 2013.

level decision process, presented in the second in-depth case in Chapter Five. While the collaborative land use planning regime has established novel institutions viewed as legitimate spaces for working towards reconciliation, major project planning and decisions over transportation in the marine environment remain hotly disputed subjects.

### ***Major projects and the marine environment***

The collaborative land use regime established out of *Kunst'aa Guu Kunst'aayah* is not entirely unique. Gwaii Haanas is also collaboratively managed and adopts an applied version of Mouffe's agonism (2000), simplified in the agreement as 'agree to disagree'. Most planning regimes in BC and Haida Gwaii, however, are not collaborative. Rather, the Crown defines them through its own laws. These laws include consultation and accommodation requirements outlined in the Crown's reconciliation policies. For example, major projects trigger both federal and provincial environmental assessment laws and strategic level marine use planning is undertaken pursuant to the federal *Oceans Act* (1996). Two, very short cases are presented here to illustrate the way Crown-led planning is conducted outside of these novel collaborative arrangements. These examples not only offer some insights on the way reconciliation mechanisms of consultation and accommodation are typically used in planning, but also provides necessary background and events leading up to the second in-depth case presented in Chapter Five.

Before these cases are introduced, it is necessary to describe the jurisdictional complexity of Canada's marine environment and the way the Crown interprets Aboriginal rights in the ocean. For much of the marine environment, '[A]boriginal and treaty rights are denied until explicitly defined in treaty negotiations or proven in court' (Jones, 2006, p. 310). This denial of rights in the ocean is reflected in Canada's ocean planning process as well: there is 'little or no policy guidance on the role of First Nations or mechanisms for involvement in oceans planning and management except where treaties and specific processes are already in place' (Jones, 2006, p. 304).

In the map accompanying the Title Case, the Haida Nation identifies title to the Haida Gwaii exclusive economic zone, extending 200 nautical miles from the boundary of the territorial sea. As outlined above, the 2005 BC treaty offer was considered to include more than previous

offers in BC, yet '[t]here was no offer from the federal government regarding the offshore component of the claim' (Jones 2006). Precedents for sea title exist elsewhere in Canada. The Nunavut Land Claim Agreement (1993), for example, grants the Government of Nunavut rights to the water, seabed and the soils beneath the seabed for up to 12 miles from the foreshore<sup>56</sup> as well as the right take part in limited activities beyond this boundary. However, scholars argue that existing case law offers little direction in helping to resolve this issue, and instead point to a negotiated solution (Brown and Reynolds, 2004), such as agreements similar to the collaborative land use regime established out of *Kunst'aa Guu Kunst'aayah* that might apply to the marine environment (Jones et al., 2010).

Alongside this murky policy pathway towards 'reconciliation' in the ocean, there have been several disputes over marine-based development activities in Haida Gwaii. For example, the Haida Nation have blockaded developments on land related to sports fishing activities (Jones and Williams-Davidson, 2000). Today, these licenses are handled through the Solutions Table, as part of the collaborative planning regime, as the Province has jurisdiction over the land-based components of sports fishing facilities (e.g. sports fishers' lodging). Opposition has also been raised among the Haida Nation in the most recent assessment into lifting the Canadian moratorium on offshore oil exploration and development off of the coasts of Haida Gwaii (Priddle et al., 2004).<sup>57</sup> Yet, conciliatory management practices between Haida Fisheries and the federal Department of Fisheries and Oceans do exist where there have been reliably good fish stocks, such as sockeye salmon management in Copper River (Jones and Williams-Davidson, 2000). Electricity generation, however, has very no historical precedent guiding the relationship between the Province, Canada, and the Haida, all of which claim jurisdiction to the waters surrounding Haida Gwaii.

### NaiKun Offshore Wind Farm Environmental Assessment

The NaiKun offshore wind farm, proposed for the waters of Haida Gwaii, has been a highly divisive issue for residents. The wind resource was identified in 2001 on Dogfish Banks in the Hecate Strait off of the east coast of Haida Gwaii. The location not only produces strong enough winds to support a large offshore wind farm, but is both close to the electricity transmission grid and has a shallow enough sea shelf for construction of conventional

<sup>56</sup> The agreement refers to the Nunavut Settlement Area defined in section 3.2.1 of the agreement.

<sup>57</sup> In 1985, the CHN issued a moratorium on all offshore oil and gas activities within Haida territory (Lee, 2012).

offshore wind turbines. The first phase of the project consists of 110 offshore wind turbine generators at a cost of \$2.4 billion. If constructed, it would produce enough electricity to power 130,000 homes with plans to expand to more than double in size to power up to half a million homes (NaiKun, 2003; 2006, p.2-2).<sup>58</sup> Even if just the first phase is constructed, the project (at that time) would have represented the largest single wind project in the world.<sup>59</sup> There are currently no offshore wind projects in operation in North America.

NaiKun started project development in 2002 and, by 2007, was in line to meet BC's new renewable electricity expansion policy commitments (Province of BC, 2007). NaiKun has also suggested their project will 'serve as a model for collaborative partnerships with First Nations' (NaiKun, 2009, p.2-1). In addition to the rather complex relationship that was built between NaiKun and the Haida Nation<sup>60</sup>, this collaboration is the result of two key factors. First, the company agreed to address concerns raised by the Haida Nation and other Haida Gwaii residents' over the 'diesel problem' facing Haida Gwaii (The Sheltair Group and CHN, 2008). A transmission link was proposed as part of the project to connect Haida Gwaii to the wind farm and, thus, to the North American electricity grid. NaiKun stated the link would displace approximately 26,000 tonnes of greenhouse gas emissions currently emitted by the diesel generators powering most of Haida Gwaii (NaiKun, 2009, p.2-3).

Two collaborative agreements were also struck. The first agreement was struck in May 2007 to 'establish a framework to govern the relationship between the Haida Nation and NaiKun' and to create 'a formal commercial relationship' in an operating company, which included possible employment and training opportunities, and marketing of carbon credits (Marketwire 2007). The second agreement was struck in 2009, with the help of a negotiator from Ottawa. This agreement included a commercial deal to acquire up to 40% of the development company, subject to a federal loan guarantee. While the company did provide

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58 The first phase would take 32 square kilometres.

59 The Greater Gabbard project and the London Array, both located off of the southeast coast of the UK, started operations in 2012 and 2013 with 140 and 175 turbines, respectively. The Gwynt y Mor is under construction in the UK with 160 turbines. Source: [http://en.wikipedia.org/wiki/List\\_of\\_offshore\\_wind\\_farms](http://en.wikipedia.org/wiki/List_of_offshore_wind_farms)

60 A few months after the resource was identified, NaiKun introduced the idea to Haida leaders in Vancouver, followed by a trip to Haida Gwaii in March 2002 to introduce the idea to a wider group. A number of early meetings took place between NaiKun and Council of the Haida Nation (CHN) leadership and Band Councils. At that time, the project was either viewed sceptically, or rejected outright. Using the lessons learned at previously failed meetings, the company brought a new mix of representatives to Haida Gwaii to gain the trust of Haida leadership through regular meetings, discussions, dinners, visits, and negotiations. According to one respondent, it was clear to them that trust (with a number of CHN leaders) had been developed when they agreed they were not lying to each other any more.

support to solicit a loan, it never materialized.

NaiKun preferred this negotiated approach because 'it was also good for business' and 'nothing can happen without Haida Nation agreement'<sup>61</sup>. From NaiKun's perspective, the Haida are 'land holders' by virtue of 'rights of use and occupation from the Haida Nation'. These are distinguished from 'legal rights' as defined by the provincial and federal governments<sup>62</sup>. Indeed, NaiKun's strategy for engaging the provincial, federal, and First Nations governments to gain permission is described as follows:

[W]e decided... to play all three [governments]. We had to rank them in order of priority and determine how we were going to go with them. So we ranked them: Haida, province, [then] feds. And we went on that basis. So the first thing we needed to move forward was a permit for investigation... What we decided to do was ask the Haida for one.<sup>63</sup>

The impact assessment process for the project is guided by both federal and provincial processes and an authorization from the provincial electricity provider, BC Hydro. The Haida also required that NaiKun satisfy their own three-tiered assessment approach. Each of these processes are described in Appendix D. Both provincial and federal governments recommended that the project proceed, subject to a number of conditions (BC Environmental Assessment Office, 2009; Canadian Environmental Assessment Agency et al., 2011). In 2010, BC Hydro decided not to call NaiKun forward in their bid to buy electricity, effectively restricting NaiKun from any market opportunity until the Province might decide to undertake another call (NaiKun, 2010). The Haida Nation has still not issued a final decision, though 'a general vote... regarding whether or not to enter into a business partnership with NaiKun' (CHN, 2010) resulted in a resounding 'no' in 2011 (CHN, 2011).

The present situation is the result of a parallel decision process led by the Council of the Haida Nation that has been viewed with varying degrees of legitimacy. While NaiKun's actions and statements appear to pay respect the Haida's decision process, the provincial and federal governments do not do the same. Instead, these governments claim that NaiKun's work with the Haida has functioned simply to fulfil the Crown's commitment to consultation (BC Environmental Assessment Office, 2009; Canadian Environmental Assessment Agency et al., 2011). The Haida Nation was clear to communicate to the provincial agency coordinating the process that they - the Haida -

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61 Interviews 26 and 7 with NaiKun representatives in 2011.

62 Interview 32 with NaiKun representative in 2011.

63 Interview 26 with NaiKun representative in 2011.

had jurisdiction to permit and regulate the project activities (Guujaaw, 2009). These overlapping and competing claims to jurisdiction are an intriguing aspect to environmental assessment that is explored further in Chapter Five. This decision model is set in contrast to collaborative planning, which is part of the regional marine use planning case examined next. Unlike the earlier collaborative *land use* regime on Haida Gwaii, this planning process was subject to controversial planning reforms.

It must be emphasized that several planning processes are occurring in the oceans and lands of Haida Gwaii, with the Haida Nation involved in *all* of them. However, a complex suite of federal and provincial agencies are involved in any number of these. For example, marine protected area planning and management for Gwaii Haanas is undertaken in collaboration with Parks Canada and Fisheries and Oceans Canada - two federal government agencies controlled by very different laws and policies. The regional north coast marine planning process, on the other hand, involves a much larger group of federal agencies, a single provincial agency, and several First Nations, while the strategic land use plan only involves a two provincial agencies at this time, though is subject to change. According to Jones et al. (2010, p.13), 'Haida involvement in all of these processes is an effective means to ensure consistency and coordination at different scales and across different federal and provincial agencies'.

### Collaborative marine use planning

Following on the heels of the relative success of the land use planning process, a planning process in the marine waters surrounding Haida Gwaii was initiated. Jones et al. (2010) describes this process in detail. In 2007, the CHN completed a vision document to guide the planning process that is based upon six Haida ethics and values that are a 'distinct expression of Haida culture' (p. 5). Similar to the Haida Land Use Vision, these ethics and values 'share some commonalities with' ecosystem-based management (p. 5). A year later, the federal government signed an agreement that committed to a regional north coast marine planning process that 'engages First Nations at a government-to-government level in advance of resolved treaty agreements' (p.11)<sup>64</sup>. This language reflects the dominant view in Canada that

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<sup>64</sup> Government-to-government is a policy term used to describe the provincial and federal governments changing responsibilities towards Indigenous people that is increasingly becoming institutionalized in government planning policy (Barry, 2012).

the treaty process is the primary avenue through which to pursue reconciliation goals (Egan, 2012), despite the alternative mechanisms of reconciliation outlined in the *Haida v BC* 2004 Supreme Court ruling (Knox, 2011). Indeed, the language suggests that Canada's engagement in the collaborative planning process is an initial step to some sort of full and final resolution. Nevertheless, the planning arrangement occurs 'where there are outstanding questions of resource ownership' (p.9).

The process started with information gathering that took place between March 2009 and September 2011. Through this time, representatives from First Nations, industry, environmental groups, local government, and federal and provincial governments met to share information on the marine planning process. They gathered 'area-specific' information from experts and community advice on future 'public and stakeholder participation', while also sharing information on sub-regional planning initiatives (PNCIMA, 2013a). The planning process has included discussions on issues such as economic development strategies, marine transport, fisheries, and conservation (Gzybowski, 2011). For example, the offshore wind developers, NaiKun, were involved throughout this process. Up until September 2011, critics had positively suggested that 'the government has been engaged in what appears to be a very thorough and honourable process to engage with [First Nations] on how BC's North Coast should be managed' (Gage, 2012).

In September 2011, however, the federal government announced it was scaling back the process. The government decided to back out of an agreement with First Nations that set the terms for using \$8.3 million donated by a US-based charitable organization (Sloan and Dick, 2013, p. 95). The money was accepted by the federal government in 2010 and was earmarked to support the consultation process for the marine planning initiative. According to official federal government correspondence, 'the agreement was cancelled to "streamline" the consultations to meet their December 2012 deadline, and align the process with other federal ocean plans' (Campbell, 2012). In other words, the official storyline was that the planning process was scaled back so it could be completed appropriately, on time, and within the original scope of work.

However, another storyline caught the attention of the media. At the time of the decision, one source was quoted several times citing 'specific concerns'<sup>65</sup> that the planning process 'could

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<sup>65</sup> The original article remains vague on what party raised these concerns.

be used to rally opposition to Calgary-based Enbridge Inc.'s proposed \$5.5 billion Northern Gateway pipeline' (Campbell, 2012; Gage, 2011; O'Neil, 2011). Six months later, the media quoted heavily from two internal government documents that pointed to Enbridge as a key player in influencing the government's decision. It was reported that nearly a year before the agreement was cancelled, Enbridge had raised a concern with the federal government that the US-based environmental organization providing the \$8.3 million funding would have negative influence on the marine planning process. The company was quoted as saying that the marine planning process 'is too important to allow it to be hijacked by parties with clear and specific motives beyond the creation of an oceans management plan' (Campbell, 2012). It seems that there was disagreement amongst parties over the most 'appropriate use' of the marine planning institution, leading the government to streamline the process and enforce the dominant view of appropriate use for this venue (Peters, 2005).

With reduced funding, the federal government decided to continue planning with a reduced scope. The process would no longer be collaborative and multi-scalar, but would offer a higher level, more regional framework to inform the sub-regional planning (PNCIMA, 2013a). The Haida Gwaii marine use plans (i.e. a 'sub-regional' plan) would no longer be an integral part of the 'integrated' marine planning process. First Nation umbrella groups, such as the Coastal First Nations that represents a number of First Nations, including the Haida Nation, continue to work with the federal government. Furthermore, the Province has since taken over the funding arrangement, partnering with regional First Nations, including the Haida Nation. In November 2011, the parties committed to working together to prepare sub-regional plans and integrate them into a 'broader regional planning document' to inform the federal government's 'streamlined' regional planning process (BC Ministry of Forests, 2011). The approach aims to undertake 'collaborative planning' and 'to work together, irrespective of jurisdiction, treaty, rights, and title issues', so parties may arrive at 'the best decisions regarding the planning and management of coastal and marine ecosystems and activities' (BC Ministry of Forests, 2011). The draft plan for Haida Gwaii was released for public consultation in April 2014.

The ability of the Province to work on matters outside of their jurisdiction, however, has raised some concern amongst those involved.<sup>66</sup> Indeed, the shift from the federal government

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<sup>66</sup> Pers. comm. with anonymous staff involved in process 20 Feb 2013.



to the provincial government appears to have opened up a gap in the process. Notably, the Haida Nation, which is involved in all of the marine planning described above (Jones et al., 2010; Lee, 2012) may have no government partner to work on shared marine use areas that are clearly outside of provincial jurisdiction, such as fisheries and marine shipping. In addition, the federal government regional marine planning process has not met their December 2012 deadline that was identified as the federal government's official reason for introducing the reforms to begin with.<sup>67</sup> These and other factors appear to have reduced overall expectations for the marine use plans. Indeed, the Haida have effectively 'settled for' the provincial venue; they had 'little choice' but to enter into the provincial marine planning process since 'significant barriers prevent their meaningful participation' in the federal process (Pralle, 2003, p.255). Despite this setback, development of a Haida Gwaii marine use plan has the potential to provide very significant political and technical resources that can open up opportunities to regulate the marine environment. At the time of writing (July 2014), it is too soon to tell just how effective this opportunity structure might be.

### **Summary**

This chapter presented a short history of politics and planning in BC and Haida Gwaii, beginning with the establishment of planning institutions in BC. An examination is provided on the role of planning in enforcing a settler mindset upon Indigenous peoples across BC at a time when the 'Indian land question' was not recognized as a legitimate topic for discussion within these spaces (Tennant, 1990). A series of cases were then presented to offer insights on how planning transformed over the rest of the century: the rapid pace of resource extraction led to the development of new planning processes and the rise of the Aboriginal rights discourses within these venues. Planning gained attention when disputes were raised in these spaces. Indeed, Borrows (1997, p.445), argues that without planning institutions to require others (especially the state) to consider their interests, 'Indigenous peoples must use very blunt instruments to make their point, such as highly charged political demonstrations, blockades, and litigation'. All of these actions have shaped how the federal and provincial governments have developed their present policies on consultation and accommodation (INAC, 2011), which are tied to a large number of overlapping and multi-level land and

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<sup>67</sup> The draft plan was just released for comment in May 2013 and expected to be completed by the end of 2013 (PNCIMA, 2013b).

resource planning venues and decisions.

A story about a novel collaborative approach to land use planning is then presented. It was developed largely for the forestry sector on Haida Gwaii and is considered by some (Takeda and Røpke, 2010) to be an implicit acknowledgement of Haida sovereignty and jurisdiction. This story profiles the first, in-depth case for this research: the Haida-BC collaborative land use planning regime established out of *Kunst'aa Guu Kunst'aayah*. This case offers important insights on the way modern planning institutions engage with and act upon the idea of reconciliation in Canada. It is offered as a novel case that is considered to have the potential to expand collaboration to new policy sectors on Haida Gwaii. For now, major projects remain subject to provincial- and federal-led environmental assessments that only require the Crown to undertake consultation and accommodation (not collaborative or shared decision-making). In addition, those policy sectors that overlap with or are clearly within federal jurisdiction, such as fish and marine transportation, are also excluded from the regime. Two examples that fall outside of the *Kunst'aa Guu Kunst'ayaah* collaborative decision regime are presented at the end of the chapter: the NaiKun offshore wind farm environmental assessment and the strategic marine use planning process. While NaiKun pays respect, even recognizing Haida jurisdiction and sovereignty, the provincial and federal governments simply ensure the Crown's consultation duties are fulfilled. The marine use plan, on the other hand, is a collaborative project that was identified by the Haida as a preferred venue to engage with Canada over mutual marine interests. Jones et al. (2010) suggests the integrated planning process would provide 'opportunities to explore co-governance arrangements' where internal Haida marine planning initiatives may be taken up to influence regional ocean governance regimes. The decision to 'streamline' the process, however, has required that the Haida settle for the provincial led process instead. Despite this apparent set-back, there remains important opportunity structures available to the Haida to develop collaborative arrangements with the Crown over marine matters.

The key purposes of each planning venue, from both Crown and Haida perspectives, are summarized in Table 5, below. This table demonstrates that, while the Crown purpose for setting up institutional planning venues has changed dramatically over time, the Haida purpose for engaging with them has generally remained constant. In other words, the Haida have always used these venues to assert their title to Haida Gwaii, highlighting their concerns

over the very fact that the Crown was asserting management authority over how the lands and waters of Haida Gwaii were used. The Crown, however, created venues to address particular policy issues (e.g. offshore oil, offshore wind, forestry, etc.) in ways that intersected with these constant Haida interests.

Preliminary evidence on the factors that give rise to planning reform is offered in the marine planning case presented above. This case shows how reform might affect the process of reconciliation as it takes place in planning. As this chapter shows, the ongoing dispute over title between Indigenous and Crown governments is apparent within every sector and at every stage of planning, from a collaborative land use planning regime, to an offshore wind farm impact assessment, to a 'streamlined' marine use planning process. In each case, the provincial and federal governments offer venues that are shaped by their own logic of appropriateness, a feature of an institution that shapes actor behaviour and speech and, thus, aspects of the reconciliation process. As shown in the marine planning case, when the federal government stated that marine planning could be used to oppose the proposed Enbridge Northern Gateway pipeline and tanker project, the marine planning process was streamlined. In this example, it appears as though the federal government's view of appropriate use for this venue was violated (March and Olsen, 2006; Peters, 2005). The method of enforcing their view includes speeding up the process and restricting integration with the Haida Nation and other First Nations. This finding is in line with the third proposition presented in Chapter Three: When the dominant view of appropriate use is violated, planning reform may be used as an enforcement mechanism (Peters, 2005). The next chapter considers how planning reform might affect the way actors use venues in the future, including their use of venue shopping strategies and access to opportunity structures.

For those unfamiliar with Canada's approach to reconciliation, an intriguing observation to point out is that the Haida have continued to raise grievances over title with the Crown for over a century in these venues, yet only implicit recognition is offered in the government-to-government regimes. The BC treaty process is still considered the primary venue for addressing these concerns. It seeks to 'resolve the long-standing dispute between Aboriginal peoples and the Crown over rights to land, and to set out the terms for Aboriginal self-governance' (Egan, 2012, p. 399). Critics of the process (Alfred, 2005; Egan, 2012; Paci et al., 2002) find that the treaty process is unsuccessful in this regard and, rather, seeks to achieve

'certainty' over title by extinguishing rights, a policy that is rejected by many First Nations. Since First Nations have 'few' options in the reconciliation process (Egan, 2012, p. 415), they are limited to 'reconcil[ing] themselves to what the Crown has to offer' (p. 18). Outside of the *ad hoc* government-to-government arrangement used for conservation in Gwaii Haanas and for land use decisions in *the Kunst'aa Guu Kunst'aayah* regime described above, legally-required consultation and accommodation in the environmental assessment process is what is on 'offer'. Like the treaty process, this practice is also subject to much critique. Indeed, the critical environmental assessment literature briefly presented in Chapter Two offers some insights into these critiques (e.g. FNEMC, 2009).

As mentioned above, there are no strategic level collaborative planning arrangements existing on Haida Gwaii for those areas that fall clearly under federal jurisdiction, like marine transport and fish.<sup>68</sup> When the title case came out of abeyance in 2012, the federal government re-established two negotiation tables with the Haida Nation (CHN, 2013). This holds promise for the future, but it is very early in the process and too soon to determine potential outcomes. So, it is argued here that there remains no adequate opportunities available for the Haida to engage with Canada over their mutual interest in these sectors and, concomitantly, to pursue reconciliation in the same way as they have with the Province through land use planning.<sup>69</sup> After the Haida were squeezed out of the federal venue for marine planning in 2011, what is on 'offer' appears to be the federal environmental assessment for the Enbridge Northern Gateway oil pipeline and marine shipping project. In other words, the Haida had to 'settle' for a less desirable venue (Pralle, 2003). In the assessment process, Canada engages with numerous First Nations, including the Haida, through an independent panel. While the Crown set up the venue to review a 'critical' infrastructure project (Emerson, 2010), the Haida raised concerns to highlight their jurisdiction and sovereignty over Haida Gwaii. Chapter Five will examine these ideas further

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68 The federal Department of Fisheries and Oceans partners with the Haida Nation on several initiatives for managing fish stocks (Jones, 2006; Jones and Williams-Davidson, 2000). However, no collaborative arrangement exists that would offer marine protections or strict fishing quotas in the same way the strategic land use regime establishes new protected areas and a strict annual allowable timber cut.

69 The federal government are involved in planning in Gwaii Haanas, but this only applies to the southern third of the islands. Importantly, this government is also involved with the Haida on small scale initiatives, sharing expertise and responsibilities for fisheries management (Jones, 2006; Jones and Williams-Davidson, 2000). They will also be involved in the Title Case in any future court proceedings.

## CHAPTER 5. REMAKING PLANNING SPACE

through an intensive examination of this second in-depth case study on Haida Gwaii: the Enbridge Northern Gateway environmental assessment.

CHAPTER 5. REMAKING PLANNING SPACE

Venue	Crown purpose	Haida purpose
McKenna-McBride Royal Commission (1912-1916)	Collect information from communities to determine adequacy of size of reserve land (Harris, 2002), not 'Indian title' (CHN, 2001, p.7).	Concern over visitors staking ground in 'our own country' and being told that the islands 'belong to men who never saw these lands' (Adams quoted in Harris, 2002, p.213).
Joint Senate-Parliamentary Committee (1926, 1927)	To study the dispute over land, to 'satisfy and quiet the Indians', and to have it 'settled' (Tennant, 1990, p. 104).	If title were refused to be acknowledged, 'we are simply dependent people' (Kelly quoted in Tennant, 1990, p. 108).
West Coast Oil Port Inquiry (1976)	'[T]o inquire into the environmental, social and navigational safety aspects of oil port proposals and the general public concerns about oil tanker traffic on the west coast of Canada' (Thompson, 1978, p.1).	'We the Haida people would rather go back to sails before we let oil spills damage our sea resource, the backbone of our culture' (Lavina Lightbone, President, Council of the Haida Nation quoted in UBCIC, 1977).
Moving between blockades / war in the woods and the courts over forestry decisions (1980s-2000s)	There is no 'fiduciary or constitutional duty' 'to consult' where there are 'claimed, but not established, Aboriginal rights' (Attorney General of Canada, 2003; Minister of Forests, 2003).	The lawsuit argued legal and equitable encumbrance and 'breach of fiduciary duty' (Haida v. BC, 2004, s.5), 'by reason of aboriginal title of the Haida Nation to the lands, waters, wildlife and resources, including the forests, of Haida Gwaii' (Haida v. BC, 1997, s.1A).
BC Treaty Commission process (1991-today)	'The First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding – through political negotiations' (The First Nations of BC et al., 1991, p. 29).	BC policy 'Treaty Cap' was 5% of Haida Gwaii. BC Crown offer of 20% of Haida Gwaii in 2005 was rejected in favour of land use planning over 100% of Haida Gwaii (Council of the Haida Nation, 2007).
Co-management for Gwaii Haanas (1993-today) (resulting out of Lyell Island <i>Athlii Gwaii</i> blockade in 1985)	These lands may become 'a reserve for a National Park of Canada and a National Marine Park of Canada... [and] Canada intends to establish the park reserves pending the disposition of any Haida claim to any right, title or interest in or to the lands comprised therein' (Gwaii Haanas Agreement, s. 1.1).	'The Haida have designated and managed the Archipelago as the 'Gwaii Haanas Heritage Site', and thereby will maintain the area in its natural state while continuing [the Haida] way of life as they have for countless generations. In this way, the Haida Nation will sustain the continuity of their culture while allowing for the enjoyment of visitors (Gwaii Haanas Agreement, s.1.1).
	'Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, and in recognition of the convergence of viewpoints with respect to objectives for the care, protection and enjoyment of the Archipelago, the parties agree to constructively and co-operatively share in the planning, operation and management of the Archipelago...' (s.1.3)	
Case 1. Kunst'aa Guu Kunst'aayah – The Beginning – Reconciliation Protocol (2009-	Haida Gwaii is Crown lands, subject to... the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia (Kunst'aa Guu Kunst'aayah, 2009, s. A).	Haida Gwaii is Haida lands... subject to... collective Title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions (Kunst'aa Guu Kunst'aayah, 2009, s. A).
	'The Parties hold differing views with regard to sovereignty, title, ownership, and	

CHAPTER 5. REMAKING PLANNING SPACE

today)	jurisdiction over Haida Gwaii...Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to co-existence' (s.A)	
NaiKun Offshore Wind Farm environmental assessment (2003-2011)	<p>'To ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects (CEAA, 1992, s.4(1)(a)).</p> <p>'The environmental assessment process provides for the thorough, timely and integrated assessment of the potential environmental, economic, social, heritage and health effects that may occur during the lifecycle of these projects, and provides for meaningful participation by First Nations, proponents, the public, local governments, and federal and provincial agencies' (EAO, n.d.).</p>	'Our people have always put our land, waters and culture first and we intend to ensure the sustainable development of the wind resource in our territory. The terms of reference for the review was set in respect to this special relationship with our lands and waters, and focused on what we know to be issues of priority' (Guujaaw, 2009).
Marine use planning (2007-today)	'[T]o ensure a healthy, safe and prosperous ocean area by engaging all interested parties in collaborative development and implementation' to achieve: 'healthy and resilient ecosystems; sustainable economies; reduced inter-user conflicts; thriving coastal communities with strong cultural and economic ties to coastal and marine areas' (PNCIMA, 2010)	'Haida culture is intertwined with all of creation in the land, sea, air and spirit worlds. Life in the sea around us is the essence of our well-being, and so our communities and culture.' The goals of the marine use plan are: 'to achieve: Conservation and sustainability in all human activities; and Effective collaborative management of the sea around Haida Gwaii' (CHN, 2007).
Case 2. Enbridge project Panel environmental assessment (2009-2013)	To 'consider the potential environmental effects associated with the Project... [and] determine whether the Project is also in "the public convenience and necessity"' pursuant to existing legislation (Natural Resources Canada et al., 2009).	'Our people have been here for a long, long time and it's not through any gift of the government that we have rights or privileges or anything like that. It comes from our ancestry, our birthplace here...We thought [this] was a forum for our people and the island people to speak' (JRP, 2012b, para 12305).

Table 5. Comparing purposes for each planning event, Crown and Haida perspectives

## CHAPTER 6. BETWEEN POLITICS AND PREDICTION FOR A PIPELINE

### *Introduction to case 2*

Part of the challenge in reforming the [environmental assessment] process is that there are inherently two distinct processes that must interact somehow when decision time arrives. These comprise the technical process of impact prediction and the political process of consultation with the intent of reconciling the interests of the Crown with those of Aboriginal people who may be affected (First Nations Energy and Mining Council, 2009, p. 10; Haddock, 2010, p. 70).

This chapter closely considers this dilemma: how the politics of planning – specifically, the politics of reconciliation within planning – might be addressed under the dynamics of planning reform. What this quotation fails to consider is that politics and values are a fundamental part of the so-called 'technical process of impact prediction' (Owens et al., 2004). As outlined in Chapter Two, the value differences between Crown-Indigenous perspectives underlying the idea of reconciliation are often expressed as an intractable conflict, which makes the implications of planning reform all the more complex and potentially politically explosive. This chapter seeks to identify the point where the disagreement over rights is encountered to understand the actions that unfold from it.

This second, in-depth case study is set in contrast to the first, in-depth case study presented in Chapter Four. This collaborative land use regime has been touted as a turning point in the relationship between the Haida Nation and the Province of British Columbia (BC). A series of smaller cases are also examined in the first half of Chapter Four to demonstrate how planning and Aboriginal rights have interacted over time to the point where, today, collaborative processes may be developed that implicitly acknowledge the existence of overlapping jurisdiction and sovereignty. Another central development has been the deployment of Aboriginal consultation and accommodation policies that are tied to overlapping and multi-level planning spaces. These policies function as important mechanisms for moving towards the Crown's idea of 'reconciliation' (INAC, 2011), which is 'central to the political discourse around Aboriginal Peoples and their relationship to the Crown' (Egan, 2012, p.398-399). Indeed, it is a central concept in this research, which poses the following research questions: *Drawing from a case study of Haida Gwaii, what opportunities exist for reconciliation to take place within the planning system? To what extent are wider shifts in the state and scales of*



*decision-making supporting or thwarting effective reconciliation in planning? What is the character and durability of these changes?*

It is posited that while these spaces operate in ways that *tend* to be colonial and function as a process for implementing development agendas, certain conditions and mechanisms are available in planning systems that can also be used in ways to open up opportunities for changing the way reconciliation is implemented across this system. As demonstrated in the previous chapter, the relationship between the provincial Crown and the Haida Nation has shifted dramatically in relation to resource planning activities. The meaning of Aboriginal rights and the practice of reconciliation has also changed. To clarify, this is not to say that project level environmental assessment will lead to reconciliation. On the contrary; this research finds that project level environmental assessments are, in themselves, largely colonial in their intent and function. One of the central purposes of this research is to uncover and examine potential *opportunities* available within these spaces that serve to question and undermine this intent and function such that reconciliation objectives might begin to be meaningfully addressed.

This chapter closely examines the practice of reconciliation as it takes place in planning. Focusing on a controversial energy project subject to Crown reconciliation policies following the pivotal *Haida v BC* (2004) Supreme Court decision. A layer of complexity is added in this case that sheds light on the durability of reconciliation in the planning process: dramatic planning reforms that took place halfway through the process. The Enbridge Northern Gateway oil pipeline and shipping project (the 'Enbridge project') has been identified as a 'critical' project, essential for the implementation of the energy export and market diversification policy introduced by the Government of Canada (Emerson, 2010). This project has galvanized a significant and vocal opposition from environmental groups, First Nations, and the public, resulting in polarized and antagonistic political rhetoric. The project has been subject to environmental assessment – one of the most common project-level environmental planning processes in Canada – and, in turn, the environmental assessment process has also been the target of this policy rhetoric. In 2012, Parliament passed two pieces of omnibus legislation that dramatically reformed federal environmental assessments and related policy and law. This chapter elaborates upon the these events.

The second half of the chapter considers four days of oral hearings that took place on Haida

Gwaii for the Enbridge environmental assessment. These hearings created a unique space for representatives of the federal government and Enbridge to engage with community members and project opponents, while the wider political rhetoric unfolded in the media and policy speeches. This account highlights the way policy mechanisms of reconciliation are deployed, interpreted, and contested, and how each actor draws upon the wider political rhetoric on 'streamlining' as well as collectively held values and worldviews to reconstruct and challenge the assumptions underlying the planning process.

### ***The issue remains the same***

One of the distinguishing characteristics of the information collected from Haida citizens directly involved in the planning events presented in Chapter Four and in the Enbridge assessment is that the issue is, and always has been, the same. One Haida leader describes this issue drawing from the words of past and present leaders:

[Chief] Alfred Adams [said] that we own these whole islands. That has not stopped. That is the same phrase that Guujaaw uses and the same phrase that past presidents have used. When you get to that point, you know, that is the ideal you are fighting for.<sup>70</sup>

This 'fight' was often referenced alongside the events that led to the present collaborative arrangement with the Province of BC, outlined in Chapter Four. This new arrangement is recognized as a turning point in the history of Haida Gwaii, moving from resistance to development to taking control over development:

'[W]e became pretty good at bugging up projects. You know, scaring off investors. We took a lot of steps to safeguard our lands through the land use plan and all that. That's kind of out of the way. We are implementing the terms... [This is] the chance to get to the independent state. Right now, we control most of the timber... It would take more than that, so, we're looking at other things, like scallop farming and other things... everything will be controversial, one way or the other. The logging is, you know, we fought it for years, but it has come to the point now where we are the ones that are logging. It's kind of an interesting twist of thinking, and working alongside the Provincial government will also be an interesting twist.'<sup>71</sup>

Now that the 'fight' with the Province of BC is 'out of the way', a new one begins with Canada. What is most intriguing about the second in-depth case from Haida Gwaii is the way it situates this pivotal moment in the history of relations between the Haida and the Crown – as the Haida move towards reconciliation with the Province and work towards greater independence, Canada seems to resist attempts made by the Haida to engage with them in a

<sup>70</sup> Interview 2 with Haida leader.

<sup>71</sup> Interview 14 with Haida leader.

similar way. Another interesting juxtaposition lies in the fact that while the issues of title and ownership remain the same for the Haida through all of these processes, the Government of Canada has only very recently defined this Enbridge project proposal as 'critical'.

### ***A 'critical' project***

In 1998, Enbridge 'began an analysis of the need for, and feasibility of, a pipeline to meet the long-term needs of Western Canadian oil production and provide Canadian producers with access to alternative markets' (Enbridge, 2010, V.1, p. 1-1). The project design and feasibility modelling has been completed since this time. In 2010, Enbridge submitted an eight-volume environmental assessment report for their proposal to build this pipeline to ship oil from the Athabasca tar sands in Alberta across northern BC to a new marine and tanker terminal in Kitimaat where the resource would be loaded onto tankers. The project would use shipping routes around Haida Gwaii, which are presented in Illustration 5. Along the same right of way, another, smaller pipeline would be built to import condensate, a chemical used to dilute the heavy bitumen oil so it can be transported by pipeline.

According to Enbridge (2010, V.1), the average Canadian oil prices will rise by \$2 per barrel over the first ten years after project start-up and lead to an increase in producer revenues of over \$2 billion in just the first year. As a result, Canada would see a \$270 billion increase in gross domestic product and a \$48 billion increase in labour income, with significant economic spinoffs including government taxes and revenue. The project has been dubbed by many as 'critical to Canada's robust economic future' and in line to meet Canada's Pacific Gateway Strategy aimed to 'transport western Canada's resources to energy-hungry customers around the Pacific Rim' (Emerson, 2010, p. 48).



Illustration 5: Enbridge project location map in relation to Haida Gwaii

This agenda became more important in late January 2012, when US President Obama decided to avoid ruling on a section of TransCanada's Keystone XL pipeline that proposed to increase Alberta oil exports to US refineries. After this US decision, Prime Minister Harper 'expressed profound disappointment' and announced that Canada would 'continue to diversify its energy exports' (Argitis and van Loon, 2012). This statement was followed by a four-day visit to China led by Prime Minister Harper with a delegation of 40 Canadian industry executives, including the head of Enbridge Inc. (Argitis and Pasternak, 2012).

This broad policy rhetoric is complemented by a more regional focus. The project has also been marketed as one that would bring essential development to BC's Northwest. Enbridge proclaims they are developing 'equity investment options' with 'participating Aboriginal groups' so they can 'financially benefit from the Project'. They also purport to be supporting groups to 'complete their own analysis of Northern Gateway's plans' and 'develop programs to provide' employment, training, business, and environmental protection 'opportunities' (Enbridge, 2010, V.1, p.1-5). At the time of writing this, it is unclear how many agreements have been struck with First Nations. While Enbridge has claimed to have signed protocol agreements with 60% of First Nations along the project route, these claims have been

challenged by some who state that most First Nations who would experience the greatest impacts of an oil spill have not signed agreements and / or strongly oppose the project (Coastal First Nations<sup>72</sup>, 2012).

The Haida Nation are not opposed to signing agreements for development on Haida Gwaii, as is evident in the example of the NaiKun offshore wind proposal described in Chapter Four. Indeed, they are also the largest timber land holders on Haida Gwaii and a proponent of shellfish farming.

If people were going to develop projects in our territory, then we should... be protected. That was always first and foremost for me. And the next thing is that if a company is to do business in our territory, we should do business with them. It should be a really good agreement, so our people are going to benefit socially.<sup>73</sup>

The evidence presented in this chapter from the environmental assessment process for Enbridge makes it clear that, while the proposed oil pipeline and tanker project 'may be of benefit to some people in Canada', it will not benefit those living on Haida Gwaii (JRP, 2012b, para 13240). A characterization of the project by Haida Gwaii participants is elaborated upon later in this chapter.

### ***The Panel environmental assessment process***

In 2006<sup>74</sup>, the first stage of the environmental assessment for the proposed Enbridge project began. At this time, the Minister of the Environment referred the project to an independent review panel process, the most rigorous type of assessment under the planning process at that time. This kind of assessment would only be undertaken when public concern warrants or the Minister feels the project may 'cause significant adverse environmental effects' (Canadian Assessment Act, 1992, s.28(1)(a)). After Enbridge submitted their impact assessment in 2010, a Joint Review Panel (the 'Panel') was set up through an agreement between two major administrative bodies responsible for coordinating federal level environmental and energy permissions – the National Energy Board (the 'Energy Board') and the Canadian Environmental Assessment Agency (the 'Agency'). The federal government's

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72 Coastal First Nations are an alliance of eight First Nations along the North and Central Coasts, including the three main Haida governments: Council of the Haida Nation, Old Massett Village Council, and Skidegate Band Council.

73 Interview 25 with Haida leader.

74 The project was referred to a panel level process in 2006, but Enbridge decided to delay the project review until 2009.

rationale for undertaking a coordinated Energy Board-Agency review was to 'avoid unnecessary duplication' (National Energy Board – Minister of Environment, 2009). This assessment avoided further 'duplication' when the Provincial Environmental Assessment Office voluntarily gave up their authority to review the project in 2010. The Province rationalised this move as an effort 'to promote a coordinated approach' and 'to achieve environmental assessment process efficiencies' (BC EA Office-National Energy Board, 2010).

The Panel was struck in January 2010 and composed of three members, one appointed by the Minister of Environment and the other two appointed by the Minister of Natural Resources. These Ministers were also given limited discretionary powers through their responsibilities pursuant to two central pieces of legislation – the *Canadian Environmental Assessment Act (CEAA)* and the *National Energy Board Act (NEBA)*. Prior to 2012, the laws required the Panel to recommend a decision to the Minister of Environment, who would then decide if a project 'is likely to cause significant adverse environmental effects that cannot be justified in the circumstances' (CEAA, 1992, s.37(1)(b)), and another recommendation to cabinet, which would then decide if they are satisfied the pipeline 'is and will be required by the present and future public convenience and necessity' (NEBA, 1985, s.52).

These federal government agencies involved in the process are guided by a 'project agreement' that sets out their roles and responsibilities with the aim of producing a 'timely and predictable' review and 'to contribute to the discharging of any duty to consult with Aboriginal groups'. The Panel is guided by a 'panel agreement' that sets out the basic framework for undertaking the assessment and specifies the Panel's legislative duties towards the aforementioned pieces of legislation. The agreement requires the Panel to review the effects on the environment and any change resulting from the environmental effects on human activities (e.g. health, heritage, land and resource use 'for traditional purposes by Aboriginal persons', or on historical/archaeological values) that are 'likely to result from the project and the appropriate mitigation measures' (National Energy Board – Minister of Environment, 2009, p.4). A 'scope of factors' document outlines, in greater detail, the substantive items that must be considered.

The 'Aboriginal consultation framework' confines the Panel to consider Aboriginal rights in the assessment without being responsible for meeting Crown duties for them. Specifically, the Panel looks at 'the manner in which the project may affect potential or established Aboriginal

and treaty rights', information provided on strength of claim, and recommendations for 'measures to avoid or mitigate potential adverse impacts' on these rights (Canadian Environmental Assessment Agency, 2009, p.8). A Crown Consultation Coordinator represents the federal government to monitor the Panel process to ensure the federal government 'meets its legal duty to consult and, where appropriate, accommodate' (p.8).

After Enbridge submitted their eight-volume report to the Panel in 2010, the Panel reviewed the document and determined there was 'sufficient' information in the study to proceed to the next phase of the process. At this stage, a registered participant or government (including a First Nation government) can submit an information request to the Panel asking that Enbridge address any gaps in the evidence filed, and the public could submit a written letter of comment. Following this, oral hearings and community hearings took place. Information requests were then directed to those who filed evidence to the Panel, such as government agencies, First Nations, environmental groups, etc. The final hearings and arguments by all parties were presented to the Panel, who then began deliberations and writing their final report in mid-2013. Table 6 presents the major milestones in this process.

CHAPTER 6. BETWEEN POLITICS AND PREDICTION FOR A PIPELINE

<b>Date</b>	<b>Milestone in Panel process</b>
May 2010	Enbridge submits application to Panel. Panel reviews application for completeness.
September 2010	Panel invites comments from public on the process and the Enbridge application.
January 2011	Panel considers public comments on process and application, finding a gap in the Enbridge risk assessment analysis for project, ordering Enbridge to file additional information. Panel revised the list of issues to be considered in the process and the list of communities to be visited.
May 2011	Panel receives additional information from Enbridge. Panel issues hearing order, setting out the ways to engage in the process.
June 2011	Panel visits 11 communities to share information on the process.
August – November 2011	Two rounds of information requests from registered participants directed to Enbridge. Two rounds of responses from Enbridge directed back to registered participants.
January 2011	Deadline for registered participants to submit written evidence for the record.
January – March 2012	Oral hearings take place in 17 communities.
March – August 2012 November 2012 – January 2013	Community hearings take place in 23 locations (including six cities outside of the project area).
May – July 2012	In May, registered participants invited to direct information requests to other registered participants who filed written or oral evidence. Responses given in July.
August 2012	Deadline for public to submit letter of comment.
August 2012 – May 2013	Cross-examinations phase of the final hearings takes place.
May – June 2013	Final arguments phase of the final hearings takes place.
June – December 2013	Panel considers evidence and writes report.
December 19, 2013	Panel issued report and recommends federal government approve the project, subject to 209 conditions.
June 17, 2014	Minister of Natural Resources issued approval of project, subject to Panel conditions. Requires National Energy Board to issue certificate of public convenience and necessity within seven days of cabinet decision.

Table 6. Milestones for the Enbridge project Panel environmental assessment process



### ***The start of a national controversy***

Oil-related proposals of any kind in the Hecate Strait have proven to be highly contentious for the last century. Chapter Four mentions the abbreviated public inquiry and a public opposition campaign from the 1970s for an oil tanker port facility also proposed for BC's north coast (Thompson, 1978). A number of events led to an outright moratorium on offshore exploration for the entire BC coast, and a moratorium on oil tanker traffic off of BC's north coast. The tanker traffic moratorium was declared by both governments in 1972 (Priddle et al., 2004), but was 'lifted' in 2006 when then federal Minister of Natural Resources Gary Lunn stated, '[t]here actually is no moratorium for (oil tanker) traffic coming into the West Coast'. He pointed instead to an industry-led 'voluntary exclusion zone' that applies to US tankers carrying Alaska oil to terminals in Washington state (Sutherland, 2007). Proposals to lift this moratorium and the offshore oil and gas exploration and development moratorium have been subject to strategic environmental assessment (SEA), which have demonstrated significant environmental and social concerns associated with this policy direction (Priddle et al., 2004). In 2010, the opposition parties passed a non-binding motion through the House of Commons calling for the government to formalize the moratorium on crude oil tanker traffic in the Pacific north coast – a call that is tightly tied to the Enbridge proposal (McCarthy, 2010). Appendix E details this chronology. In this example, two discourse coalitions (Hajer, 1995) formed that aligned upon two very different narratives on the reality of a (purely verbal) moratorium.

The 'no moratorium' discourse has been institutionalised, as government websites and policy documents clearly indicate that no moratorium on tanker traffic has ever existed (e.g. Transport Canada, 2010). However, an alternative discourse coalition challenged this perspective, but not without repercussions. As Enbridge initiated their involvement in the planning process, a series of regional and national campaigns and grassroots opposition formed around the project in an attempt to gain the attention of the media, public support, and to challenge decision makers. The Haida Nation, as part of the Coastal First Nations, issued a legal declaration banning oil tankers from their waters (CFN, 2010), in alliance with other First Nations across the country, and regional and national environmental groups and other organizations and individuals opposing the project. Much of the opposition was expressed through conventional media as well as photography, film and social media. This

continued to the time of writing (July 2014).

Some of the opposition took advantage of opportunities in the Panel process to gain influence over the final decision, and to gain public attention for their cause. In one example, environmental groups actively recruited members of the public to sign up and present at the hearings (Cotter, 2012). Most notably, the Dogwood Initiative, a small BC-based citizen rights organization interested 'in ways to take back decision-making power over their land and water' (Dogwood, n.d.), used online social networking to encourage individuals and their friends to sign up to present at the Panel hearings in their 'mob the mic[rophone]' campaign. By the time the first set of hearings were scheduled to begin in January, 2012, over 4,300 people had registered to present (Swanson, 2011). According to Dogwood, approximately 1,600 people signed up through their campaign. Over 1,200 people presented in 16 communities and regional centres. This represents the largest group of people to ever speak at an environmental assessment in Canada<sup>75</sup>, extending the Panel's original schedule by a full year (JRP, 2011).

These citizen campaigns raised some concerns amongst Enbridge and the federal government. The Enbridge spokesperson was worried that the campaign was not simply 'a genuine expression of public interest', but 'a strategy being employed by political activists to try and undermine the regulatory process' and turn the project 'into an anti-oil sands battleground' (Cotter, 2012). Through this campaign and subsequent critiques, the artificial boundary between the technical and political functions of planning was blurred, leading some to challenge the legitimacy of the Panel process itself (see, for example, Owens et al., 2004). Its legitimacy was questioned most acutely on the eve of the first of the oral hearings when federal Natural Resources Minister Joe Oliver released an open letter to Canadians:

We know that increasing trade will help ensure the financial security of Canadians and their families. Unfortunately, there are environmental and other radical groups that would seek to block this opportunity to diversify our trade. Their goal is to stop any major project no matter what the cost to Canadian families in lost jobs and economic growth. No forestry. No mining. No oil. No gas. No more hydro-electric dams. These groups threaten to hijack our regulatory system to achieve their radical ideological agenda. They seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects. They use funding from foreign special interest groups to

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75 A controversial Joint Review Panel for the Mackenzie Gas Project, completed in 2009, saw 558 presenters across 26 communities or regional cities. The assessment of an earlier iteration of this same project in the 1970s saw Justice Thomas Berger visit 35 communities. The Enbridge JRP has travelled to 16 communities and regional centres (Dogwood, 2013). For a history of environmental assessment in Canada, see Appendix F.

undermine Canada's national economic interest... [T]he systems seems to have lost sight of this balance over the past years. It is broken. It is time to take a look at it. It is an urgent matter of Canada's national interest (Oliver, 2012)

The letter was quoted extensively after it was released, generating a heated national debate over the future of Canadian energy, the legitimacy of environmental advocates in the debate, and the purpose of the environmental planning process. In response, the editor of one of Canada's national newspapers, the *Globe and Mail*, argued that the government views 'some contributions to public debate as "out of bounds", if they are "against the national interest" – that is, opposed to a proposed pipeline from the oil sands of Alberta to the British Columbia coast' (*The Globe and Mail*, 2012). In other words, the public interpreted Oliver's rhetoric as a response to the campaign against the Enbridge project (van Loon and Olsen, 2012).

This divisive rhetoric continued in the media after Oliver's letter. Critics of the anti-Enbridge campaign identified the 'mob the mic[rophone]' event as an important example for why the government's call to reform environmental assessment is so important (*Calgary Herald*, 2012). Since this letter, there have been numerous protests, court challenges, a high profile dispute between BC and Alberta Premiers over distribution of project royalties, and threats of future conflict (*CBC News*, 2012; Paris, 2012; *The Canadian Press*, 2013a).

Soon after Minister Oliver's statement, the federal government set up new disclosure requirements for charities to report on their political activities to the Canadian Revenue Agency while also setting aside \$8 million over ten years to restrict the 'political activity' of charities, amending the Income Tax Act to make clear that 'charitable activities' excludes 'political activities'<sup>76</sup>. These new rules appear to target groups involved in the campaign that resulted in such a high number of registered participants in the environmental assessment. The rhetoric characterises these groups as threatening 'to hijack our regulatory system' or misusing the planning process. The logic of appropriateness can be used to explain this and later responses. Enbridge's and the federal government's view of appropriate use was violated and, since the rules of who can participate in the process were rather vague, their view of appropriate use was enforced by introducing new rules. The next section elaborates upon the enforcements deployed by the federal government following Minister Oliver's letter.

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<sup>76</sup> This led to the resignation of Dr. David Suzuki from the David Suzuki Foundation and the creation of the advocacy arm of Forest Ethics (Berger, 2012).

### ***A focus on environmental assessment reform***

One of the more significant changes that has taken place since Oliver's open letter is the passing of two omnibus budget bills that modified many of Canada's environmental laws. These changes were in support of a 'one project, one review' policy introduced in 2012 for environmental assessments. The policy is aimed at 'integrating federal and provincial requirements and consolidating federal responsibilities... key to a more modern, efficient and effective regulatory system' (Government of Canada, 2012, p. 8). In July 2012, the budget bill, *Jobs, Growth and Long-term Prosperity Act*, passed through the Canadian Senate to become law. In December 2012, the *Second Act to implement certain provisions of the budget* became law. These bills replaced some of the most important laws available to protect environmental values in Canada. Most notable were changes to the *Canadian Environmental Assessment Act* (1992), and the laws that are referenced within this Act that provide various federal government agencies with the legal powers to involve themselves in the process of decision making for large infrastructure and resource projects. Specifically, these laws include *National Energy Board Act*, the *Fisheries Act*, the *Navigable Waters Protection Act* (now called the *Navigable Protection Act*), the *Species at Risk Act*, and the *Canadian Environmental Protection Act*. Table 7 outlines some of the key changes. (For context, Appendix F provides an overview of the history of environmental assessment in Canada and BC, including an examination of case law guiding Crown consideration of Aboriginal interests.)

As mentioned above, the first two laws are central to establishing and defining the scope of the environmental assessment for the Enbridge project. The second two laws are equally important to most environmental assessments in that they are often used as the 'triggers' for government to apply the *Canadian Environmental Assessment Act*, while also shaping the scope of the process.

Law	Summary of 2012 changes
Canadian Environmental Assessment Act (Bill C-38)	The Act was replaced and underwent many significant changes, including elevating full decision authority for project approval to cabinet, restricting who can participate to only those 'directly affected', introducing time limits on decisions, narrowing the factors considered to those strictly within federal jurisdiction (a jurisdiction that has shrunk due to changes in other environmental laws, outlined below), reducing the number of assessments (notably eliminating the requirement for the least controversial projects subject to a 'screening' level assessment, which made over 90% of assessments under the old Act), and allowing the federal governments to opt out of the assessment process where an 'appropriate substitute' is in place in a provincial/territorial/land claim jurisdiction. These changes may affect the way consultation takes place in assessments by reducing the total number of assessments and, thus, opportunities for consultation, narrowing the pathways by which a project may be considered to give rise to an impact upon an Aboriginal right to only those environmental effects within federal jurisdiction, and speed up the available time for consultation.
National Energy Board Act (Bill C-38)	Changes include elevating full decision authority for project approval to cabinet, introducing time limits on decisions, allowing projects to be 'split' and approved in parts (e.g. where a roads or additional facilities are necessary for a project to function, these parts may be reviewed separately), deleting the public hearing requirement for licences to export oil, gas, electricity, and including only those 'directly affected' in public hearings. Significant paperwork must also be filed before participants may be included (Munson, 2013).
Fisheries Act (Bill C-38)	When a permit is required for disrupting fish habitat under this Act, the Canadian Environmental Assessment Act is 'triggered' thereby initiating an environmental assessment. The new Act no longer requires a permit unless there will be a 'permanent' alteration or destruction of habitat that supports <i>fisheries</i> . The previous category, fish habitat, did not necessarily include habitat that supported fisheries and, thus, was a much broader category of jurisdiction. The new Act also allows the federal government to sign agreements with provinces to cooperate on powers, roles, and functions concerning fish. The new Canadian Environmental Assessment Act is no longer 'triggered' by other pieces of legislation; rather, developments are subject to assessments if they are deemed a 'designated project' under new regulations or by new discretionary powers granted to the Minister and Agency.
Navigable (Waters) Protection Act (Bill C-45)	When a permit is required under this Act, the previous Canadian Environmental Assessment Act was 'triggered' thereby initiating an environmental assessment. The Act once gave the federal government jurisdiction to 'protect' waters for environmental / navigable purposes, but the new Act no longer applies to any 'navigable water' <sup>77</sup> (estimated to be over 2 million rivers and 32,000 major lakes, and 3 oceans). The new Act only applies to prescribed bodies of water (62 rivers, 97 lakes, and 3 oceans). It also exempts large pipelines and power lines.

<sup>77</sup> Case law clarified the meaning of this, suggesting that a water was navigable when it could hold a floating vessel for transport, recreation, or commerce. The frequency of navigation was a possible consideration as well.

Species at Risk Act (Bill C-38)	Changes include taking away time limits on permitted or licensed activities that affect species at risk and their habitat and exempts National Energy Board from considering species at risk and their habitat when assessing pipelines.
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Table 7. Key legal reforms in 2012 that affect environmental assessments<sup>78</sup>

A flurry of debate over these Bills and their purposes was raised in the national media by policy pundits, politicians, and activists. Opposition to the first Bill (C-38) was strong with critics arguing that it would have a detrimental impact on the environment. Four former BC-based federal fisheries ministers, including two conservatives, issued an open letter to Prime Minister Stephen Harper (Siddon et al., 2012) arguing that the proposed amendments to the *Fisheries Act* 'will inevitably reduce and weaken habitat-protection provisions' (see Table 7). While many critics hope that the new environmental assessment law will address the long-standing criticism on provincial-federal duplication, many were concerned over the potential effects on environmental protection and the nature of First Nations consultation (Rossi and Woods, 2012). Part of the concern stems from 'jurisdictional gaps' that may appear after offloading federal fisheries' responsibilities to Provinces who do not have the appropriate jurisdictional authority to deal with the issue (West Coast Environmental Law, 2012). (This jurisdictional gap is described in Chapter Four in reference to the 'streamlined' regional marine planning process.)

In a critique of the environmental law reforms, Canadian environmental assessment scholar, Robert Gibson, argues that the purpose of the bill is to facilitate 'economic growth through more rapid resource exploitation' (2012, p. 180). The new law, he says, 'eliminates most federal government involvement in environmental assessments and sharply curtails the scope and potential effectiveness of what remains'.

[The new] law is expected to cut the number of federally led assessments from several thousand to at most a few hundred annually. It will also narrow the scope of the assessments that are done... the new law [also] increases reliance on ministerial discretion in process decisions (Gibson, 2012, p. 179).

<sup>78</sup> Table sources: Canadian Environmental Assessment Act, 2012, SC 2012, c 19; Canadian Environmental Assessment Act, SC 1992, c 3; David Suzuki Foundation, 2012; Doelle, 2012; Ecojustice, 2012a; 2012b; 2012c; Fisheries Act, RSC 1985, c F-14; Gibson, 2012; Jobs and Growth Act, Bill C-45, 2012; Jobs, Growth and Long-term Prosperity Act, Bill C-38, 2012; National Energy Board Act, RSC 1985, c N-7; Navigable Waters Protection Act, RSC 1985, c N-22; Species at Risk Act, SC 2002, c 29; West Coast Environmental Law, 2012.

Strongly-worded concerns were also raised by First Nations in BC:

[The Union of BC Indian Chiefs] Council<sup>79</sup> strongly opposes the omnibus Bill C-38, including its erosion of environmental protections to serve the interests of industry while ignoring Aboriginal Title, Rights, and Treaty Rights, and the unilateral imposition of the proposed Canadian Environmental Assessment Act 2012 (UBCIC, 2012).

The news release for the first bill promised to include a new Aboriginal reconciliation policy guidance document to reflect the new emphasis on the 'whole government' approach to consultation that is intended to be better suited to the task (Government of Canada, 2012). At the time of writing this, no policy guidance has yet been released.

The new assessment process focuses project reviews into a single assessment – allowing federal government to opt out of assessments and encouraging provinces to do the same when there is an 'equivalent' process in place. The new laws impose strict timelines and rules for including only individuals or groups who are 'directly affected' by a development (Government of Canada, 2012, p.9) – a change that appears to directly avoid campaigns like 'mob the mic'. The new legislation also limits federal government agency review to only those environmental effects that clearly fall within federal jurisdiction – a change that is further limited by related legislative changes that consolidate federal powers, impose strict timelines, and reduce federal oversight for certain issues through the 2012 legislative changes outline in Table 7, above. And, importantly, the final decision for assessments is raised to cabinet<sup>80</sup>. Critics of the first omnibus bill considered these changes to be some of the most significant changes to environmental and conservation law in Canada 'in half a century' (Langer in Pynn, 2012).

Following the announcement of the first bill, many feared that the Panel process would be obliged to stick to the newly legislated 24-month timeline for panel reviews – a move that the Union of BC Indian Chiefs said 'completely eclipses any hope or opportunity for reconciliation'. When the decision was made for the Panel, however, their extended timeline was allowed, but any discretion to modify their timeline in the future was taken away. This was outlined in a letter issued by the Minister of Environment, Peter Kent, to the Panel in

79 The Union of BC Indian Chiefs is a non-governmental political organization that focuses on building relationships amongst Indigenous peoples and to present BC First Nations' voice at many scales of governance.

80 The legislation specifically gives the 'Governor in Council' final decision authority over an assessment that finds there is likely to be a significant adverse environmental effect. This term refers to the governor general that acts upon the advice of the federal cabinet.

August 2012 (half-way through the hearing process), which also directed them to a revised 'project agreement' that clarifies the new regulatory framework within which they exist. The Panel was asked to consider 'environmental effects' within the new, much narrower definition provided within the new federal laws outlined in Table 7 (CEAA, 2012, s.5). This has important implications for how 'aboriginal peoples' are considered. Specifically, an effect on 'aboriginal peoples' (e.g. health, heritage, socio-economic conditions, historical site, etc.) is only considered when there is a pathway through an identified 'environmental effect'. For example, if fish habitat that supports an Aboriginal fishery is likely to be permanently destroyed, there might be a health and socio-economic effect on 'aboriginal peoples'. Previous law would have required the Panel to consider fish habitat generally (not only habitat that supports a fishery) that would be disrupted or altered (not permanently altered or destroyed). The new agreement also requires the Panel to make final recommendations on both environmental assessment and pipeline approval in a single report issued to the Minister of Natural Resources (Kent, 2012) with the final decision resting entirely with cabinet (Rossi and Woods, 2012).

#### A decision space opens up on Haida Gwaii

The first half of this chapter has outlined the controversy surrounding the Enbridge project and its assessment process. The Enbridge project has been framed as 'critical' to the federal government's energy export policy agenda. As the project was subject to a Panel environmental assessment, the opposition to the project was able to leverage an 'opportunity structure' by signing up a large number of people to present, forcing the Panel to extend the assessment process timeline by a year. This appeared to trigger government reforms of the environmental assessment process. How this reform might influence the way reconciliation is treated in environmental assessment remains unclear. This concern is addressed more directly in the next half of the chapter which describes how the notion of reconciliation has been deployed in the oral hearings on Haida Gwaii. These hearings were set up for the Panel to take 'oral evidence' – or that evidence that 'cannot be communicated in writing'. The relatively open format of evidence-giving allowed for a Haida way of understanding reconciliation to be presented. These hearings are then contrasted with the cross-examinations that took place nearly a year later, on the subject of 'Aboriginal Engagement and Consultation' (JRP, 2013a). This questioning reveals how the oral evidence has been



interpreted by both Enbridge and the Council of the Haida Nation in the decision process. Since Enbridge draws upon Panel guidance and Crown policy, and appears to be discursively aligned with the federal government in the activities described above, the Enbridge discourse coalition characterised below will offer some insights on the Crown's interpretation as well.

### ***Oral hearings on Haida Gwaii***

#### The setting

As this political controversy over the Enbridge project and the assessment process unfolded, the first of the oral hearings on Haida Gwaii began. Four full days of hearings were held in 2012 on February 28<sup>th</sup> and 29<sup>th</sup> in Old Massett and March 21<sup>st</sup> and 22<sup>nd</sup> in Skidegate (see Illustration 1 in Chapter Four for locations). The first of these hearings came less than two months after Minister Oliver's open letter to Canadians. By February 28<sup>th</sup>, the Panel had already sat through twelve days of hearings in eight different communities<sup>81</sup>. Many presenters in Haida Gwaii were aware of the other hearings, and followed the wider political debate. In preparation, many presenters practised their presentations – some with guidance of their legal counsel – while others erected hand painted signs along the road to demonstrate opposition to the project (Illustration 6).

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81 The Panel heard thirty-six oral hearings in seventeen communities. Over the entire process, the Panel visited twenty communities to hear oral evidence from interveners, oral statements from the public, and questioning and cross-examinations amongst interveners, including Enbridge and their consultants. Up to and including June 24, 2013 (the final day of hearings), the Panel has sat for 170 days. These were in addition to the information sessions held in sixteen communities on the Panel process and ways to participate in the process in 2011.



Illustration 6: Signs erected before Panel arrived for oral hearings on Haida Gwaii.

Photo credit: Archie Stocker Sr.

Up to 500 people attended all or part of the four hearings, a significant proportion of the island population (approximately 10%). Volunteers, with paid staff from the Haida Nation and cooks and servers from the community helped coordinate the event with Panel staff. The beginning of each hearing was marked by a very solemn procession of hereditary leaders, women held in high esteem (clan matriarchs), and elected members. The procession was paired with song. Many of these leaders were dressed in formal regalia and sat in prominent positions in the room, in equal standing to the Panel. The table and chairs where presentations took place faced the Panel. And the Panel was flanked on either side by the clan matriarchs and hereditary leaders. Elected officials sat in two single rows to the presenters' back left and back right. Illustration 7 presents this scene.



Illustration 7: Panel proceedings in Haida Gwaii

Photo credit: Mike Ambach

Before the Panel Chair spoke, a Haida community representative introduced one matriarch to say a prayer first in Haida *Xaayda Kil*<sup>82</sup> and then in English, and then the territory's chief was asked to give a welcoming address. When the Panel Chair was given the floor, she and the other panel members addressed the audience in English and in French (Canada's two official languages) and presented the goals of the oral hearings as they were written in their procedural documents.

Each event included a full hour lunch break with a feast of many local and Haida foods, like herring roe on kelp *k'aaw*, a variety of salmon *tsiin*, and deer *k'aad* stew, for everyone who

<sup>82</sup> All Haida language words are in Skidegate dialect – *Xaayda Kil* – unless otherwise noted.

attended.

### Formalising politics

Before each presentation, participants were asked to swear an oath on a bible and an eagle wing to 'tell the truth, the whole truth, and nothing but the truth'. To speak, presenters would first press a button on the microphone sitting in front of them. The words spoken in the microphones were transcribed by Panel staff. Each visual aid that accompanied a presentation was added to the record as 'late written evidence' and assigned a number by the Panel secretary, unless an intervenor or the Panel objected on the grounds that prejudice would be caused by permitting its filing. These and other procedural aspects of the event helped to maintain a very formal atmosphere. This formal atmosphere was important. It was clear that the anger and negative emotions associated with the politics opposing the Enbridge project, widely held across Haida Gwaii, could bubble to the surface at any moment. The procedure, however, moderated this atmosphere.<sup>83</sup> This emotional tension is revealed in a number of moments, described below. Much of the tension seems to arise out of a collective sense that the Panel misunderstands the purpose for these meetings in Haida Gwaii. The tension appears to be moderated by certain moments that show the Panel is making an honest effort to understand.

First, the formalities imposed by the Panel were respectfully challenged. In two separate instances, the Chair of the Panel, Sheila Leggett, requested that the audience refrain from clapping after each presentation. Later in the proceedings, she did not accept a hand-made book presented to her by a young girl. When the importance of clapping and accepting gifts was explained to the Chair, these formalities were overlooked. 'I know my Panel mates continue to learn all the time... So my sincere apologies' (JRP, 2012a, paras 20786-20787).

Another formality was not so openly discussed. The Panel had become accustomed to addressing a particular participant above all others when admitting new written evidence in the hearings. When new evidence was admitted to the proceedings, the Panel Chair asked (nearly without fail) if Enbridge counsel objected. The counsel was located near the front of the room, just behind the Panel Secretary. This visibly agitated members in the audience and

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<sup>83</sup> In fact, some community members brought signs and other protest props to the first day of hearings in preparation of a protest. When they arrived, however, it became evident to them that this was not the appropriate space for protest.

representatives of the Haida Nation. In one instance, when the counsel representing Enbridge in the Old Massett hearings objected to the admission of evidence, the President of the Haida Nation stated, 'I object to his objection' (JRP, 2012b, para 13066). And on several occasions, without prompting from the Panel, he interjected, 'We have no objection' (e.g. JRP, 2012b, para 13867).

An underlying politics influencing the planning space was evident when presenters linked their presentations to wider national-level politics. Many presenters made reference to Minister Oliver's letter<sup>84</sup>, for example, while others questioned the legitimacy of the process itself. In the opening statements made in the first hearing on Haida Gwaii, it was stated, 'Our people, of course, are concerned about what is proposed here and more concerned when they see a government who seems to have already made up their mind' (JRP, 2012b, para 12302). The politics were not always as obvious. Many presenters conveyed knowledge of their own cultural histories, ancestral occupation, and continued interconnectedness that link the Haida with Haida Gwaii, but a number presented an additional, political layer. Politics were also expressed when presenters conveyed stories of dispossession in full view of the Crown and the public. Foods that have always been harvested are now depleted. Commercial fishing is blamed for the decimation of abalone and logging for eliminating some salmon runs and other seafood. 'We used to get our clams in the area by Kung but the logging wrecked that. They'd drag the logs right through the beach, through the clam bed' (Respected Elder Margaret Edgars, JRP, 2012b, para 12490).<sup>85</sup>

These and other personal and collectively held narratives were shared, demonstrating the layers of past use, occupation, and dispossession from Haida Gwaii. These stories generated highly emotive responses from presenters, leading the Chair to describe the hearing as 'a very solemn occasion' (JRP, 2012a, para 20236). These emotions were also tied to a sense from the community that the Panel was imposing their own process on them for a decision that is perceived to have very extreme consequences:

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84 For example, in the hearings held in Haida Gwaii in March 2012 the term national interest was quoted seven times, and seven additional references were directed at general statements made by the Prime Minister or Minister Joe Oliver.

85 This was evident throughout hearings on the coast. On the first day of oral hearings in the Haisla Village of Kitimaat, stories were told of the history of pollution in the Kitimat River that eliminated the oolichan runs – a type of smelt that has been used and traded by the Haisla for generations with many First Nations, including the Haida (JRP, 2012f, Chief Sam Robinson, para 3849).

It really feels like our way of life is on trial here. You know, it's a pretty strange feeling to have to defend how we live here... [A]nd the consequence[,] if we don't say the right things and convince you[,] is all this can be gone (Jaalen Edenshaw, JRP 2012c, para 13876).

One of the more obvious ways in which this tension presented itself occurred when presenters directly addressed the question of reconciliation. The former President of the Haida Nation, Miles Richardson, compared the Panel assessment process to earlier forums that came before the Panel to make policy decisions over Indian Reserve lands:

Commissioners came around in the late 1800s and then again in the early 1900s [to ask] our people a specific question, "What land do you need to live on?" We're going to give you some land, was their assumption'. 'In those days, our people were as equally clear and every bit as eloquent as what you're hearing from our people today about this Enbridge question. Our people said, "That's not the right question"... [Our people] said, "According to your law, you must deal with this question of Aboriginal title, and we've never addressed that question (JRP, 2012a, paras 20273-20275).

After [the Royal Commission] left, far from coming and dealing with the title question, they outlawed the potlatch, outlawed hiring lawyers to pursue the title question and continued with the residential school initiative, continued with all their efforts to alienate our people from our land (JRP, 2012a, para 20280).

[W]e know that this reconciliation, respecting each other as nations, as peoples and reconciling that on a government-to-government basis – is the way to go... [We now have the tools to do this, but n]ow we must get on with it (JRP, 2012a, paras 20266-20267).

The oral hearings offered a space for participants to speak about their perspective of reconciliation in clear, straightforward terms. A century earlier, the commissioners might have threatened jail time for speaking about title (Harris, 2002). This Panel did not make any effort to re-direct presenters away from talking about the title dispute<sup>86</sup>. Indeed, a Panel member asked a very direct and rare probing question on the matter. This was probably the most direct probing question over the entire four days of hearings. Panel member Hans Matthews asked the President of the Haida Nation about the nature of reconciliation with the Crown: 'And am I correct in assuming that you have an agreement with both the federal and provincial governments?' (JRP, 2012b, para 12410).

You have agreements with the Crown governments?

This question probes the very heart of reconciliation initiatives on Haida Gwaii, much of which is outlined in Chapter Four. The question is addressed in many ways by different

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<sup>86</sup> The Panel Chair did interrupt if the presenter went over time and if presenters were providing their opinion on the proposed project, as opinions were reserved for community hearings taking place after oral hearings.

presenters. This section outlines how presenters not only tried to characterize ongoing reconciliation initiatives with the Province and Canada, but also outlined their frustrations with fairly recent initiatives involving Canada. Many of these frustrations were then directed at the federal Panel process itself.

This was the first we heard that you were an agent of the Crown to deal with us

In direct response to the Panel question, the President responded by recounting his sense of disappointment over federal government actions to achieve reconciliation. Contrasting the *Kunst'aa Guu Kunst'aayah* with federal initiatives related to the ocean, the President stated that the federal negotiator was given 'no mandate to negotiate' an agreement on similar terms (Guujaaw, JRP, 2012b, paragraph 12414). He elaborated later in the hearings:

[O]ur people have worked to reconcile the title dispute between ourselves and the colonial government of Canada. You've heard of some success with the Province of BC and lands issue within their jurisdiction and we presented evidence to show what exactly that's doing and how it worked to eliminate conflict. ... [There is] less logging today; it's done in a better fashion. The lands that we didn't want logged won't be logged. There's lands set aside for cultural purposes to look after medicines and to ensure that we have the cedar that we need.

[However, w]e've had no response from the federal government who, in [the] split of authorities between federal and provincial government[s], [Canada is] charged with the oceans. We've had no dealings with them on this matter. This is the first that we've heard that you are their representatives to deal with us on this matter and that Enbridge itself has become an agent of the Crown to deal with us (Guujaaw, JRP, 2012c, paras 13469-13471).

This final reference to Enbridge reflects upon a controversial practice in consultation activities, where the Crown may delegate certain procedural aspects of consultation to industry, like gathering information about the impact of a proposal on Aboriginal rights (INAC, 2011, p. 20). Another presenter highlighted this concern:

Our people knew about that where the Crown in right of Britain, Great Britain, and then[,] after 1982 in right of Canada, as a matter of law said that the only way Aboriginal -- in our case Haida -- title can be alienated from its rightful possessors is through agreements with the Crown. Not with the Hudson's Bay Company, not with the MacMillan Bloedel, not with some fishing company, but with the Crown in right of this nation (Miles Richardson, JRP, 2012a, paras 20271-20272).

Everything depends on everything else

Like hearings in other coastal communities, concerns were raised over a potential spill and the personal and collectively held values reflecting a connection to home and land. Haida

culture has a long history of developing this connection that is deeply intertwined with the day to day activities that take place on Haida Gwaii. This complex history and way of life has been encapsulated in a series of principles used by the Council of the Haida Nation in their natural resource planning and management activities. One such principle, *Gina waadluxan gud ad kwaagiida* - Everything depends on everything else (Jones et al., 2010), is expressed throughout the hearings (JRP, 2012a, para 20501 and 21414).<sup>87</sup>

In one presentation, geographic information system tools were used to illustrate this principle. Up to 24 feet of high tide stretches across 350 islands of Haida Gwaii or 4,700 km of intertidal zone. This area of land is 'being dipped into the ocean' twice a day (John Broadhead, JRP, 2012d, para 21400). This interaction with the sea extends to the whole of the islands; 'a huge pulse of nutrients from the ocean is delivered into the bodies of trees, and plants, and medicines in the forest' when bears drag salmon from a river to the forest floor, when an eagle takes the salmon remains further inland, etc. (para 21417). This description was used to consider the extent of a potential oil spill. This presentation offered insights on the way an assessment ought to be done if it were to follow the Haida principle of *Gina waadluxan gud ad kwaagiida* - Everything depends on everything else. This venue provided the opportunity for this alternative impact prediction that, as we see later in this chapter, challenges the impact prediction guided by the *Canadian Environmental Assessment Act* undertaken by Enbridge. The diverging approaches to impact prediction are expressions of competing world views, a critique of environmental assessment presented in Chapter Two.

Other presenters illustrated this principle in other ways, describing their relationship to the marine environment and everything it is connected to, offering intimate details about places they gather seaweed, clams, and cockles to fish for halibut and salmon, and the importance of learning how to gather, fish, and prepare these foods to health, identity, family, spirituality, and livelihood. Some presenters shared knowledge of marine transport, such as their experience with storm events, historic marine spills and accidents, or knowledge of existing traffic not included in the technical reports. Some of this evidence is more easily included within the Enbridge assessment. The *Canadian Environmental Assessment Act* guides this approach and requires the Panel to review the effects on the environment and any change

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<sup>87</sup> These principles are discussed briefly in Jones et al. (2010). However, to understand this idea requires lived/experiential knowledge that cannot be explained in writing here. See Nadasdy (2003) for a thorough description of this critique.



resulting from the environmental effects on human activities, including use 'for traditional purposes by Aboriginal persons' that are 'likely to result from the project' (National Energy Board – Minister of Environment, 2009, p.4). Any moral or ethical lessons derived from these presentations that might influence our understanding of the relationships between food and identity, however, are peeled away so they fit within Canada's laws. Chapter Two argues that since these laws require other supporting evidence to confirm the accuracy of 'oral evidence' (see, for example, Cruikshank, 2000), the result is merely a confirmation of the presence or absence of species and plants used by humans that can be mapped onto any existing impact predictions.

We will become those one-eyed people

Some Haida stories were also deployed to not only convey the importance of the places where these stories were set<sup>88</sup>, but also offer guidance to the Panel. In one presentation, a Raven *Nang kilsdlaas*<sup>89</sup> story was told for this purpose:

Raven was looking for a place to rest. So, he bit into the sky and part of the sky was transformed into a town. When he arrived in the village, he saw that the Chief's daughter had a baby. He found his way to the baby and pulled the child's body out of the skin and put the skin on and he became the baby. In the evening, he was absolutely starving because he was fed baby-sized portions. After everybody went to sleep, Raven went to each house and plunked out one eyeball from each person and put it in a basket and he cooked it on the fire. And that was his food. In the morning, people were all talking furiously and asking what happened - they only had one eyeball. A supernatural told the people that baby was really Raven, so they threw the baby and the baby came from the sky and landed on the water and carried on to another episode.

I was puzzled by the story for a long time and I tried to make sense of it. So I covered one eye, and we all know when you cover one eye there's no depth of perception. ...[This is] the path that Canadian society is on. The pursuit of objectives for the benefit of a few without considering the greater good will be our demise. If we allow the tankers to pass through Haida Gwaii waters, we will become those one-eyed people in that story town. We will become ravenous (paraphrased from Robert Davidson, JRP, 2012b, paras 13313-13321).

This story has been used as a critique of the policies and decisions shaping forestry activities on Haida Gwaii in the past (e.g. Penikett, 2006) in a similar way this story offers an important critique of Canada's tanker and oil export policy.

Much of the evidence presented to the Panel was delivered in narrative or story format. As the

88 For example, these stories identify places that have both scientific and spiritual significance. '[S]ome western scientists have begun to recognize the correlations between oral histories and... archaeological and geological evidence' (Kii7iljuus and Harris, 2005, p. 121). And one of many Haida creation stories was told, such as

Raven coaxed the first men out of a clam shell at Rose Spit located on the North-eastern tip of Haida Gwaii.

89 Haida reference in *Xaad Kil*, Masset dialect.

story above reveals, presenters adopted their own perspective to give evidence, drawing from personal stories or histories, others used stories passed down from their ancestors, and others still used both science and law guided by Haida ethics to present factual information and moral guidance. The quasi-judicial structure of the hearings allowed presenters to criticize the process itself and the politics surrounding the event. However, this kind of moral evidence is interpreted and used in a particular way by the Enbridge assessment.

### ***Interpreting evidence from the Crown's vantage point***

The oral hearings provided a novel forum for Haida Gwaii residents and the Council of the Haida Nation to communicate to the Panel. There were brief moments when the Panel revealed what they were thinking, like when the Panel member posed a question. A substantial number of procedural and policy documents outlined above have been developed to guide the process and offer insights on how the Panel might interpret the oral hearings. Yet it wasn't until a year after the oral hearings took place on Haida Gwaii that Haida counsel was given a forum to cross-examine Enbridge on how they have interpreted and used the evidence presented in the oral hearings. Moderated by the Panel, questioning focused on how the company evaluated the evidence in relation to the collaborative planning and reconciliation efforts undertaken on Haida Gwaii.

Much of the rhetoric used by Enbridge in this questioning phase drew upon the Panel's 'Aboriginal consultation framework' (CEAA, 2010) and their 2010 environmental assessment report submission (Enbridge, 2010). The framework highlights 'how the federal government will rely on the [Panel] process... in fulfilling its legal duty to consult' (CEAA, 2010, p. 1). The central approach the Panel uses in their process is to consider 'the potential adverse impacts... [the project] may have on potential... Aboriginal rights' (CEAA, 2010, p.1). To explain, federal government policy and case law defines Aboriginal rights as (1) the 'practices, traditions, customs integral to the distinctive culture... prior to contact'<sup>90</sup> and (2) their 'exclusive use and occupation' of Haida Gwaii (INAC, 2011). When determining how the project might impact an Aboriginal right, they must consider any effect on a component of the environment (e.g. fish, water, etc.) that may, in turn, limit or modify the way a population might use it as a natural resource (Doelle, 2012, p. 12; INAC, 2011, p. 12). This technical 'impact prediction' approach

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<sup>90</sup> This time is believed to be 1871 when BC joined the Confederation of Canada.

is further confined to a very narrow interpretation of a right in one very important aspect. Project effects are characterized as effects on the environment that may impact 'traditional' practice<sup>91</sup> rather than a right to land through continuous occupation (Engle, 2010). This right is referred to as Aboriginal title. While the Panel framework requires Enbridge to identify 'lands, waters and resources... including title', the company stated that they avoided 'characterizing or taking a position on the merits of claims' and, instead, they focused on the 'project effects' on the possibility of such a right (Enbridge, 2010, V.5A, p.2-13). Therefore, the dispute over Haida and Crown titles – the central dispute under consideration in reconciliation from the perspective of Haida leadership in 2013 (CHN, 2013, p. 10) – is not expressly considered in the impact prediction undertaken by Enbridge. This practice conforms to some interpretations of existing case law, suggesting that the Panel may not consider the title dispute in their final deliberations either<sup>92</sup>. This approach recognises the 'right to culture' that, as Engle (2010) points out, effectively excludes self-determination. The effect is the use of thresholds, decision frameworks, process steps, types of knowledge, and values that are entirely defined from the vantage point of the Crown. Unlike the collaborative arrangements described above, there is no acknowledgement from Enbridge or the Crown that the Haida have title to Haida Gwaii.

Contrasting perspectives are evident in the oral hearings and cross-examination transcripts. Presenters at the oral hearings were very clear in articulating their position on Aboriginal title throughout:

I belong to the Haida Nation, which has inherited rights, responsibilities and title to the land and waters of Haida Gwaii. These have never been surrendered to Canada or any other government (JRP, 2012a, para 20166).

The cross-examinations take place within the 'final hearings' phase of the Panel process. It allowed participants to direct questions to Enbridge and other parties who have filed evidence on the record to 'test the credibility of the evidence' (JRP, 2012e). The cross-examinations took place in Prince Rupert (a six-hour public ferry east of Haida Gwaii) between September 2012 and May 2013. In this section, information is presented on the

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91 According to federal legislation, these activities can include 'activities for food collection, social, ceremonial and other cultural purposes' (CEAA, 2009, p.9)

92 Existing case law (e.g. *Dakota v. Enbridge*, 2009; *Lawson Lundell LLP*, 2010) outlines that 'grievances with the Crown, such as that over title, cannot be pursued with the Crown through such project decision processes like [environmental assessments]'

questions posed by the Haida Nation counsel to the Enbridge expert panel on the topic of 'Potential impacts of the project on Aboriginal rights and interests' on March 11, 2013. In this process, the rules of appropriate use that each party draws upon becomes evident in the way they interpret and understand the evidence provided in the oral hearings phase described above. This process sheds more light on how the Panel might deploy their Crown-led decision framework when interpreting oral evidence in their final deliberations. The Panel report on these deliberations will be issued in December 2013, after this dissertation is completed, so further research will be needed to better understand how this evidence is interpreted in the final phase of the Panel's decision process.

For the cross-examination phase, Haida counsel was tasked with posing questions to the Enbridge expert panel. Terri-Lynn Williams-Davidson started with asking the Enbridge panel to describe how they 'incorporated' the evidence presented at the oral hearings in Haida Gwaii into any 'application updates' (JRP, 2013a, para 22621), including impact prediction or mitigation measures, that Enbridge has filed with the panel (paras 22617; 22619). She went on to identify certain knowledge holders who presented to the Panel on 'the importance of the ocean as a whole as a marine ecosystem as being a birth place of the Haida people'. She also asked, '[H]ow do you assess the impacts on an oil spill on the entire marine environment and the impact upon Haida culture?' (para 22598-22599).

Paul Anderson, Director of Environment for the Enbridge project, argued that the information would be used 'for our spill response planning going forward' (JRP, 2013a, Anderson, para 22589). He elaborated upon the method of breaking down 'different aspects of life and lifestyle... and then [the effort made to] try to quantify those effects or potential impacts... on those resources' (para 22594).<sup>93</sup> He said that the information presented at the oral hearings 'in a general way, is consistent with what we've heard in terms of the importance of this area and other areas in the marine environment... when it comes to site-specific measures, that will be identified in the detailed planning going forward' (paras 22620; 22622).

As the questioning continued, it was not entirely clear how consistent the evidence actually was. For example, the Haida principle identified in the Marine Use Planning process, *Gina waadluxan gud ad kwaagiida* Everything depends on everything else (Jones et al., 2010), was employed in the oral hearings to demonstrate how the interaction between the marine and

<sup>93</sup> Here, lifestyle refers to the 'practices, traditions, and customs' of using renewable resources, within the first part of the definition of Aboriginal rights guiding the Panel process.

terrestrial environments means that an oil spill would extend to the upland areas of Haida Gwaii. Yet, Enbridge environmental staff argued, 'This project doesn't affect upland areas in Haida Gwaii. So the primary effect mechanism is between a potential accident, a malfunction, an oil spill then affecting the shoreline in Haida Gwaii. So the focus of our assessment has been on the coastal areas of Haida Gwaii and not the upland areas' (JRP, 2013a, para 22780).

In a similar line of questioning, Haida counsel questioned Enbridge directly on how they incorporated 'Haida traditional laws and values into [their] application or [their] application updates' (JRP, 2013a, para 22793). Mr. Green, for the Enbridge panel, responded: '[This] would not have been considered in the environmental assessment because what drives the environmental assessment is the Canadian Environmental Assessment Act' and other guiding documents for this Panel process (para 22794). He went on to say that the Act requires them to look at 'traditional use of lands', which has been done and addressed' (para 22795). Haida laws and values appear to be outside of the scope of 'traditional knowledge' for this assessment.

In reference to the marine use planning process, Haida counsel went on to identify one of the objectives, as guided by Haida values: 'On Haida Gwaii... [the] marine use plan will guide restoration of the sea to its full potential' (JRP, 2013a, para 22819), asking how the company considered these ideas in their assessment. Green argued that this idea 'speaks to essentially the concept of sustainable development' and argues that 'those exact same sentiments are reflected' within the opening description of the *Canadian Environmental Assessment Act*. Here, Green is referring to the Purposes of the Act (s.4(h)) where it states that the Act aims 'to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy'.

Haida counsel then directed the focus of questioning to title. Pointing to an Enbridge report filed as evidence, Ms. Williams-Davidson highlighted that the company claimed to have 'sought to identify the interests and concerns underlying [Aboriginal] claims' (also see Enbridge, 2010, V.5A, p.2-13). She then asked them where exactly they have identified 'interests and concerns underlying Haida Aboriginal title and rights' (JRP, 2013a, para 22841). The company repeated the information contained elsewhere in their written evidence: 'we have endeavoured to avoid characterizing or taking a position on the merits of claims including title... rather we went to looking at the potential effects on the rights' (para 22842).

Haida counsel ended with a question that sought to solicit information on how Enbridge considered the collaborative planning approach taken by the Haida to begin regaining control over Haida Gwaii: 'Did you also proceed on the assumption that the Haida Nation holds the right to choose how marine resources are used and managed?' (JRP, 2013a, para 22863). She went on to explain:

[W]hat is important for the Haida Nation is, of course, the co-management that the Haida have entered into which is very unique compared to other nations, and that is an exercise of the Haida's Aboriginal rights and title which must be considered in any project that might have an impact on the exercise of those rights. I'd like to know whether it was considered. Everybody around the world knows about these agreements with the Haida and that this is something that the Haida and the Government of Canada and the Government of B.C. have participated in for many years (JRP, 2013a, paras 22881-22882).

At this point, Enbridge counsel spoke up, objecting to the statement with the following rationale: 'What the Haida Nation's rights are is a matter to be determined in argument or to be determined by the courts' (JRP, 2013a, para 22873). The Panel asked the Haida counsel to restate her question. 'Enbridge did not specifically consider the impacts on joint management activities of the governments, of the Haida Nation and Canada... is that correct?' she asked (para 22887). Mr Green replied, '[N]o' because this is a 'routine effect' and therefore 'it would not compromise the ability of the Haida Nation and the Government of Canada to co-manage the resources on Haida Gwaii' (para 22888). He went on:

[I]f a spill was to occur -- and we believe that is a highly unlikely event -- that if there was an effect on a harvestable resource, there are mechanisms in place for compensation and rehabilitation and recovery and those are not considered specifically because we think that (a) it's an unlikely event and (b) if it was to occur, then there are mechanisms in place to address and mitigate that (JRP, 2013a, para 22889).

In their initial application to the Panel in 2010, Enbridge highlighted their 'concern' over Crown consultation, outlining how the company has taken the process as far as they can. Federal policy follows existing case law by identifying the Crown as having the legal duty to consult and, where appropriate, accommodate Aboriginal interests - one of the central mechanisms of reconciliation (Knox, 2010). Haida counsel and other First Nations were able to highlight this gap in the cross-examinations phase. This gap gained some media attention. In March, 2013, the Canadian Press (2013b) reported that even though the Panel process is meant to be the central way the Crown will address rights and title, Enbridge has not set out to characterize title in any of their impact predictions. Janet Holder, the environmental

assessment lead for Enbridge, is quoted as saying, 'We do explain very clearly in our application what we refer to as rights. Title is not something that we have ever taken a position on at any point in time'. She goes on, 'We've taken a practical position with regards to rights and title and the title aspect needs to be left between [First Nations] and the Crown' (The Canadian Press, 2013b).

A few days after this news release, near the end of this final phase of the Panel process, federal Natural Resources Minister Joe Oliver announced the federal government was establishing a Special Federal Representative 'to deal with aboriginal opposition to resource development in Alberta and British Columbia', appointing the chief federal negotiator, Douglas Eyford, for the treaty process to lead the new initiative. Oliver said, 'It is essential that we work closely with First Nations communities, in order to incorporate their knowledge and experience' (The Canadian Press, 2013c). The new federal representative is mandated 'to facilitate greater participation by Aboriginal peoples in resource development' (Natural Resources Canada, 2013). Eyford reported directly to the Prime Minister with an interim report in June and a final report in November 2013, released only one month before the Panel issued their report. While some cautiously welcomed this news as a 'promising development' (Assembly of First Nations, 2013), criticisms about the timing of the new venue and its focus on a resource-based economic growth agenda emerged soon after (e.g. West Coast Environmental Law, 2013). Following the interim report in June, the media and the Union of BC Indian Chiefs described an unexpected series of meetings with First Nations as a last minute 'pipeline push'. CBC was told by undisclosed sources that 'Eyford urged the federal government to take a lead role in dealing with Indian bands (sic.) on both the Gateway project' and a controversial pipeline expansion project that would increase oil tanker traffic around BC's major urban centre of Vancouver (Hall, 2013). Several high-profile federal Ministers (including the Ministers of Environment, Leona Aglukkaq, Aboriginal Affairs and Northern Development, Bernard Valcourt, and Natural Resources, Joe Oliver) set up meetings with a number of First Nations organizations in BC in September 2013 (Hall, 2013). The final report appears to have had influence on the tone of the discourse, offering not only reasonable recommendations for including First Nations in economic development, but emphasizing meaningful collaborative governance, including reconciliation (Eyford, 2013).

The final arguments phase of the Panel was completed in June 2013. After this, the last phase

of the process began when the Panel deliberated upon the evidence and made their determination, including their determination on the significance of the project effects on Aboriginal rights. Their decision was outlined in a report released in December 2013. They recommended to the federal Minister that the project proceed, subject to 209 conditions mainly focused around risks posed by the project to the marine environment (JRP, 2013b). The federal cabinet agreed with the Panel, allowing the project to proceed subject to those conditions. It is unlikely that the project will proceed before 2015 if at all. Many of the conditions impose requirements that must be fulfilled at least one year prior to construction. Furthermore, the environmental assessment is subject several judicial reviews brought forward by organizations opposing the project, including the Council of the Haida Nation. These legal challenges will, at minimum, stall construction for several months or years or stop the project from proceeding altogether. The 2014 *Tsilhqot'in v BC Supreme Court* ruling was also released only days after the Minister's conditional approval, which may also affect the viability of the project. This decision clarifies the meaning of Aboriginal title and puts in place a series of new criteria that the Crown must fulfil if they do not gain consent from First Nations where title is not yet proven. The case was issued too late in the writing process to integrate into the analysis. Instead, the implications of this case for creating new opportunity structures within and alongside the planning system are briefly discussed at the end of Chapter Eight.

## ***Conclusion***

This chapter set out to examine the case of the Enbridge environmental assessment (EA), focusing on its encounter on Haida Gwaii, and the broad changes made to Canada's environmental laws in 2012. This case was presented to consider opportunities that might be available in the formal assessment process to unsettle and challenge the idea reconciliation. Following Cowell and Owens (2006), the planning reform process was also presented to examine how it may impinge upon these planning-related opportunities (following Cowell and Owens, 2006). Building upon the in-depth case of collaborative land use planning on Haida Gwaii outlined in Chapter Four, this case offers a dramatically different account of reconciliation in planning. The oral hearings demonstrated that collaborative land use is a favoured venue to that of environmental assessment, challenging the conventional 'right-as-



culture' definition of Indigenous rights (following Engle, 2010). The Haida have deliberately pursued collaborative management as a central and preferred method of expressing title. Federal government policy and related mechanisms of reconciliation purport to address title in EA as well, but only require that the Crown consider likely impacts to Aboriginal rights and engage in consultation and accommodation exercises. Adding to the already divergent interpretations between expected Crown and the Haida expressions of title and reconciliation in planning, the Enbridge EA omitted express consideration of impacts on title in their assessment (also see JRP, 2013b, p. 47). When this omission became clear and raised to the public, the federal government opened up a new venue, appointing a Special Federal Representative, Doug Eyford. The new venue created an opportunity to discuss Aboriginal rights and, specifically, First Nations and energy-related resource development. When Eyford's report was released, there were important recommendations for the federal government, including a recommendation to 'refine the current approach to consultation' and establishing 'a Crown-First Nations tripartite energy working group' to create dialogue on west coast energy issues (2013, p. 4). However, the subsequent *Tsilhqot'in v BC* (2014) ruling may have even greater implications for the future of the Enbridge EA. This ruling occurred too late in the writing process to be integrated into the analysis, so is only discussed briefly at the end of Chapter Eight.

In addition to title, federal environmental assessment purports to include consideration of Indigenous knowledge. However, the cross-examinations phase reveals that Enbridge merely finds the evidence provided at the oral hearings is consistent with their own, even though this oral evidence is also inconsistent and provides important critiques of their evidence and the methodology used to collect and interpret it. Evidence provided by the Haida also offered information in areas beyond what was collected by Enbridge, offering crucial moral insights on the federal natural resources policy. Initial review of the Panel report reveals that these moral perspectives were merely acknowledged but were not used to shape the assessment in any way (see s. 4.7 of JRP, 2013b). Indeed, this kind of misinterpretation is evident in section 4.7 of the JRP Report (2013b). In this section, evidence presented to the Panel that demonstrated ongoing use of lands and waters was interpreted by the Panel as demonstrating 'that there is a current compatibility for multiple uses', including industrial use, in the proposed project area (p. 48). This was the Panel's interpretation, despite the evidence on the

record describing continuous and ongoing dispossession from the land and waters resulting in very clear destruction of highly valued use areas (e.g. clam beds destroyed due to forestry activities, etc.) and, thus, an erosion on the ability to express title and effectively govern territories.

In addition to these existing tensions and omissions within the planning process, a divisive rhetoric emerged over the Enbridge project and the purpose of planning in Canada. Two discursive coalitions developed around the tanker moratorium policy: industry and the federal government institutionalised the absence of an oil tanker moratorium while an alliance of First Nations and others asserted a formal declaration banning oil tankers. Similar coalitions formed around the debate over Enbridge, with some critics of Canada's moratorium policy leading a campaign to sign up participants for the proposed Northern Gateway oil pipeline and tanker project environmental assessment. The subsequent delay in the process resulted in a shift in the discourse from the tanker moratorium to the appropriate use of environmental assessments. Minister Oliver was clear to state in his open letter that certain groups 'seek to exploit any loophole they can find, stacking public hearings with bodies to ensure that delays kill good projects' (Oliver, 2012). Industry and government were clear that the environmental assessment process was misused, a move that the government exploited to justify calls for planning reform. In 2012, dramatic planning reforms were introduced by the federal government, resulting in significant changes to the environmental assessment process and related environmental laws (Doelle, 2012; Gibson, 2012). These changes appear to affect the way opportunity structures were available to Indigenous political actors. Since Canada's mechanisms of reconciliation – consultation and accommodation – are tied to multilevel and overlapping statutory decision points, the 'one project, one review' reform policy led to a consolidation and lining up of these decision points. Such an effect has the potential to impinge upon venue shopping strategies that have been taken advantage of to result in transformative change on Haida Gwaii, as outlined in Chapter Four. Furthermore, the narrowing of the factors considered within these venues have the potential to create even more tension between competing world views evident in the Enbridge cross-examinations, offering fewer opportunities to express jurisdiction interests and title over Haida Gwaii. These ideas are explored in more detail in the analysis presented in the next Chapter.

## CHAPTER 7. ON THE LIMITS TO RECONCILIATION IN PLANNING

### *Introduction*

Planning systems have made positive contributions through the displacement of unsustainable development (Cowell, 2012). In Canada, positive contributions have also been made through displacing development that conflicts with Aboriginal interests (e.g. Berger, 1977; Morin et al., 2010). Planning reform, in both cases, may impinge upon these positive displacement effects (following Cowell and Owens, 2006). Chapters Two and Three present arguments that such reforms may limit the available options for political actors to engage in the politics underlying planning events (following Allmendinger and Haughton, 2010; Metzger, 2011; Owens and Cowell, 2011). It is reasoned that while planning spaces operate in ways that *tend* to be colonial, certain conditions and mechanisms are available in these systems that can be used to open up (perceived) opportunities for changing the way reconciliation is implemented across this system. These spaces reveal information about Indigenous-state power relations that are usually not observable until a conflict arises, at which point analysts may observe how actors respond to these perceived opportunities (Lukes, 2005). This is a critical finding that other analysts should consider when developing research frameworks and assessing the value of planning in itself. Of equal importance is the finding that these observed interactions have the potential for real institutional effects. These large institutions that govern the reconciliation process may seem impervious to change but can be influenced and changed. This research finds that planning is tied to certain mechanisms of reconciliation that can have influence over the Crown's interpretation of Aboriginal rights and reconciliation, but it can also be used by the state to enforce its own interests. Such effects (under specific conditions) can transform the planning system. This chapter elaborates upon these findings, drawing upon the observed cases presented in Chapters Five and Six to consider the guiding research questions: *Drawing from a case study of Haida Gwaii, what opportunities exist for reconciliation to take place within the planning system? To what extent are wider shifts in the state and scales of decision-making supporting or thwarting effective reconciliation in planning? What is the character and durability of these changes?*

Case law in Canada (e.g. *Haida v. BC*, 2004; Knox, 2010) identifies several mechanisms through which reconciliation is pursued. One of these mechanisms is consultation, which is enshrined in policies and practised within planning processes such as environmental assessment (INAC, 2011; Province of BC, 2009). The policies state that 'the Crown seeks to strengthen relationships and partnerships with Aboriginal peoples and thereby achieve reconciliation objectives' (INAC, 2011, p. 6). Despite this lofty rhetoric, the state confines much of the reconciliation process to very specific legislative windows and adopts a rights-based approach that is almost exclusively represented by culture rather than self-determination and title, or the right to land. The right to land and resources is merely considered by the Crown to define 'strength of claim' to a territory to determine level of consultation (INAC, 2011, p. 44). In cases where title is not yet proven, the right to exercise jurisdictional control over land, the right to receive economic benefits from the land, or other expressions of title are excluded from discussions when a development dispute arises. Instead, the Crown claims that unresolved title disputes are more appropriately negotiated in the treaty process or in the courts, or simply set aside for another time or venue (also see Bhandar, 2004; Blackburn, 2007; Johnson, 2011; McCreary and Milligan, 2013). This is a critical flaw in the Crown's reconciliation process and, indeed, one that Canada's highest court has recently rejected. The ruling imposes stricter measures on the Crown in respect of these title rights, which will likely have far-reaching implications for planning and reconciliation (*Tsilhqot'in v. BC*, 2014). (This ruling was issued late in the PhD writing process. The implications for this research is discussed further at the end of Chapter Eight). Jurisdiction, sovereignty, and ownership are essential considerations in reconciliation; if these continue to be set aside, then a 'middle ground' will not be achieved.

There are, however, examples where consultations have led to decisions to halt development when it conflicts with cultural interpretations of Indigenous rights and interests (Morin et al., 2010) or where this narrow definition of Aboriginal rights has had influence on several policy sectors (Cashore et al., 2001). Consultation is an institutionalized process that is generally required when a planning or decision process begins for any proposal that will infringe on Aboriginal rights. The mechanisms of reconciliation, conceptualized in Chapter Three, are tied to these processes and, in turn, mirror the scales and jurisdictions of the planning system. Canada's federal system, then, gives rise to *several overlapping and multi-level 'opportunity*

*structures'* that provide some jurisdictional space and resources that actors can use to resist and gain influence over institutional structures in the planning system. Such activities have the potential to influence development decisions and the way in which reconciliation is implemented by the Crown. The Haida Nation have expertly resisted the forestry planning system to slow down development and regain much control over their land and the system itself. The Haida Nation's related intervention in the Supreme Court of Canada led to a dramatic restructuring of Canada's planning system and reconciliation policies.

These opportunity structures can also be used by the state. Governments are aware of how other actors engage with and use these structures, making them a prime target for planning reform (e.g. Cowell and Owens, 2006). Both the Panel and federal marine planning cases demonstrate how political actors can be 'squeezed' out of planning venues. In both the forestry and Enbridge cases, the governments made reforms planning laws by reducing the number of statutory decision points where consultation would be required through Crown policies. For the Enbridge case, additional observations were made concerning federal government tactics used to shift political debate from one focused on a tanker moratorium to arguments over the appropriate use of environmental assessment, while also speeding up decision timelines and reducing the scope of those who can participate to only 'interested parties'.

The first half of this chapter presents the original propositions (presented first in Chapter Three) and examines how these propositions are expressed in each case. In other words, the empirical work presented in Chapters Five and Six is synthesized with arguments presented in Chapters Two and Three to demonstrate, extend, and revise the original theoretical propositions. Through this process, a series of key findings are identified and described and, in turn, a series of original observations are developed, along with a revised set of propositions. The second half of this chapter examines the findings in more detail, focusing on their contributions to research and policy.

### ***Revisiting the research approach***

The literature presented in Chapters Two and Three offers insights on the dynamics of power and scale in planning processes as it relates to Indigenous settings. Existing research in the

area of Indigenous planning has found a 'bifurcated record' in planning (Hibbard et al., 2008, p. 147): it can bring about celebrated collaborations *and* facilitate colonial control. The theorizing in these chapters led to a useful vocabulary and explanatory framework for analysing unevenness in Canada's reconciliation practices, while also revealing the multi-level mechanisms that shape, and are shaped by, planning. A series of propositions were adopted in Chapter Three to consider the three research questions re-stated at the very beginning of this chapter:

1. Planning is a contested space that has particular functions and qualities that limit its utility to serve as a venue for reconciliation. The mode of planning is influenced by the objects it governs and may not align with goals of reconciliation. (Notably, it serves to guide decisions using evidence and opinion and also serves an expressly political function. It is characterized by its unevenness and value conflicts.)
2. Consultation in planning is likely the most common decision space used by the Crown to implement Canada's reconciliation policy. The space is created by the Crown and, so, begins on uneven ground. Several mechanisms of reconciliation are available in Canada's planning system that may be used to shape its implementation, with important implications for resource development and planning policies. The posited function of these mechanisms is described below.
3. Spatial and temporal scale is an essential tool for influencing the function of these mechanisms. In fact, a rights-based approach to reconciliation relies upon a strong tie to place that directly challenges the approach to implementing reconciliation policy today.

Proposition two refers to mechanisms of reconciliation, which are based upon several legal mechanisms of reconciliation established through case law have since shaped Crown policy. These are expanded upon to include other mechanisms of reconciliation identified in existing research, notably through the policy dynamics literature that is concerned with how institutions are used to change policy. These are discussed and developed in Chapter Three, and summarized on page 82. Table 8 outlines how these mechanisms express themselves in the Haida Gwaii case study. For each of the two key cases, the expressions of these

mechanisms are distinct but share some important similarities.

Mechanism of reconciliation	Mechanism as expressed in the two cases
<p><i>Legal mechanisms of reconciliation:</i></p> <ul style="list-style-type: none"> <li>- Treaty negotiations</li> <li>- Justifying incursions based on consultation and, where appropriate, accommodation;</li> <li>- Creating rules and regulations associated with adequacy of consultation and Aboriginal claims;</li> <li>- Negotiation (rather than litigation); and,</li> <li>- Changing common law in ways that relate to Aboriginal rights protected in s.35(1) of the Constitution.</li> </ul> <p>Cultural rights tend to be protected over self-determination, but are limited when in conflict with government agendas.</p>	<p><i>Crown's duty to consult and accommodate:</i></p> <p>Case 1 (Haida Gwaii land use regime). No consultation took place despite BC's infringement in violation of fiduciary duty (reformed law restricted consultation requirements).</p> <p>Case 2 (EIA for Enbridge proposal). Information exchange, oral hearings provided space for TK, resources to accumulate evidence and present to decision maker, Panel recommendation for additional mitigation to address marine risks, but excluded arguments over title. Project framed as matter of national concern and appeared in conflict with cultural rights.</p>
<p><i>Opportunity structures:</i></p> <p>Defined as 'configurations of resources, institutional arrangements and historical precedents for social mobilization' (Kitschelt, 1986, p. 58). These structures can facilitate or constrain social and political change and can act endogenously or exogenously.</p>	<p><i>Opportunity structures (other than consultation):</i></p> <p>Case 1. Legal precedent describing duty, experience accessing the courts for rights claims, etc.</p> <p>Case 2. Opportunities for public participation and, equally, reforming these opportunities, media scrutiny, political alliances, raise and simplify authority to cabinet, etc.</p>
<p><i>Venue shopping:</i></p> <p>Occurs when actors strategically seek out a more receptive political venue. This action requires the issues to be redefined to suit the new venue and may allow for the mobilization of new actors, access to new resources, among other advantages.</p>	<p><i>Venues in each case:</i></p> <p>Case 1. Land use: Court → forestry license transfer → road blockade → interim agreement → <i>Kunst'aa Guu Kunst'aayah</i> - - → (future) Title Case</p> <p>Case 2. Marine use: federal integrated marine planning process → provincial regional planning process → NaiKun EIA → Enbridge EIA<sup>94</sup> - - → (future) Title Case</p>
<p><i>Logic of appropriateness:</i></p> <p>Assumes that those interacting with institutions will generally act in a way that 'conforms to the norms of the organization' (Peters, 2005, p. 29). The norms of any institution, though, are open to interpretation and, thus, require 'monitoring behaviours and reinforcing dominant views about appropriateness' (p. 30).</p>	<p><i>Central rule violations for each venue:</i></p> <p>Case 1. Crown violates duty to consult by transferring forest license without consulting the Haida.</p> <p>Case 2. Public opposition overwhelms process, extending review process schedule by a year; and, Enbridge deliberately excludes title from impact assessment though process meant to be central method for addressing rights (including title).</p>
<p><i>Planning reform:</i></p> <p>Conceptualized as enforcing the state's definition of 'appropriate' norms of the planning system. Reforms aim to streamline planning processes to make them more efficient, especially for those projects or sectors viewed as 'essential' to fulfil state policy priorities.</p>	<p><i>Planning reform events:</i></p> <p>Case 1. Reforms to planning laws from 2002-2004 removed statutory obligations to oversee forest license transfers, resulting in the Crown not fulfilling their duty to consult and 2005 road blockade.</p> <p>Case 2. Changes to federal environmental assessment and related laws in 2012, reducing total number of projects reviewed, excluding participants, reducing federal oversight on statutory decision processes (some of which are tied to Crown duty to consult), and raising decision authority to cabinet.</p>

Table 8. Mechanisms of reconciliation and their expression in each case study

<sup>94</sup> The venue shifting for both cases did not necessarily occur in the order presented in the table and many venues have been accessed at once. A detailed description of the shifting is presented in the empirical chapters.

For both cases, Haida and Crown engagement through the consultation process is a central one. Reforms were made to forestry laws and environmental assessment laws that have resulted in changes to the way consultation has been / will be implemented. The process is a fundamental part of the Crown's policy of reconciliation, a policy established following case law that identified reconciliation as a 'fundamental purpose' of s.35(1) of Canada's Constitution Act (R. v Van der Peet, 1996). Reconciliation has a much broader definition in the literature examined in the section on reconciliation in Chapter Two (p. 39). In that chapter, two central ideas are introduced to complicate the approach taken by the Crown. Borrows (2001, p. 33-34) conceptualizes reconciliation as a process of reaching the 'middle ground' where parties meet 'in mutual respect and recognition to negotiate the resolution of their differences'. He goes on to exclude actions that require Indigenous peoples to 'abandon their rights... to fulfil objectives that are of "sufficient importance" to the non-Aboriginal community'. The middle *ground* is constituted by the territory in dispute and, thus, *must* be included in the reconciliation process. The land is central to this relationship. It is not just a material object that produces material wealth and well-being, but is produced through human relations while also constituting these relations (Blomley, 2002).

Engle (2010) offers contrast to this principled view of reconciliation with a critique of the dominant rights-based approach. She finds there is general agreement that the 'right to culture' is a sufficient legal vehicle for protecting Indigenous rights even though it excludes the right to self-determination – of political and economic autonomy – a fundamental component Indigenous rights. Further, when this cultural right is relied upon, these rights may be unjustly infringed upon when they come into conflict with certain state interests. Engle's ideas are extended to suggest that when the 'right to culture' comes into conflict with state interests in a planning venue, the 'appropriate use' of a planning institution is questioned. These divergent views of reconciliation suggest an inherently uneven political and institutional terrain from which the Crown and Indigenous political actors approach this process. Since the institutional form of reconciliation is predominantly constituted through the planning system, this unevenness is even more evident when we acknowledge that the entire statutory system – its rules of procedure, its values and interests, its view of what constitutes evidence – is created by and for Crown governments.



The research findings presented in this chapter supports some of the criticism presented earlier in this dissertation; notably, Crown approaches to reconciliation are failing. Even the 'best case' example of the collaborative Haida Gwaii land use regime continues to operate predominantly from the vantage point of the Crown, with high priority industry sectors for the Province excluded from the regime entirely. This research does not offer a systematic evaluation of either of these processes, but explains and describes the potential for change, the potential for rights to open up opportunities for moving the vantage point of the dominant planning system to shift it closer to a 'middle ground'. There is more reason for this optimistic tone following a landmark 2014 Supreme Court of Canada decision that gave clear title to the Tsilhqot'in Nation, establishing a new set of principles around Aboriginal title. This decision provides clarity on the nature of title; it applies to large historic territories (not small pieces of intensively used land), and that – if title is likely or proven – the Crown is encouraged to gain *consent* from individual Nations. This court decision was issued by the time this dissertation was nearly finalized, so is not integrated into the analysis of this research. Initial thoughts on the potential implications of this decision for the research findings and the reconciliation process in Canada are presented at the end of Chapter Eight. The following section discusses research findings in relation to the initial proposition.

### ***Proposition 1. Conditions for reconciliation***

The first proposition considers the conditions that influence the process of reconciliation. For this to be understood, power and opportunity must be located in space and time. Scale is an essential concept to uncover these locations and characterize the unevenness in them and between them. The cases support the suggestion that the Crown and Indigenous actors meet most frequently in the consultation process - a process that occurs when a Crown decision is required regarding a proposed development or plan - rather than a treaty nor other negotiation table. The planning and consultation systems are developed from the vantage point of the Crown, adopting the rules and procedures of the federal or provincial governments. It is a space where the Crown and Indigenous political actors bring with them values tied to their spaces of dependence. When in these spaces, though, each actor must respond to the object under scrutiny, whether it is a forestry tenure or an oil pipeline and shipping project. Planning is contested space that has particular functions and qualities that

limit its ability to serve as a venue for reconciliation. The mode of planning is influenced by the objects it governs and may come into conflict with goals of reconciliation. This is evident in the Haida Gwaii case study in several ways as explained below.

Chapter Two presented an argument in defence of scale as an essential analytical frame for studying power when considering Indigenous engagement in state-led planning systems. This research finds that a 'flat' or topological frame (see Allen, 2009; Marston et al., 2005) would unfairly exclude consideration of how the state and Indigenous political actors both derive power from a specific place and territory yet use (constructed) scales to manipulate and coerce the planning system, and gain influence. The Haida Gwaii case study supports these idea through an elaboration of Engle's argument; specifically, this research finds that the tie to place and territory generally dismissed as a fundamental concept in examining the right to culture as it is employed in planning. Yet, it is the very tie that gives rise to these rights. Protecting the right to culture is also, in itself, fundamentally place-specific and, in turn, gives rise to the right to make decisions about territory. The approach of merely protecting a 'right to culture' without providing the right to influence a decision or collaborate meaningfully over ocean governance indicates a misunderstanding behind the meaning and purpose of planning between two distinct traditions, as evidenced in the second case. Self determination is right and a fundamental expression of the responsibility to protect and relationship with ancestral lands and, thus, the right to title cannot be decoupled from the right to culture. Despite this fact, the state views claims to Indigenous sovereignty as politics nested 'within' its own borders and 'under' its jurisdiction. This hierarchically scaled institutional framework gives meaning and legitimacy to laws that effectively 'grant' resources and authority to 'local' Indigenous communities. Indigenous Nations and the Crown claim ownership, sovereignty, and jurisdiction over the same land and resources yet the recognition, resources, and jurisdictional space afforded in even the 'best case' forestry land use planning regime is only an initial baby step towards the 'middle ground' that may take several lifetimes. Thus, *rights must include title as a fundamental component so the process of reconciliation can begin taking place. This means, at minimum, sharing jurisdictional space with Indigenous communities where the reconciliation process takes place, in the planning system.*

The object under scrutiny in the planning process also shapes the mode of planning (Cowell

and Murdoch, 1999; Cowell, 2007). In the two main cases explored in this research, forestry and an oil pipeline are these objects that shape the planning process. The scalar quality of the object of governance and the planning system it is subject to, both have important implications for how the process unfolds. These objects have influence on the potential to influence how citizens' values are activated (following Hajer, 2003) and the degree to which latent conflict moves to observable conflict (following Lukes, 2005). The urgency associated with object also has influence on the process, with forestry subject to waning international prices and oil export on the top of the federal government's agenda. These findings are elaborated upon in the next section. In general, *the spatial extent and urgency associated with the object of governance has different implications for who is activated and how the process unfolds*. The conflict over forestry was one largely between forestry industry, government, and the Haida Nation. While there was some division amongst residents of Haida Gwaii, there were several powerful statements that showed strong support for the Haida position. The pipeline, on the other hand, divides dozens of First Nations, provincial and federal governments, municipalities, and citizens across the country. If you consider the spatial 'reach' of the oil sands issue, however, this division extends to several other parts of the world. These differences go some way to explain why the forestry planning process slowed down decisions and opened up jurisdictional space, while the reforms to environmental assessment seem to have resulted from the Enbridge pipeline planning process.

### ***Proposition 2. Mechanisms of reconciliation***

The second proposition focuses on the mechanisms available within planning spaces. These mechanisms influence, and are influenced by, the planning system and its configurations of power and scale. Canada's federal planning system is highly complex, characterized by its jurisdictional overlap and fluidity that does not conform with dominant assumptions of neatly nested hierarchies of scale. Reconciliation is embedded within this complexity, the mechanisms of which have important implications for resource development and planning policies such that new scales of Indigenous governance may be created, and existing ones may be eliminated. Scale and power were used to frame the analysis, drawing upon Lukes (2005), who suggests analysts observe how people react to (perceived) opportunities to escape a subordinate position so that we may view underlying value differences, and Cox (1998), who

asks us to consider how spaces of engagement may help to secure territorial spaces of dependence. Framed within this understanding of power and space, the original proposition is confirmed, revised, and extended.

### Mechanism 1. Using opportunities to have interests heard

The first mechanism considers how opportunity structures are sought out through venue shopping and can lead to change in the way reconciliation is implemented. This research revises a key condition of venue shopping to offer clues about other factors that might facilitate planning changes. This research has paid greater attention to the character of the entire planning regime to understand how the scalar configuration of a planning system might influence the way venue shopping strategies take place in the future.

#### Making the strategy public

Venue shopping is observed in both cases. In the first case, two venue shopping strategies were used to reach agreement through *Kunst'aa Guu Kunst'aayah* in and around court venues. The first strategy relied upon the possibility of bringing the title case to court when it came out of abeyance in 2012. The title case was meant to function as a 'back up' if the regime established through *Kunst'aa Guu Kunst'aayah* failed. When the possibility of the case going to court became real, Canada made a decision to engage with the Haida more actively, though the effectiveness of this engagement remains unclear. In this example, it seems that *the venue shopping strategy was made public to help influence the actions of the federal government*. Future research may benefit from using the concept of venue shopping to consider how shifts occur in other places. Are there instances, for example, where keeping venue shopping strategies private is preferred? What are the relative merits of private and public performance, exactly?

#### Gain public attention to have issue heard

The second strategy involved the 2004 Supreme Court of Canada case, which resulted in dramatic changes to the way the Haida and other Indigenous peoples are positioned in relation to the Crown in environmental planning venues. The court decision presented a very

important opportunity structure that became tied to land and resource planning processes across British Columbia and, a year later, another decision extended this ruling to the rest of the country<sup>95</sup>. Such an extensive 'reach' across the entire country, resulting out of a challenge to a single planning decision, demonstrates the magnitude of transformation that is possible through planning. Public attention helped the Haida generate extensive support for their cause to halt logging activities that were in contravention with the Haida Land Use Vision (CHN, 2005). This public attention, and the timing of a provincial election campaign, appeared to be necessary to gain public support for the Island Spirit Rising blockade in 2005, which, in turn, led to the creation of a new formal venue – a negotiation table that led to an interim land use deal. These findings support Baumgartner and Jones' (1991) observation that venue shifting is likely to bring greater attention to an issue, leading to further venue shifting and rapid policy change.

Accessing the courts can create many opportunity structures all at once

The mechanisms of reconciliation resulting from the *Haida v. BC* (2004) case have since been adopted in federal and provincial government policies (e.g. INAC, 2011). These policies allow government the option of rejecting a proposal that unjustifiably interferes with Aboriginal rights, including title. The court decision created a new 'precedent' that has the potential to further mobilize change, while also attracting more resources and changing institutional arrangements (Kitschelt, 1986 in Cowell and Owens, 2006, p.404; 2011).<sup>96</sup> It clarifies the Crown's requirement to consult with respect to any environmental planning decision that may infringe upon proven or unproven Aboriginal rights (INAC, 2011), dramatically altering planning across Canada. Indeed, a large number of overlapping and multi-level opportunity structures have opened up in several planning venues as a result of the court decision. Forestry planning reforms that sought to enhance control over the provincial jurisdiction gave way to fluid and multi-level systems, challenging the province's constructed 'jurisdictional integrity' (Skelcher, 2005). Despite this dramatic shift resulting out of the deployment of

95 The *Haida v. BC* (2004) case applied to non-treaty areas, such as those in BC. A year later, another case was issued that clearly extended the findings from *Haida v. BC* (2004) to 'Canada's historic treaties with First Nations' (*Misikew Cree v. Canada*, 2005 in Isaac and Knox, 2005).

96 It also has the potential to mobilize further legal precedents that, in turn, can further mobilize change. The *Tsilhqot'in v BC* (2014) court ruling, for example, builds upon the precedent in *Haida v BC* (2004), encouraging the Crown to gain consent from each First Nation for decisions that have the potential to affect their rights.

Aboriginal rights, the state continues to hold significant power (Sommerville, 2005) not only in its narrow interpretation of Aboriginal rights and exclusion of Indigenous perspectives and systems of governance. This practice is examined in the next section.

Transformative change is possible

The final part of the first proposition suggests that strategies, such as venue shopping and accessing opportunity structures to challenge the Crown policy on reconciliation, have both transformative and oppressive possibilities. In the Haida Gwaii cases, each shift to a new venue was spurred on by the threat of having Haida rights 'overridden without their consent' (Borrows, 2001, p. 34). Borrows indicates that this is exactly what does *not* constitute the idea of reconciliation. Yet these oppressive actions expressed in planning did lead to venue shopping, which resulted in the creation of a new set of venues. In the first case, the new venue was process to co-create and implement the *Kunst'aa Guu – Kunst'aayah* (2009) agreement, offering the basic structure through which many believe that reconciliation might be able to begin to take place on Haida Gwaii. While this research does not evaluate this process, it does appear change the trajectory of reconciliation. Chapter Two defined transformations as those changes to planning institutions that reorient the relationship between the Crown and Indigenous peoples in a way that allows Indigenous peoples to 'regain a greater measure of control over their ancestral lands and resources' (Egan, 2012, p. 416). Prior to the *Kunst'aa Guu – Kunst'aayah*, there was no process that allowed the Haida to make decisions that were formally recognized by the Province. Thus, the fact that the Haida Gwaii Management Council undertakes decisions for certain strategic-level policy about Haida Gwaii jointly or together, where no decision can be made without agreement by both the Haida and the Province, a transformative change seems to have occurred. Thus, *venue shopping has led to opportunities used to create transformative change*. Further research is needed to understand the extent to which this transformation has occurred.

Summary of findings related to venue shopping

This section has highlighted four research findings. First, venue shopping strategies may be made public to help influence the actions of oppositional actors. This was effectively used when the title case was announced as 'back up' to influence Canada's involvement in a

collaborative decision framework. Second, venue shopping may allow for an issue to gain greater public attention and, in turn, more venues may become available. In the first Haida Gwaii case, the court decision gave rise to public support to protest the Crown's lack of consultation and, in turn, created access to a new negotiation table with the provincial government that eventually led to an interim agreement. The courts have been a particularly powerful venue in this case study, not more so than in the third finding: accessing the courts may create several new opportunity structures (in this case, consultation and accommodation) that become available through many venues all at once. This is evidenced by the creation of consultation and accommodation requirements formally adopted in policy following the *Haida v. BC (2004)* decision. Since this policy conveniently ties consultation to statutory decision points, opportunity structures are present across the complex, overlapping and multilevel planning system. Finally, this research found that venue shopping can be used to create opportunities that can, in turn, create transformative change. Indeed, *Kunst'aa Guu – Kunst'aayah* is a regime that has allowed the Haida to regain greater control over Haida Gwaii, and it was expertly achieved, in part, through these strategies.

Venue shopping strategies were also employed in relation to the marine use planning venues. The Council of the Haida Nation indicated that the federal negotiator was given 'no mandate' to negotiate a collaborative arrangement similar to *Kunst'aa Guu Kunst'aayah*. Instead, they engaged Canada through a collaborative regional marine use planning process. However, Canada effectively pulled out of this venue in September 2011. Canada's decision forced the Haida Nation to settle for representation by a regional organization in a significantly scaled back process, and the Haida moved to another venue – a Province-led marine planning process that has weaker jurisdiction over key marine matters such as marine transport. In this circumstance, the Haida Nation had 'little choice' but to participate in the BC-led venue 'when significant barriers prevent[ed] their meaningful participation in others', effectively 'settling for a venue rather than shopping for one' (following Pralle, 2003, p.255). The new venue appears to be less receptive to engaging with issues that are clearly within federal jurisdiction, and may effectively 'shield' the issues from the Haida Nation (following Dudley and Richardson, 1996, p. 64). Governance of marine transport, in other words, appears to be kept under the control of the federal government. These observations lead to the conclusion that *the Crown may pose barriers to prevent preferred venue shopping strategies*. This finding is

extended later in this chapter to describe how the Crown deliberately prevents access to opportunity structures made available through consultation duties.

No need to redefine the issue to suit a new venue

One of the key attributes of venue shopping is the way actors redefine their issue to suit the new venue. Table 5 at the end of Chapter Four shows that the concerns raised in each planning venue by the Haida have not changed. In every planning case presented in this dissertation, opposition was expressed against decisions related to either dispossession or development, the two stories at the 'heart of the Native land question in British Columbia' (Harris, 2002, p. 294). Haida existence is dependent upon a relationship with the land, water, and air of Haida Gwaii, an idea presented in each venue unfailingly, whether the venue was set up by the Crown to discuss Indian Reserves at the turn of the century or for the collaborative land use management regime established nearly a century later. This observation supports Feit's (2010) argument that Indigenous Nations are less likely to express a disagreement over any particular policy issue or sector (e.g. forestry or immigration policy); rather, their concerns are embedded in the understanding of history, place, and territory. This highlights an important distinction from the policy dynamics literature: *an issue does not always need to be redefined when it is brought to a new venue*. This finding supports Zittoun's (2009) critique that institutional theories attempt to offer universalizing theories for policy change. From a policy perspective, this finding raises further questions about the effectiveness of Crown reconciliation policies that, for a century, have not satisfied this historic and ongoing dispute in any venue.

The above analysis has demonstrated how actors use venue shopping to have their interests heard. Venue shifting to the courts is a powerful strategy that can result in opening up a series of opportunity structures all at once. These new opportunity structures helped to create the BC-Haida collaborative land use regime, characterized as transformative change since it gave power back to the Haida to control Haida Gwaii. The marine use planning example hints at the oppressive possibility of planning in the way a venue is 'settled for' when others are not made available. The next sections considers the dual, transformative and oppressive, possibilities of planning in light of how rules of planning are interpreted by oppositional actors.



## Mechanism 2. Different interpretations of the rules

The second mechanism of reconciliation is concerned with how Indigenous and Crown interests meet and respond in planning spaces. It was posited that they either come into conflict and defy the rules imposed by the Crown, or come into agreement and defer reconciliation to another venue or time period. Engle (2010) argues that Indigenous rights are expressed and understood from a western vantage point. The 'right to culture' definition of Indigenous rights offers a 'secure and relatively uncontroversial means' for protecting Indigenous interests (p. 6). This remains the dominant legal approach for making claims, despite its failure to attend to the goal of Indigenous political autonomy. These ideas resonate in the Canadian context: Aboriginal rights are more often expressed as cultural rights in planning and in a form that is compatible with common law (Blackburn, 2007). Engle (2010) also finds that these rights are limited by the fact that the state will protect them *only* as long as they don't affect other, more important, interests. Extending Engle's ideas to follow March and Olsen's (2006) logic of appropriateness, it is suggested that any expression of rights in planning institutions that violates the Crown's vantage point may trigger an enforcement mechanism. When agreement is made, the underlying disagreement over title is set aside and reconciliation is deferred to another stage or venue.

Agonistic approaches may stabilize power and defer conflict to another time or venue

In both in-depth case studies<sup>97</sup>, Aboriginal rights are clearly expressed in ways that privilege the Crown's vantage point. There are endless possible analyses to make this assertion apparent, but one of the most pertinent issues that underpins the conflict presented in the cases of Haida Gwaii is the title dispute. In the first case, the collaborative land use regime, the title dispute is openly acknowledged and set aside in a mutually agreed manner. Here, the parties agree to set aside the disagreement over title, adopting an agonistic approach (Mouffe, 2000). The agreement mutually recognizes 'differing views with regard to sovereignty, title, ownership, and jurisdiction over Haida Gwaii', while also agreeing to work collaboratively on decisions over land. This is an implicit acknowledgement of title, including jurisdiction (Takeda and Røpke, 2010).

In the final arguments phase for the Enbridge hearings, the Province's implicit recognition of

<sup>97</sup> The smaller cases did not reveal these details, nor did they intend to, as outlined in Chapter Three.

Haida jurisdiction through collaborative management was referenced. Here, Haida counsel argued that 'Aboriginal title includes the right to make decisions' (JRP, 2013, para 1521). In practice, however, the Province limits what is available to the *Kunst'aa Guu Kunst'aayah* collaborative regime, and (at this time) excludes certain policy areas that overlap with federal jurisdiction and major projects such as environmental assessments.<sup>98</sup> Haida governance encompasses the whole range of policy areas that, through Canada's federal system, are governed by a large number of discreet, overlapping, and multilevel structures. From the Crown's vantage point, however, certain policy areas are off-limits to collaboration with the Haida, so the any efforts at working towards reconciliation for these important policy areas have been deferred to a later stage. The observations presented here lead us to a new proposition: *agonistic arrangement may still encounter disagreements that must continue to be set aside but each of these defer reconciliation to another time (in the case of certain Crown policies) or venue (in the case of title)*. Mouffe (2000, p. 127) describes this deferment-through-agreement as a stabilization of power, an idea that is explored in more detail below.

#### Targeting an inappropriately used venue for reform

In the Enbridge case, a tug-of-war broke out between those who wished to include the full expression of the title dispute and those who wished to exclude it from the process altogether. Using March and Olsen's (2006) logic of appropriateness, it is suggested that violations of appropriate use in an institution may trigger dominant actors to reinforce their views about appropriateness. Chapter Two posits that planning reform might function like an enforcement mechanism to impose dominant views about the appropriate use of planning spaces. The Enbridge assessment process offers two examples of these violations of appropriate use that give rise to two very different state responses. In the first example, opposition groups were charged with finding loopholes to stack public hearings that would then delay the review process, leading Minister Oliver to conclude that the system was 'broken'. He argued that a 'quicker and more streamlined' process was an 'urgent matter of Canada's national interest' (Oliver, 2012). When the review was delayed by a year, Enbridge openly questioned the intention of these participants. When it became clear Canada and Enbridge believed that the

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<sup>98</sup> This statement in no way detracts from the intent and meaning of the argument presented at the hearings. The Haida Nation have made clear that collaborative management is the preferred option for governing Haida Gwaii and existing regimes establish important precedents.

Panel process was not being appropriately used, the Government of Canada introduced a series of planning reforms similar in intent to those discussed elsewhere in the literature: introducing new rules, disqualifying certain participants, excluding certain issues (Metzger, 2011), moving decisions to new scales, and speeding up decision timelines (Cowell and Owens, 2006; Owens and Cowell, 2011). The specific changes are presented in Chapter Four. With these observations, it is argued: *when appropriate use is violated, a venue can be targeted for reform*. An interesting observation that will be carried forward for further discussion is that Aboriginal rights were excluded from the rhetoric altogether. Indeed, those who violated this apparent ethic of efficiency in environmental assessment were simply described as 'environmental and other radical groups' (Oliver, 2012). Even though some Indigenous political actors were very much involved in anti-Enbridge campaigns and felt that Oliver's rhetoric was directed at them, as suggested both in the oral hearings and in the media (e.g. Paris, 2012), the government did not argue that Aboriginal rights had been inappropriately used.

Conflict over appropriate use may lead to important questions and public debate

The second example in the Enbridge case that sheds light on appropriate use comes from the cross-examination phase of the oral hearings. This time, the violation is very much tied to the idea of Aboriginal rights. Arguments presented in this phase show that the oral hearings provided an opportunity to air tensions over the formal rules of procedure enforced by the Panel, and the much broader intention of the presenters. As outlined in the Aboriginal consultation framework (Canadian Environmental Assessment Agency, 2009, p. 1), the Panel is required to consider 'the potential adverse impacts... [the project] may have on potential... Aboriginal rights'. Presenters offered evidence within the relatively uncontroversial 'right to culture' definition (Engle, 2010); that is, identifying fishing and gathering locations to help with the impact predictions on these kinds of Aboriginal rights. These presenters conformed to the rules for addressing Aboriginal rights in the Panel process. Other presenters moved the conversation beyond 'right to culture', demonstrating Haida title, citing historic and legal precedents relating to Haida-Crown relations, and drawing upon Haida ethics and practices as an assertion of Haida sovereignty and jurisdiction. This latter approach is used in one example presented in Chapter Five, when the principle *Gina waadluxan gud ad kwaagiida* – Everything

depends upon everything else – was used to show an interaction between the marine and forest environments. This was used to critique the Enbridge impact assessment methodology that adopted the limited spatial extent of the Haida Gwaii shoreline, excluding the upland and forest environment.

The underlying disagreement between these two perspectives, though, was made apparent in the cross-examination phase when Haida counsel questioned Enbridge on the way oral evidence would be used in their assessment process. An argument was raised over what constituted appropriate use of the oral hearings when Haida counsel asked Enbridge, 'Did you also proceed on the assumption that the Haida Nation holds the right to choose how marine resources are used and managed?' Enbridge responded, 'What the Haida Nation's rights are is a matter to be determined in argument or to be determined by the courts' (JRP, 2013, para 22873). The company, in their interpretation of the rules of the venue, attempts to push the title dispute to another venue. These are the terms presented to the Haida Nation by the company. Yet, the courts have been clear to defer any characterization of title back to government, asking that they use the mechanisms of reconciliation to address this dispute (Egan, 2012; Knox, 2010). After the cross-examinations phase made it clear that title was set aside by Enbridge in their impact assessment, it wasn't clear who had control over the dominant view. What was apparent, however, was a dispute over what constituted appropriate use of Aboriginal rights, specifically title, in environmental assessment. When this dispute was highlighted by other First Nations and raised to the public, a new venue was created by the federal government. The mandate of the Special Federal Representative does not focus specifically on this gap in considering title; rather, the new venue was created to facilitate 'greater participation by Aboriginal peoples in resource development' (Natural Resources Canada, 2013). The above findings bring us to the following statement: *when conflict over what constitutes 'appropriate use' is apparent in a venue, sufficient questions may be raised for the Crown to appear and make efforts to accommodate these concerns. More research is needed to understand the purpose of creating this new venue and how it might function in this dispute. Is it meant to quieten dissent or to truly begin to find solutions? How will the report add to the disagreement? In the resulting Eyford report (2013), title is implicitly addressed in its focus on encouraging collaborative management and reconciliation, though the federal government has not signalled any acknowledgement of this concern*

(Hume, 2013).

Accommodating the opposition when inappropriate use is made apparent to the public

There is evidence in the collaborative land use regime case that might offer additional insights into these questions. When the Crown violated its own rules, transferring Tree Farm License 39 without Haida consultation, the Haida decided to access a new venue – the road blockade. The blockade, along with the election campaign, seemed to raise the profile of this disagreement in a way that was necessary to strike the interim land use deal. These observations suggest that *when 'appropriate use' is clearly violated, venue shopping may be used to make this violation apparent to a wider public so that the Crown will make efforts to accommodate concerns*. In the Enbridge case, the rules are simply in dispute and it is not clear whether the Crown has violated its own rules or not. This uncertainty has led to a new venue, a kind of (rather minimal) procedural accommodation. Perhaps more to 'quieten' opponents on this issue than to do anything meaningful especially after the federal government conditionally approved the project in June 2014. However, a recent judicial review was launched by the Haida questioning the Constitutionality of the project on the grounds that the mandate 'excluded consultation and accommodation of Aboriginal Rights and Title. The Haida and other First Nations are asserting that this was unlawful' (CHN, 2014, p. 1). At the time of writing (July 2014), it is unknown if the law will afford the Haida any meaningful accommodation or not, but the cases in Chapter Four show just how powerful the courts have been for moving Haida interests forward in the past.

Summary of findings related to appropriate use

The findings presented above show that the rules of a planning institution matter for how changes unfold. When rules are established to set aside an underlying disagreement – to 'agree to disagree' – any potential agreement over the point of disagreement, like the title dispute, is deferred to another stage. When the state is publicly seen to have violated its own rules, public debate is raised and accommodation may be offered to the oppositional party. When political actors are seen to have broken the dominant view of the rules of a venue, however, planning reform may be used to enforce this view. Thus, the act of violating appropriate use in a venue has the possibility to result in two divergent outcomes. An

examination of this interesting finding is presented later in the chapter. And, further, this finding reveals intriguing observations about the nature of opportunity structures afforded by Aboriginal rights and the way these structures are modified under planning reform. The next section examines these ideas in more detail, finding that reforms may indeed impinge upon these structures.

### Mechanism 3. Planning reforms and the future of reconciliation

The third, and final mechanism of reconciliation, focuses on planning reform. It was posited in Chapter Three that planning reform may be used to reinforce the dominant view of 'appropriate use' when it is violated. Reforms, in turn, modify the planning institutions to affect the way venue shopping and opportunity structures are engaged with in the future. The analysis of the Enbridge case presented in the previous section supports part of this: planning reform can be a response to violating appropriate use in a planning venue. When the environmental assessment process was delayed by a year, Minister Oliver suggested that it was 'broken', reinforcing the view that planning ought to be a less lengthy process. This delay was used to justify a series of environmental reforms aligned with this view. One of the more notable reforms that sought to achieve the 'one project, one review' policy was the elimination of supposed duplication of provincial and federal assessments for the same projects.

#### Changing opportunity structures through planning reform

Cowell and Owens (2006) document how reforms may change or eliminate opportunity structures that were previously available. As argued above, the opportunity structures of interest in the Haida Gwaii cases are made available through consultation and accommodation. It is argued here that the planning reforms tied to the Enbridge controversy reduces the total number of times the Crown is required to consult and accommodate in relation to environmental planning decisions affecting Aboriginal rights (Dembicki, 2013). In his review of the Enbridge process and related reforms, McIvor (2013) argues that government may 'avoid consultation on a project by simply reducing the number of projects requiring an [environmental assessment]'. Even if consultation is still required when permits are issued, he argues, 'it cannot substitute for consultation on the project as a whole'. This is

also an important distinction: environmental assessment offers one of the few opportunities for consultation to consider the whole project. Indeed, this was 'arguably the reason behind the [original] *Canadian Environmental Assessment Act*, ... [which] contemplates multiple agency decisions for major projects, and so creates, by statute, a single window assessment process which precedes all other permits' (McDade and Giltrow, 2007, p. 9). By breaking up a whole-project approach to smaller decision points, it could be argued that the Crown is undermining the goals they had hoped to achieve through the 2012 'one project, one review' planning reforms.

Planning reforms shape the way venues are accessed

While this single window is provided by environmental assessment for environmental components, '[n]o such statutory structure exists for aboriginal accommodation' (McDade and Giltrow, 2007, p. 9). Rather, Canada's Aboriginal law is clear that '[t]he duty of consultation and accommodation is continuous, and is not tied to a specific decision but rather to the contemplation of 'conduct' that will infringe. The duty is that of the Crown itself, not a specific decision maker or tribunal, and arises from a constitutional context, not a statutory one' (McDade and Giltrow, 2007, p. 2). In practice, however, the duty is usually conveniently tied to statutory windows. The environmental assessment itself is considered to be a single window. Furthermore, many of the procedural aspects of consultation are delegated to industry (INAC, 2011). The 2012 planning reforms reduce the total number of single-window assessments and replaces full project reviews with a series of smaller permitting decisions involving fewer agencies with narrower statutory obligations as outlined in Table 7 in Chapter Five. Thus, these planning venues are narrower and simplified with fewer decisions involving full projects. While these statutory changes cannot modify the Crown's constitutional duties (as outlined in *Haida v. BC*, 2004), it is posited that *the practice of conveniently tying the Crown's duty to statutory decision windows means that planning reforms will likely have an effect upon the ability of actors to venue shop*. Since the courts are presented as an influential venue above, the potential effects of planning reforms on venue shopping to access the courts are examined in the next few paragraphs.

The government is very much aware of the way the courts are used to gain influence over the planning system. A 2013 court challenge highlights how planning reforms have expressly

targeted these kinds of venue shopping strategies. It was determined that a series of 10 small hydro-electric dams proposed in BC, each to generate less than 15MW, did not require an environmental assessment under either the provincial or the new federal processes. The BC *Environmental Assessment Act* requires assessments for projects 50MW or more and the combined project would be 150MW, exceeding this threshold. The BC Supreme Court challenge was over whether or not the projects were being 'split' for the assessment when the combined projects should be considered together. The court ruled that the projects were functionally (although not economically) independent from each other so did not meet the 50MW threshold and, thus, did not require an environmental assessment (Rowntree, 2013). Before the 2012 federal planning reforms, the 10 plants would have been subject to the federal environmental assessment process because the dams would require a federal permit to authorize the destruction of fish habitat outlined in the pre-2012 *Fisheries Act*. When a federal permit is required, the pre-2012 *Canadian Environmental Assessment Act* is 'triggered' and the project is subject to a federal environmental assessment. The new federal regulations only require those hydro projects to be subject to the process when they generate 200MW or more (higher than even the cumulative proposed 150MW for all 10 plants). The federal planning reforms adopted BC's project list approach, reducing the total number of projects assessed. This not only gives oppositional actors fewer decision points from which to access opportunities to engage directly with the Crown, it reduces the number of opportunities available to access the courts if a dispute is unresolvable. To explain, the reforms reduce the number of project assessments and reduce the number of permits required. Federal laws, like the *Fisheries Act* and *Navigable (Waters) Protection Act* were reformed so that fewer decisions would take place and a lower threshold for considering effects would be included in decisions for any given project. Table 7 outlines how fisheries permits once required for destroying fish habitat are now only required for destroying designated fisheries, and how navigable waters permits were required for any navigable water but now only applies to the three oceans, and a small number of designated lakes and rivers. McDade and Giltrow (2007) find that the Crown limits its responsibility by artificially framing an issue 'as though only a discrete decision were the problem' (p. 9). Since there are fewer decision points through which First Nations are effectively allowed to challenge, 'the question of consultation is evaded and deferred' (McDade and Giltrow, 2007, p. 9-10).



Yet, a legal case that is progressing through the Canadian court system at the time of writing (July 2014), challenges this approach to consultation (unrelated to any of the Haida legal cases). The case highlights the tension between the Crown's constitutional, continuous duty and the narrow statutory windows of opportunity to engage in reconciliation activities. Specifically, the trial will consider the cumulative effects of developing bitumen (heavy oil) mining projects in Beaver Cree First Nation territory to the extent that they can no longer exercise their 'traditional rights to hunt and fish' (Pratt, 2013).<sup>99</sup> The Nation claims that this 'cumulative effect arose out of some 300 projects or developments in which approximately 19,000 individual authorizations were granted' since Treaty No. 6 was struck in 1876 (Beaver Lake Cree and Province of Alberta, 2008). This case is being touted by anti-oil sands activists as '[promising] to be one of the most significant legal and constitutional challenges to [the oil sands development] seen in Canada to date' (Linnitt, 2013).

Strategic environmental assessment (SEA) could offer space to discuss these cumulative Aboriginal rights incursions in relation to broader regional interests or decisions about policy direction. The last SEA in British Columbia took place in order to decide whether or not the federal and provincial governments would lift their respective offshore oil and gas exploration moratoriums in the early 2000s. SEAs in Canada do not compel governments, in any legal sense or established precedent, to follow the resulting findings or recommendations. They are also entirely voluntary for governments to use with very little formal guidance, save for a federal directive issued in 1999 (Noble, 2009). It is speculated here that governments have not legislated SEA, as this may trigger the duty to consult and become a space where governments are limited in their authority to introduce new policy direction. Regional land use planning, however, has taken place across much of BC through multi-stakeholder decision forums, including government-to-government negotiations between First Nations and the Province such as the plan completed for Haida Gwaii.

Restricting access to courts to challenge planning decisions is also evident in other jurisdictions. In the UK, for example, the proposed Heathrow International Airport expansion project would introduce a third runway. However, opponents successfully stopped the project through judicial review in 2010 (BBC, 2010). Three years later, the UK government has

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<sup>99</sup> The Beaver Cree First Nation territory is approximately the size of Switzerland and produces 30% of the daily oilsands production (560,000 barrels per day; Pratt, 2013).

decided to reduce the time allowed to apply for judicial review in planning decisions and introduce a new fee (Donnelly, 2013). The reasons given for introducing the timelines were 'to discourage those who seek to use judicial review for PR [public relations] purposes, or as a tactical device to cause delay' (Justice Secretary, Chris Grayling quoted in Donnelly, 2013). These utterances of planning echo those made by Minister Oliver. While the nature and intent of planning reform in this UK example and planning reform literature share some similarities with the Haida Gwaii cases, there are important limitations of using these examples. The Haida Nation is a society within Canada that has a distinct colonial history and relationship to planning institutions that are defined by not only conflict over values and interests, but an entire cultural identity and worldview, a language, a history of very different kinds of planning traditions. It is the intent of the author to highlight challenges facing planners in this context to nudge the conversation forward in conceptualizing the mechanisms that could be taken advantage of within this unjust planning system.

#### Mechanisms of reconciliation: A summary of findings

This research has identified three mechanisms of reconciliation based upon Canada's laws and policy dynamics literature. The analysis of the Haida Gwaii case study demonstrates their use and traces the how and under what conditions these mechanisms change. Planning reforms, like those that target access to the courts, appear to close down opportunities to venue shop. Indeed, reform has cumulatively changed the way oppositional actors may gain entry to the courts, to decisions that require explicit consideration of rights and title, and to particular jurisdictional levels, among others. Systematically observing these changes, we may begin to map a broader, system-wide change following the 2012 reforms. Planning reform has not only placed limits on venue shopping but also on the quality and quantity of opportunity structures available in each venue. When Crown governments adopted new consultation and accommodation policies in 2005 in response to the 2004 Haida v. BC Supreme Court of Canada ruling, an assemblage of overlapping and multilevel opportunity structures for consultation and accommodation were created. As outlined in the previous chapters, these duties are associated with a certain pattern of institutional structures; a 'stickiness' associated with certain issues and venues, such as land-based resource decisions that tend to be undertaken by provincial governments (Pralle, 2003). It is argued that planning reform has the potential to reduce the number of opportunity structures available in a planning system

when configurations are more closely tied to a single level of governance.

Reform also appears to enhance the jurisdictional integrity, simplifying the complex configuration of 'multiple channels of influence' that are common in plural liberal democracies (Constantelos, 2010, p. 461). That is, reforms that raise decisions to higher orders of government and create clarity around the sectors they have authority over (oil, nuclear) may enhance the perceived jurisdictional integrity of the government. This simplification of the complex and messy federal system may not explicitly erase the scales where Indigenous governance is exercised as observed in Cross (2006 in Howitt et al., 2013, p. 319), but may modify the scale at which Indigenous resistance is aimed. It is too early to accumulate evidence that could systematically map these opportunity structures to compare the pre- and post-reformed planning system, so further research is needed to confirm this claim and examine its implications.

Some early evidence points to an escalation of conflict resulting from dissatisfaction with these planning reforms, sharing some similarities with the observations found in planning reform in a UK context (see Cowell, 2012). For example, an important, critical debate was raised over the environmental planning reforms and other laws and issues affecting Indigenous peoples through a series of Indigenous-led protests across Canada, referred to as the 'Idle No More movement' (The Canadian Press, 2013a; Paris, 2012; CBC News, 2012). While it is too early to make any conclusions about the effect of conflict on the potential for transformative or oppressive outcomes in the Enbridge planning case, the other in-depth case study from Haida Gwaii offers some insights in this regard.

The land use regime implemented through *Kunst'aa Guu Kunst'aayah* resulted, in part, out of the conflict arising from similar kinds of planning reforms that occurred in BC in the early 2000s. Takeda and Røpke identify these planning reforms (often referred to as 'deregulation' in this context), combined with the lack of consultation and the decision to log in a cultural cedar stand, as the 'explosive combination' that led to the Islands Spirit Rising road blockade in 2005. This is not to say that these kinds of blunt instruments will be necessary for transformation in the Enbridge case, though it was necessary in the forestry case (Takeda and Røpke, 2010). To summarize this section, the first part of the last theoretical proposition is confirmed: *When the dominant view of 'appropriate use' is violated, planning reform may be*

*used as an 'enforcement mechanism'.* While the Enbridge case shows that the structure of the planning system has changed as a result of planning reform, more research is required to understand the implications of this on the future of venue shopping and opportunity structures. Instead, an incomplete revision is offered with evidence used from the strategic land use planning case: *Reform may also contribute to conflict that can, in turn, contribute to transformative change.* Political resources and legal precedent, timing during an election, and access to an effective road blockade were also important factors in this case. The Enbridge case has similarly progressed with a rise in protest and conflict following the 2012 planning reforms and, at the time of writing (July 2014), is subject to a well-timed Supreme Court decision that increases the requirements for Crown consultation (Tsilhqot'in v BC, 2014) and a judicial review that uses this case to challenge the constitutionality of the federal government's decision to conditionally approve the Enbridge project (CHN, 2014). Conflict in this case has the potential to expand and be channelled in other unintended venues, or may lead to a series new venues (Inch, 2012).

### ***Proposition 3. The power of scale***

Scale has been alluded to through the analysis in this chapter. Proposition three states that spatial and temporal scale is an essential tool for influencing the function of the mechanisms of reconciliation. In fact, a rights-based approach to reconciliation relies upon a strong tie to place that directly challenges the approach to implementing reconciliation policy. This idea has influenced much of the analysis already presented. Indeed, it is the very dispute over territory, the dispute over both parties claiming jurisdiction and ownership to the same land, that challenges asserted Crown sovereignty. Reconciliation is about reconciling two incompatible ideas: Crown sovereignty and Aboriginal rights (Blackburn, 2007; Borrows, 2001). Within the spaces of planning engagement, it is clear that scale is used very differently by the Crown than the Haida Nation. Indeed, the strong tie to place is leveraged in order to directly challenge the Crown's approach. This act of 'scale bending' has been a powerful progenitor of social change, challenging the vantage point of the Crown governments and opening up new spaces to engage them.

Coulthard (2014) highlights a fundamental economic component of this scalar difference in

his comparison between the planning process for the Mackenzie Valley Pipeline in the 1970s and the more recent proposal in the 2000s. He argues that the Dene people's place-based ethics of reciprocal relations required that the land be understood as having an obligation to the people, and the people having an obligation to it for mutual survival and well-being. This was non-negotiable in the 1970s. After land claims were agreed upon in the decades that followed, this ethic seemed to become more negotiable to some Dene political actors. Land claims made the Dene 'masters in their own house' (p. 33) and development was no longer equal to dispossession. Land could be a material resource to accumulate capital. Coulthard explains that this shift away from the place-based ethic towards a capitalist one is the result of land claims negotiations creating a new (private property) relationship with the land. Scale is important here. It is not a conflict between local interests and broader, more important national interests. As Cox points out, it is a tension between the fixed space of dependence (homeland, communities) and mobile space of engagement (marketplace, planning). It is also a tension between the venues themselves. Indigenous planning systems give space to certain families that have rights to particular territories. While federal and provincial planning systems for pipelines give space to several actors with authority and economic interests. Who is in and who is out *matters*.

Tension between scalar and temporal boundaries is also apparent in the Joint Review Panel oral hearings. Historic infringements and ancestral obligations are ignored by the Panel's planning rules. Spatial boundaries are placed around the intertidal area, ignoring ancestral laws and principles that view the ocean and land environments as interconnected. These boundary decisions limit the analysis of impacts on Haida Gwaii and, in turn, the assessment of predicted impacts on Haida rights. The 2012 planning reforms appear to provide even less space for Haida perspectives in planning. Reforms saw federal jurisdiction limited to specific sectors and areas of responsibility, limiting the spatial extent over which the Crown is granted authority. This fulfils the simultaneous purpose of enhancing jurisdictional integrity of the federal Crown over those more specific spaces and constraining the way federal and provincial governments implement the Crown process of consultation and accommodation. That is, since the federal government legislated itself out of the responsibility for (a) protecting fish habitat that does not support fisheries and (b) navigation for most of Canada's waterways, it is unlikely that the Crown will authorize accommodation for any infringements

related to effects on these specific components of the environment. For example, if a First Nation can no longer access an important hunting area because water levels in a small tributary have dropped due to mining demand on water, the Crown may claim that it does not have responsibility for accommodating this effect. Yet, the legacy of historic infringements and ancestral legal traditions are placed on the public record in a way that challenges these rules. This public record may provide a resource for future legal action to compel the Crown to address Aboriginal title.

As outlined in previous sections, planning reform has placed important spatial boundaries around certain issues and participants, excluding them from accessing planning spaces of engagement, and raised decision authority to higher spatial 'levels' of government. This effort at rescaling the planning system is an effort at state control. This new scalar ordering is used to manipulate and coerce potential leverage points that may exist within the mechanisms of reconciliation. In this way, the reconciliation process is modified in way that appears to only further advantage the Crown. Within this highly uneven institutional terrain, attempts at finding opportunities to engage with the state may have to occur outside the limited statutory framework provided by the Crown and instead appeal to Canada's 'highest' order of law, through the courts.

### ***A discussion of key research findings***

The first half of this chapter has considered the propositions, developed in Chapters Two and Three, in relation to the two cases from Haida Gwaii. The analysis demonstrates, extends, and revises aspects of these propositions. Certain aspects of these research findings have important implications for research and policy and are explored in the following four sections. The first section underlines the relevance of locating where reconciliation takes place. The second section revises the concept of venue shopping to suit an Indigenous planning context and the third considers the importance of avoiding a narrow definition of Indigenous rights in planning. The final section considers the implications of planning reform for the practice of reconciliation in Canada.

## **1. Planning reveals reconciliation**

At the outset of this chapter, a crucial finding was presented: planning spaces reveal information about reconciliation. This research has developed a framework for locating spaces where tensions inherent to reconciliation may be observed. Following Lukes' (2005) third-dimension of power, this phenomenon is not observable when conflict is not actualized. Conflict does not actualize when Indigenous interests are excluded from decisions, agreement is struck based upon reason while values remain in conflict, or people are prevented from having grievances in the first place. Conflict is observable when road blockades are erected over a forestry dispute; when agonistic agreements are struck that make the disagreement over title apparent. It is observable when specific proposals activate citizen values and make value differences between these parties unmistakable (following Hajer, 2003). The power of the Crown over Indigenous territories and interests is manifest even when planning allows for the mere assertion of these value differences, such as those over jurisdiction and ownership of land, in a public forum that is tasked with hearing and recording these grievances. Planning allows for detailed observations to be made about this conflict and may generate new narratives to describe the history of grievances and value differences that constitute it. When combined with Aboriginal rights, the analyst may observe the strategies used by different actors in response to perceived opportunities to gain more power and control over their territory.

Scale is crucial for helping analysts locate the spaces where responses to these opportunities may be observed. Scalar configurations of planning venues may also be changed to express the power dynamics in the reconciliation process. Place and local values can be networked to planning venues, a type of space of engagement (following Cox, 1993) where these values mingle and conflict with one another. In this way, planning does not manifest a generic Indigenous-Crown relationship; rather, observations about reconciliation concern 'broader events and forces' and tension between local values around specific relationships unique to each place, each set of histories, and each set of communities. The mechanisms of reconciliation, expanded upon in this research to include treaty negotiations, consultation, regulations, negotiation, legislation, litigation, and direct action, are also crucial points of contact that may lead researchers to observe the power dynamics in reconciliation. These specific mechanisms as well as their broader relationship the governance regime may help

reveal strategies used to shape the reconciliation process. At the time of writing (July 2014), consultation and other mechanisms operate in and around the planning process. As resources are allocated to this process for implementing the Crown's policy of reconciliation, this space remains an important one for observing reconciliation.

This finding underlines an overlooked purpose of planning: an empirical space for understanding reconciliation. Planning provides a rare opportunity to observe real tensions that are not often actualized alone. The purpose of planning is thus expanded to include reconciliation.

## ***2. Opening up new spaces of engagement***

Venue shopping has proven to be a useful concept for describing, and beginning to explain, the ways in which political actors take advantage of planning venues. However, some of the findings of this research add complexity to our understanding of this strategy. These findings concern (a) the way a venue shopping strategy might be made public to influence other actors and (b) the way an issue need not be redefined when entering a new venue. The latter finding is particularly important in an Indigenous planning context because, in contradicting a central feature of the venue shopping concept, it points to a critique, or at least an elaboration, of the existing literature. According to existing writing on the venue shopping, tactics must be used to manipulate the issue for this strategy to work:

Groups often have to redefine an issue in order to suit the discourse and norms of the institutions they are soliciting for support. If environmentalists hope to involve the courts, for example, they must invoke the discourse of rights or otherwise reframe their argument in ways that engage the legal system. Or, if an advocacy group wants to move an issue to the sub national level, it must highlight the local origins or impacts of the policy problem so as to engage policymakers and publics at the local level. In short, issue redefinition is a tactic designed to shift an issue from one venue to another (Pralle, 2003, p. 242).

Previous research demonstrates how redefinition of the forestry over-harvesting issue has indeed been an essential part of the venue shopping strategy used by groups in Haida Gwaii seeking public support for Haida title claims. Opponents accessed forestry decision venues and the courts by learning the language of forestry planners and lawyers (Pinkerton, 1983). However, the underlying dispute presented in each venue for over a century on Haida Gwaii has not changed. What has changed is the way each venue is accessed. The issue of title



presented in each venue, once the venue has been accessed, however, has remained constant.

This section reflects upon the discourse presented at the Enbridge oral hearings to argue that while parts of the presentations were framed to suit the institution to gain access and conform to the terms of the Panel, the presentations challenged these terms and thereby challenged the dominant view of appropriate use. Thus, a *hybrid* strategy is deployed, allowing for access *and* critique of the Crown's approach to reconciliation. Specifically, two complementary strategies were undertaken. First, cultural land and resource use practices were relayed to the Panel in ways that conformed to the generic 'right to culture' definition, ensuring access to the venue. Second, Haida jurisdiction and ownership was asserted through stories and ethics, for example, the Haida principle of *Gina waadluxan gud ad kwaagiida* - Everything depends on everything else. This latter strategy conveys moral and ethical codes, which assert jurisdictional rights embedded in the notion of title. According to the Enbridge lawyer presenting at the cross-examinations phase, outlined in Chapter Six, this issue is one for the courts, not for the impact assessment. Importantly, however, this information was admitted to the oral hearings and placed on the public record.

This distinction between what is *admitted* to the process and what *influences* the impact assessment decision is made apparent in the Enbridge case. What is admissible here appears to be much broader than what was admissible in the McKenna-McBride Royal Commission and the repercussions of non-conformance appear to be less extreme (indeed, secondary sources suggest that some presenters who talked about title were sometimes threatened with jail time; Harris, 2002). In the Panel oral hearings, evidence concerning Haida title, beyond the mere 'right to culture' definition, was admitted. This evidence was even directly probed, as when Panel member Hans Matthews directed a question to the Council of the Haida Nation on the contents of the agreements with the two Crown governments. In addition, Haida principles, such as *Gina waadluxan gud ad kwaagiida* - Everything depends on everything else – were used to express a Haida ethical code, which is an expression of Haida law and underpins their jurisdiction. While evidence of culture and title were both admitted to the process, the Panel interpreted the information rather narrowly. The cross-examinations phase, described in Chapter Five, reveals that Enbridge considered the evidence presented at the oral hearings on Haida Gwaii as merely 'consistent' with the scientific evidence their

consultants have already collected. This claim of consistency masks the complexity of the evidence, stripping away the moral and ethical codes to merely the presence or absence of a cultural component that is able to 'fit' within the impact assessment framework (see, for example, Cruikshank, 2000). This process of interpreting evidence in a narrow way is well-established within Canada's planning institutions, however. The courts have been clear to point out that while they *hear* 'oral tradition', they reject 'assertions about broad concepts embodied in oral tradition' unless it is confirmed by 'findings based on other admissible evidence' (Delgamuukw v. BC, 1997 in Cruikshank, 2000, p. 64). In other words, while title and moral arguments underpinning assertions of jurisdiction over the project decision are admissible, the Panel decision will be influenced by other kinds of evidence. Thus, the Crown maintains control over excluding a broad set of values in planning and consultation processes.

It is argued here that since the 'other admissible evidence' is mostly scientific in nature, there is a particular quality to the evidence that is used in the decision process. Any of the 'oral tradition' provided as evidence must correlate with a potential impact pathways on a particular harvestable resource that is measurable in a scientific sense. That is, consideration is more likely given to impacts of an activity on the right to a harvestable resource than any acknowledgement that possible title might warrant shared decision-making. Thus, what the Crown uses to influence its decisions is limited to Engle's (2010, p. 6) 'right to culture' definition, not any right to jurisdiction or ownership.

Even so, the fact that moral codes and assertions of jurisdiction are admitted has the potential to influence a decision process over time. Indeed, the very fact that what is admissible in an institutional venue has expanded over the last century suggests that this expansion would not have been possible without a constant expression of title over a long period of time. Chapter Four offers some evidence for this assertion, showing that the expression of title has been maintained over time. This research also shows that planning institutions offer variable amounts of accommodation for Indigenous perspectives. The Enbridge assessment, for example, admits a wide range of evidence, while *ad hoc* arrangements like the land use process established out of *Kunst'aa Guu Kunst'aayah* have gone a little further in accommodating for overlapping jurisdiction by establishing a collaborative decision regime. More research is needed to confirm this assertion – has the constant expression of title in

planning institutions shaped such institutions over time? How has the violation of appropriate use of these institutions played a role in this process?

In short, this research finds that the expression of title in planning venues has remained constant on Haida Gwaii, over time and across venues. This finding raises an important challenge to the dominant understanding of venue shopping because the concept relies upon the assumption that an issue must be modified to suit a new venue (Pralle, 2003).

Furthermore, findings show that planning venues in Canada have opened up to admit the issue of title over time, though this openness is highly variable between venues. It is suggested that this persistent expression of title over long periods of time may have an influence on the way venues open up to and accommodate Indigenous perspectives. More research is needed to understand the significance of this constant expression of title on this opening up process. This strategy of relentlessly challenging the dominant view of appropriate use, however, is a risky one because, as the next section explains, it may lead not to opening up but to additional restrictions on the accommodation of Indigenous perspectives in planning.

### ***3. The limits to rights as opportunity structures***

The way a venue is used matters. This is an important observation in the face of an increasingly sceptical public that questions the legitimacy of planning and broader democratic institutions (Inch, 2012). These large institutional spaces seem impervious to change (Baumgartner and Jones, 1991), despite policy commitments to participation and, in this case, consultation and accommodation. March and Olsen's (1989) logic of appropriateness has proven to be a useful concept for explaining how planning institutions change in relation to how they are used. Arguments presented in Chapter Two suggest that the definition of appropriate use in any institution is often left 'rather vague' (Peters, 2005, p. 31) and 'open to interpretation' (March and Olsen, 1984, p. 30). Later in this chapter, it is argued that reconciliation and the meaning of Indigenous rights remain unclear in Canada (Blackburn, 2007). The absence of a single or agreed-upon definition of Indigenous rights enables opportunity structures in planning venues in two ways: first, it leaves the Crown vulnerable to resistance against its own dominant view of appropriate use; and second, it enables the Crown to enforce the dominant view of appropriate use through planning reform. These ideas

are examined in turn below.

Why is the Crown's definition of appropriate use *vulnerable* to resistance when rights are called upon in the planning process? It has been argued above that what is admissible in the planning space is broad but what the Crown includes in its decision is limited to Engle's (2010, p. 6) 'right to culture'; that is, any right to title that might warrant shared decision-making is dismissed. This underlying disagreement over how rights are to be used in planning is raised to the public, presented in the media, and put on the public record and what is argued here is that the Crown is violating its own rules. In the case of *Kunst'aa Guu Kunst'aayah*, new venues were accessed, including the courts that confirmed the Crown was violating its own rules, leading to a transformative outcome. In the case of Enbridge, the Government of Canada created a new venue in an effort to address this disagreement over how rights are to be used in planning, but the combination of political opposition, several judicial reviews challenging the constitutionality of the panel review, and the principles established in the *Tsilhqot'in v BC* (2014) Supreme Court case may provide sufficient legal and political resources to halt the project, which may also transform the planning system and related reconciliation policies.

The act of violating appropriate use does not always lead to transformative outcomes. Indeed, a violation may also *empower* the Crown to justify reforms. This argument is supported in the Enbridge case when the accused 'radical groups... that threatened to hijack the regulatory system' were used to justify a series of dramatic planning reforms, such as restricting the participants to only those who are 'directly affected' (Munson, 2013). As argued above, the reforms discursively target those particular people who are described as threatening to 'hijack' the planning system. It is important to point out that Aboriginal rights was *not* explicitly invoked as a reason to justify these reforms and, instead, it was those 'radical groups' that inappropriately used the planning process who were targeted.

This finding begs the question: why is the Crown *vulnerable* to resistance when Aboriginal rights are used to challenge the definition of appropriate use and *empowered* to justify reforms when there is a delay in the planning process? This research does not explain why the Crown does not attempt to target Aboriginal rights to justify reforms. It is speculated that this is because the government is aware that their narrow 'right to culture' definition is vulnerable

to broader legal arguments that justify jurisdiction through title. This issue requires legal analysis outside the scope of the current research. In the next section, however, it becomes clear that the government does not need to discursively target rights to justify reforms. Indeed, other avenues are available to enforce their view over how Aboriginal rights ought to be used in planning. Government is very much aware of how these venues are used. The decision to target 'environmental and other radical groups', as characterized by Minister Oliver, may nonetheless affect the character and accessibility of those opportunity structures available in planning provided by Aboriginal rights. This argument is presented in the next section.

#### ***4. Implications of reform for reconciliation***

The fourth significant contribution of this research concerns the character and durability of a planning system. Specifically, this research sheds light on the relative permanence of a planning system. It is concluded that the Crown consultation process creates novel spaces of engagement with the Crown. Depending on the strategy adopted to engage with these spaces, there is a potential for the characteristics of the planning system to change, such that the system may increase and/or limit access to these mechanisms of reconciliation and, in turn, are more or less likely to change.

Following the *Haida v. BC* (2004) Supreme Court ruling, the planning system was transformed to open up a series of new overlapping and multilevel opportunity structures. Planning decision were then tied to the underlying constitutional duty of the Crown to consult and accommodate Aboriginal interests. This shift appeared to open up opportunities for change, leading some scholars to identify consultation as the 'more useful' venue to pursue reconciliation objectives over the dominant Treaty process (Egan, 2012). Following the 2012 planning reforms, however, the spatial complexity of the planning system was simplified, lined up, and placed at one level. Planning may appear even more impervious to change, since there appear to be fewer opportunities for accessing the Crown and influencing or 'overturning' these policy systems. This relationship between planning reform and closing down access to opportunity structures in the future is not so clear, however.

Following Cowell and Owens (2006), this analysis traces changes to opportunity structures

made by these reforms. The Enbridge case presented in Chapter Six provides sufficient detail to track some of these structures and consider how they were used before and after the introduction of the 2012 planning reforms. Several opportunity structures are available in Canada's federal planning system, all of which are aligned with statutory decision points in a complex, overlapping spatial configuration. These structures include Aboriginal consultation and public engagement exercises. The last section highlighted how public engagement with the assessment, leading to a planning delay, was discursively singled out by the federal government to justify wider planning reforms in 2012. Aboriginal rights and consultation and accommodation processes, however, were not targeted in the same way. Despite this discursive targeting, the reforms appear to limit *both* kinds of opportunity structures. Indeed, the spatial configuration of the decision points tied to both the public engagement and the - very different - consultation processes have been changed as a result of planning reforms. This has, in turn, changed access to both of these opportunity structures, highlighting an important characteristic of planning reform: *a suite of opportunity structures may be shaped when only one is discursively targeted for inappropriate use*. This finding suggests that planning reform may effect opportunity structures in a cascading manner. Similar to the way venue shopping strategies can unintentionally give rise to several opportunity structures all at once, planning reform can close down several opportunity structures that were not directly targeted for reform. In other words, the strategies resulting in an opening up *and* a closing down of opportunity structures can change several structures.

The effects of the 2012 planning reforms consolidating statutory decision points appears to also reduce the efficacy of opportunity structures in each venue. Indeed, each statutory decision point includes a narrower definition of the issue or eliminates an object for review altogether, as outlined in Table 7 in Chapter Five. These changes also appear to reduce opportunities for venue shopping: if fewer venues are available, there will be fewer opportunities to 'shop'. These arguments raise important questions about the durability of the opportunity structures, such as those created following the *Haida v. BC* (2004) court decision, and the potential for any future possibilities for transformation.

The conditions necessary to lead to transformation are fragile and fleeting. This is demonstrated in the *Kunst'aa Guu Kunst'aayah* case. Kingdon's (1995; 2003) 'policy window'

concept is useful for explaining this fragility. Windows are 'separate [policy] streams [that] come together at critical times', notably, the politics, the recognition of a problem, and an available policy solution. A window may open when 'a new problem captures the attention of government officials and those close to them' (p. 168). These openings are highly unpredictable and may not last very long. The striking of *Kunst'aa Guu Kunst'aayah* appeared to rest upon a lining up of the following events to ensure the attention of government: the landmark 2004 court ruling, and two critical forestry decisions that led to a road blockade, and a forthcoming provincial election. When these factors lined up, many solutions outlined in the Haida Land Use Vision (CHN, 2005) were available to address the problem, including a large number of valued cultural areas identified for protection.

What might not be evident in applying Kingdon's policy streams approach is the way in which one of the forestry decisions helped to pry open the policy window. Kingdon suggests that openings might occur when there is a change in the political stream or a new problem captures attention as outlined above (1995; 2003). In this example, the problem arose as a result of the Crown violating its own rules. The 2002-2004 forestry planning reforms allowed the forestry license to be transferred without government oversight and without consultation. This was a clear violation of the rules of consultation set forth in the *Haida v. BC* (2004) decision. Despite the fact that the dispute in court was from the 1980s, the court appeared to take note of these forestry planning reforms of the early 2000s and ruled that 'legislation was to be used by the Province to fulfil their obligation to First Nations rather than to avoid their obligation' (Takeda and Røpke, 2010, p. 185). This violation was a key contributing factor that led to the decision to erect a road blockade. The protest and public attention, timed with the election, led to the conditions necessary for transformation. While it is too soon to know if a policy window will open for the planning reforms and the Enbridge case at the time of writing (July 2014), conflict has certainly arisen in response to these reforms and opposition continues to target the Enbridge project. Perhaps the most influential event is the precedent-setting *Tsilhqot'in* Supreme Court ruling issued in June 2014 that requires the Crown to deal with the issue of Aboriginal title more seriously. This ruling has also been drawn upon by several judicial reviews that aim to stop the Enbridge proposal from proceeding. The implications of this are discussed further at the end of Chapter Eight.

To summarise, evidence from this research lends support to Cowell and Owens' (2006) prediction that planning reform will change the political opportunity structures embedded in planning events. It is too early to accurately trace how these structures have been changed as a result of the 2012 federal planning reforms, but preliminary evidence presented in Chapter Six offers some important lessons. Planning reform appears to consolidate and line up the venues that constitute Canada's complex federal planning system. The creation of a simplified planning system appears to have erected an important barrier in front of those political actors who use venue shopping strategies by limiting the number of potential venue shopping possibilities. Furthermore, those opportunity structures that remain in each venue have changed in character, activated by more narrowly framed issues. In addition to this structural change, there seems to be a public perception that reforms have placed important limits on the way Aboriginal rights will be addressed in these planning spaces (e.g. Dembicki, 2013), which may have indirect effects on the way groups interact with and use these venues in the future. More research is needed to understand how environmental assessments are perceived and whether or not changes in perception may lead to changes in the way political actors behave in relation to these venues.

### ***Summary of conclusions***

Barry and Porter (2011) highlight the tension apparent in the planning literature between scholarship that emphasizes the merits of planning as a universal good and the scholarship that emphasizes the injustices that planning can bring to Indigenous communities. They argue that in order to attend to this tension, analytical frameworks must be sensitive to both the transformative and oppressive possibilities of planning. In Canada, land and resource use planning tends to be colonial in its approach but is increasingly preferred as a space to pursue reconciliation goals over other venues such as the treaty process (Egan, 2012). Thus, a central finding of this research is that *while planning institutions may offer important opportunities to pursue reconciliation goals, they may also be used to constrain them.*

The courts have established a series of mechanisms for reconciling Aboriginal rights and the sovereignty of the Crown (Knox, 2011), which are expanded upon in this dissertation. The most common of the formal, legal mechanisms used in environmental and natural resource



planning practice, and required by federal and provincial Crown governments, are those of consultation and accommodation (e.g. INAC, 2011). The analysis here finds that the practice of consultation in these planning venues effectively defers the opportunity to work on resolving the title dispute – the overlapping rights to jurisdiction, ownership, and sovereignty over land and water – to another venue. In the Enbridge case, the courts were referred to as the most appropriate venue for addressing this disagreement, while government policy refers it to the treaty process (e.g. INAC, 2011). In the case of the collaborative land use regime on Haida Gwaii, this research shows that even though the title dispute is more clearly defined and agreed upon, it is set aside to another time with the potential for it to be deferred to another venue. In both of these divergent cases, then, the disagreement over title is excluded from the planning venue. This research finds that Canada does not give jurisdictional space to address the title dispute. At the time of writing, however, the *Tsilhqot'in v. BC* (2014) Supreme Court ruling highlighted this gap, requiring the Crown to consider title using a 'culturally sensitive approach', basing this determination on 'the dual perspectives of the Aboriginal group in question... and the common-law notion of possession' (s. 41). This judgement underlines Matunga's (2013) call for dominant planning systems to give jurisdictional space to Indigenous planning traditions so they may function and influence the decision process. That is, a 'culturally sensitive approach' is one that makes equal room for Indigenous perspectives on environmental and resource planning and management.

Despite Egan's (2012) suggestion that consultation might give rise to a 'more useful' venue than the treaty process to begin the reconciliation process, this research makes clear that it will not take place until the title is recognized such that jurisdiction and ownership are shared with the Crown. This research also brings some optimism to this critical observation. Indeed, what is most interesting about this research is that it creates an empirical framework to observe possibilities for pursuing reconciliation. While the planning process is not explicitly designed to reconcile assertions of Crown sovereignty and Indigenous interests, it provides important insights on the title dispute itself and how institutions are used and changed over time to express Indigenous interests not usually expressed in final decisions and policies. Indeed, the constant expression of title in planning venues, not only raises questions about the purpose of planning, but also opens up planning venues to admit and respond to Indigenous perspectives over time. Often considered impervious to change, these planning systems can

be modified and shaped by those actors engaging with it.

However, planning is also a colonial tool that can be used to enforce dominant ideas about reconciliation and title. While new spaces might be opened up, they can also be closed down. Aboriginal rights are a rather vague legal concept with several interpretations. The flexibility in meaning makes the Crown vulnerable to resistance when the public perception of its interpretation is considered to be incorrect. The Crown may also enforce its interpretation of consultation in planning through planning reform. The implementation of a 'one project, one review' process has implications for the way consultation takes place.

The dissertation began with an analysis of literature concerned with Indigenous planning, policy dynamics, and reconciliation, resulting in three theoretical propositions. These were used to frame the analysis of several historical cases and two in-depth cases from Haida Gwaii. This chapter has presented the analysis and research findings in order to confirm, revise, and extend these original theoretical propositions. The cases studied here have offered important new insights into the way reconciliation is shaped and understood in relation to planning in a Canadian policy context. The final chapter considers the theoretical and policy implications of these findings and proposes a research agenda to explore them further.

## CHAPTER 8. CONCLUSIONS AND REFLECTIONS

Commissioners came around in the late 1800s and then again in the early 1900s [to ask] our people a specific question, 'What land do you need to live on?' We're going to give you some land, was their assumption. In those days, our people were as equally clear and every bit as eloquent as what you're hearing from our people today about this Enbridge question. Our people said, 'That's not the right question'... [Our people] said, 'According to your law, you must deal with this question of Aboriginal title, and we've never addressed that question' (Miles Richardson with the Haida Nation, JRP, 2012a, paras 20273-20275).

[I]f a spill was to occur -- and we believe that is a highly unlikely event -- that if there was an effect on a harvestable resource, there are mechanisms in place for compensation and rehabilitation and recovery and those are not considered specifically because we think that (a) it's an unlikely event and (b) if it was to occur, then there are mechanisms in place to address and mitigate that (Jeffrey Green with Enbridge, JRP, 2013, para 22889).

Planning institutions are used in different ways to achieve different purposes. The process by which one use prevails over another use is an important area of research for planning theory and practice and especially relevant to the Indigenous planning literature. In the first quotation above, planning is viewed as an space for expressing Haida title over Haida Gwaii to the Crown for over a century. During this time, there has been a transformation in the way Indigenous peoples relate to the Crown. In the second quotation, planning is used as a technical-rational process by which an impact on an Aboriginal right may be predicted with some certainty. This approach to planning peels away any moral interpretation of Indigenous knowledge (Cruikshank, 2000) and claims to the right to land based on continuous occupation, limiting any right to 'an effect on a harvestable resource'. In the final Report of the Joint Review Panel that issued the Panel recommendation to proceed with the project, Enbridge's perspective prevailed while the Haida perspective was merely acknowledged (s. 4.7, JRP, 2013b). This power dynamic highlights the historic and ongoing 'oppression that state-based planning often brings about for [Indigenous] communities' (Barry and Porter, 2011, p. 173).

These two quotations also contrast the possible implications of adopting a 'right to culture' definition of an Indigenous right over that of the right to self-determination and title (Engle, 2010). The 'right to culture' definition is expressed in the second quotation above in terms of potential impacts on 'a harvestable resource', while the right to jurisdiction, sovereignty, and

ownership is expressed in terms of repeated engagement with the Crown on this topic since the 1800s. The Government of Canada addresses title in their determination of 'strength of claim', shaping the way the legal mechanisms of reconciliation - consultation and accommodation - are implemented. The *Kunst'aa Guu Kunst'aayah* - Reconciliation Protocol – collaborative land use regime offers an alternative to consultation as a way of attending to Aboriginal title. This regime gives the Haida greater control over the planning process in a way that 'implicitly acknowledge[s]' the Haida as a 'sovereign authority' (Takeda and Røpke, 2010, p. 182). The government-to-government process brings Crown and Haida representatives around the same table to make recommendations and decisions collaboratively in an always-evolving relationship. Yet, when the importance of co-management as a way to exercise Haida rights (including title) was highlighted in the cross-examination phase of the hearing process, Enbridge counsel replied, 'What the Haida Nation's rights are is a matter to be determined in argument or to be determined by the courts' (JRP, 2013, para 22873). Defining how to appropriate use the planning is a tactic used by the Crown to squeeze out the issue of title and to justify the dramatic planning reforms. However, this definition is not always under state control.

This research sought to understand how opportunities for reconciliation in the planning system might be realised. Relying upon documents and statements made in formal planning institutions, it also sought to illuminate how competing interpretations of reconciliation shape, and are shaped by, the system. Reconciliation is predominantly interpreted within Canada's institutions and laws, rather than Indigenous systems - an approach that defers, if not explicitly denies, the recognition of Indigenous autonomy and jurisdiction (Bhandar, 2004; Blackburn, 2007; Johnson, 2011, p. 189; McCreary and Milligan, 2013). Canada predominantly relies upon the tools of consultation and accommodation to fulfil reconciliation objectives in planning; notably, in the widely criticized environmental assessment process (e.g. Booth and Skelton, 2011; FNEMC, 2009; Haddock, 2010; McCreary and Milligan, 2013). Environmental assessment and consultation are not designed to accommodate for competing world views and, rather, consider only those aspects of traditional knowledge that are compatible with a linear planning framework (e.g. effects on a harvestable resource), an approach that effectively omits any alternative planning traditions and claims to jurisdiction. Having sought to address this problem, this research focuses on the,

albeit fleeting and fragile, *opportunities* to challenge and redefine Canada's dominant view of reconciliation. Specifically, it offers insights on how these opportunities can open up through several mechanisms of reconciliation deployed in and around formal planning venues, with a focus the heavily-relied-upon consultation and accommodation process. It is argued that a potential pathway towards reconciliation may be forged by taking advantage of these mechanisms, such as the opportunity structures available within existing environmental planning regimes. This relatively optimistic lens on what is possible must be subject, nevertheless, to a realism about its significant limitations. In the context examined here, planning might be best conceptualised in terms of 'contested sites' that tend to operate in a colonial way (following Barry and Porter, 2011, p. 173).

### ***Revisiting the research questions***

Three research questions were carefully developed in the earlier chapters. Each question was designed to build upon and critique existing research and theories and respond to a particular policy problem. Early in the research process, several bodies of literature were reviewed to develop a set of propositions that were presented as potential answers to these questions. These propositions guided the investigative process, including the research design, data collection methods, and analysis of the case study. As outlined in Chapter Four, much of this work was not completed in this sequence; indeed, some literature was reviewed after the bulk of the data were collected. In his chapter on case studies, Flyvbjerg (2011, p. 305) argues that this approach is useful for generalizing through 'falsification' where observations from a case study may invalidate a proposition, requiring it to be revised or rejected. At this point in the dissertation, the propositions have been examined in light of the case study evidence and the original propositions have been confirmed, extended, and revised. Additional conclusions beyond the original propositions were also developed in a more inductive fashion. Since the research draws upon two extreme or deviant cases, they help researchers to 'understand the limits of existing theories... to account for what were previously considered outliers' (Flyvbjerg, 2011, p. 307). It is clear that the case study research has added to and revised our understanding of the phenomena of reconciliation in planning, contributing to the literatures on Indigenous planning and reconciliation and addressing the original research questions. More discussion on the contributions of this research is provided later in this chapter, but this

section returns to the original research questions to understand the degree to which the findings have addressed them.

The first two findings offer a response to the first research question: *What opportunities exist for reconciliation to take place in the planning system?* Planning provides several opportunities for reconciliation to be discussed, debated, and influenced through mechanisms of reconciliation that allow for Indigenous-Crown engagement. Chapter Five traces the decision spaces for reconciliation over time highlighting how questions of title are raised with the Crown through land-based planning decisions since the early 1900s. When the British Columbia (BC) Treaty Commission's was established in 1991, there was much optimism over the possibility to engage with the Crown. Since this time, however, only three treaties have been finalized and only 60% of First Nations are involved today. Its policies, including that of extinguishment, has made it a less favoured process for many nations, including the Haida. After consultation policies were adopted by the Crown, this space of engagement is the most frequently used and one of the least worst, and thus preferred, options available for most First Nations.

The second finding relates to the same question. A venue such as a planning space may be opened up in particular ways through venue shopping. Since planning and consultation are so closely tied, this has important implications for reconciliation. One finding of this research is that more than just consultation that takes place; several other mechanisms of reconciliation can be involved, including challenging the rules of planning, causing a delay in the process schedule, or venue shopping. In examining the latter mechanism, it was suggested in Chapter Three that the grievance or issue brought to a new planning venue must be redefined or modified to suit its unique characteristics. This research has shown, however, that this does not always have to be the case. Rather, in keeping the issue the same – as is the case with grievances over title for the last century – the venue may itself be subject to change. The finding challenges a central characteristic of venue shopping as envisaged in policy analysis. It may, however, be unique to Indigenous planning because of Indigenous peoples' persistent attention to the idea of title in relation to the equally-persistent resistance expressed by the Crown. It is argued that asserting concern over title using a hybrid approach - one that 'suits the discourse and norms of the institutions' (Pralle, 2003, p. 242) and one that remains

constant across every venue - may, over time, contribute to the broadening of what is admitted into one or more venues. More research is needed to advance or discard this argument.

The second key finding – concerning the limits of rights as opportunity structures – is tied to the second research question: *To what extent are wider shifts in the state and scales of decision-making supporting or thwarting effective reconciliation in planning?* March and Olsen's (1989) logic of appropriateness is a useful concept for characterising how planning institutions are modified in relation to the way in which they are used. The analysis finds that the unclear definition of Aboriginal rights has left the Crown vulnerable to resistance. Indeed, the Crown may appear to violate the rules of its own planning institutions and spark important actions. However, what is appropriate or not is not always evident. In the very same planning institution, the Crown's view may be enforced through planning reform. It must be noted that while the rules related to rights remain vague and in dispute, there is no evidence to suggest that the Crown has attempted to justify planning reforms on the basis that venues were being inappropriately used to pursue Aboriginal rights.

Despite the fact that the discursive justification for the planning reforms targeted the public participation process, rather than Aboriginal rights, both types of opportunity structures have been modified by the planning reforms. The public participation process, while significantly different from the consultation process, is tied to many of the same statutory decision points. The reforms have consolidated and lined up these decision points, affecting access to a suite of opportunity structures available within planning venues, thus closing down several opportunity structures that were not directly targeted for reform. It is found that the strategies resulting in an opening up *and* a closing down of opportunity structures can change several structures at once. This research finding is significant because it provides a cautionary lesson for political agents to consider the far-reaching implications of adopting these strategies. The evidence presented here does not allow us to determine if these effects are intentional or unexpected. What is evident is that when parties conform to appropriate use, change does not appear to occur.

The third interesting finding relates to changing opportunities for reconciliation through reform, which addresses the final research question: *What is the character and durability of*

*these changes?* Supporting Barry and Porter's (2011) contention that transformations in Indigenous planning are superficial and fragile, the land use planning case demonstrates that very particular conditions are required to give rise to the arrangement implemented through *Kunst'aa Guu Kunst'aayah*. And the 2012 planning reforms outlined in Chapter Six have had an effect upon the total number and quality of the venues available to deploy venue shopping strategies of the kind that were so successfully used to achieve this collaborative land use arrangement. By simplifying the 'multiple channels of influence' (Constantelos, 2010, p. 461) that were once available, large institutional spaces may appear even more impervious to change (following Baumgartner and Jones, 1991). The opportunity structures that were once available in these multiple and overlapping planning venues are also consolidated and lined up. The complex scalar configurations of the federal planning system may have fewer polycentric qualities and may function to enhance jurisdictional integrity of the federal Crown. In the Enbridge case, planning reforms have given rise to conflict. While it is too soon to tell what the effect of conflict might be on the durability of the reforms themselves, the forestry planning reforms highlighted in the first case show that reforms have acted as a contributing factor in unsettling state-led planning institutions in the past.

These research findings make several contributions to theory, methods, practice, and policy. However, it is cautioned that these contributions are only as strong and as weak as the research methods. Methods, contributions, and calls for further research are presented below.

### ***The merits of the methods***

As outlined in Chapter Four, the two in-depth cases from Haida Gwaii were selected to represent opposite extremes on a spectrum of potential cases demonstrating the way reconciliation is treated in planning. Extreme cases are used to both 'shed light on a larger class of cases' (Gerring, 2007, p. 20) and to offer 'the force of example'; indeed, lessons that are transferable to other cases are arguably just as valuable as generalizations (Flyvbjerg, 2011, p. 305). This research design allows for a comparison of concepts across cases to shed light on the nature of several concepts explored in this research: reconciliation, planning reform, venue shopping, opportunity structures, and appropriate use. The intensive nature of the cross-case study analysis offers sufficient detail to characterize the different ways actors



engage with planning to reveal observations about the practice of reconciliation. Throughout this chapter, it has been clear that the events unfolding in both cases have had repercussions for planning practice and reconciliation beyond the spatial extent of Haida Gwaii. Indeed, this research is useful for understanding how strategies and institutional structures for reconciliation might be operating across a large number of cases across Canada and other English-speaking settler states like Australia and Aotearoa-New Zealand. These societies are also experiencing tension and conflict across land and resource planning regimes over the idea of reconciliation and its implementation. The findings, however, will resonate more with cases that are subject to impact assessments, collaborative land use regimes, and jurisdictions that have similar rules and routines in place for Indigenous rights in planning.

The discursive methodology allowed this research to include overlapping and competing ontologies that are inherent to Indigenous geographical research (Turnbull, 2007). The arguments and ideas presented in this dissertation are in the presenter's own words or that of the policy text and presented as a narrative of the case events. The decision to adopt this methodology intends to pay sincere respect to the Haida principle of *Isda ad diigii isda* – Giving and receiving – Reciprocity. This approach will continue after the submission of this dissertation, when plain-english research cases will be written to document these historical moments, attending to the ways in which the findings will be interpreted and provide valuable insights for the community.

The use of discourse was also essential to reveal the tension in the reconciliation process. Important sites of argumentation were presented in Chapter Five to examine the 'argumentative structure' in relation to 'the practices through which these utterances are made' (Hajer, 2006, p. 66). This was important in the Enbridge case where the disagreement between Enbridge and the Council of the Haida Nation over the appropriate use of planning became clear in the argumentation phase of the environmental assessment process. If the analysis was restricted to factual planning reports, the nature of the conflict would not be as visible. Notably, the Enbridge counter-arguments, while present in the written documentation, were very limited in the sense of directly addressing concerns raised in the Haida written record.

### ***Contributions to Indigenous planning***

The concepts presented in this dissertation - including those that constituted the mechanisms of reconciliation, from institutional dynamics literature, and from policy reform research - offer important tools for understanding the nature of change in an Indigenous planning context. Appropriate use has been a particularly helpful concept for revealing divergent perspectives on how Aboriginal rights are used in planning. The framework provided an approach to understand these institutions from the Crown's perspective, while also offering a convincing explanation for the way it responds to how rights are deployed in these venues. Indeed, the concepts are flexible to begin attending to overlapping and competing ontologies and epistemologies when examining planning. It will be important to determine if these concepts are useful for explaining change in other Indigenous planning settings, including collaborative regimes and project appraisal processes, and in different jurisdictions.

Contributions are also made to broader concerns raised in the Indigenous planning literature. Much of this research is borne out of the tension between planning scholarship that emphasizes the merits of planning as a universal good and the scholarship that emphasizes the injustices that planning can bring to Indigenous communities (as highlighted in Barry and Porter, 2011). When positioning research questions in this context, it is important to point out that *accommodation is borne disproportionately by Indigenous political actors* in the process of reconciliation (also see Blackburn, 2007 and Nadasdy, 2003) and in any state-led planning systems. For example, even though *Kunst'aa Guu Kunst'aayah* appears to be balanced, the Haida bear the greater part of accommodation when the Crown defers collaboration over certain policy sectors and major projects to another time. In the Enbridge case, this occurred when the Crown attempted to separate title from other 'cultural' rights of Indigenous peoples and excluded it from consideration in the environmental assessment. This research confirms Engle's (2010) assertion that the state will protect cultural rights so long as they are consistent with the Crown's 'vantage point' or epistemological framework. Because of this, the Crown does not go very far towards the 'middle ground' (Borrows, 2001).

The notion of reconciliation, finding the 'middle ground' (Borrow, 2001), underpins every interaction between the Crown and Indigenous peoples. This is an important distinction from other forms of planning involving cultural, religious, or value differences. The notions of title,

of ownership, jurisdiction, and sovereignty, as well as historic precedents in law and practice unique to English-speaking settler states (Porter, 2010), make Indigenous planning distinct from other forms of planning. The ever-changing politics that unsettle established rules and norms in planning set the empirical foundations for what could become a burgeoning field. Indeed, this dynamism is not exclusive to Canada (see, for example, the discussion of the global reach of the Idle No More movement in Liddle, 2013).

The findings presented here help to justify the case for distinguishing and developing an Indigenous planning literature. They also present an important critique. Walker et al. (2013) call for planning to be 'reclaimed'. It is clear from this research that planning continues to be a colonial enterprise, which remains at its root an instrument of control that enforces Canada's vantage point. It is not possible for such a system to be 'reclaimed'. Instead, some attempt has been made to facilitate the mingling of Indigenous planning traditions and Canada's planning traditions to create a new system, like the co-managed land use process in Haida Gwaii.

Extending the concept of opportunity structures to this literature is an important contribution. A number of planning scholars have pointed to the 'policy critique' function of the opportunity structures available in planning (see, for example, Cowell, 2012; Cowell and Owens, 2006; 2010; Cowell and Flynn, 2006; Diercechter, 2010; Hajer, 2003; McClymont, 2011; Metzger, 2011; Owens, 2002; Owens et al., 2004; Owens and Cowell, 2002; 2011). In the cases considered here, these opportunity structures do function in a 'subversive' way by admitting behaviours and evidence that resist the Crown's dominant conceptions of Aboriginal rights within planning. Those who use planning in this way seek to infuse meaning in planning venues that better reflect place and territory. Indeed, this is one distinguishing feature between the 'subversive' uses of planning identified in some planning scholarship (e.g. Cowell and Owens, 2006) and in Indigenous planning scholarship: there is no express policy critique function in the latter (following Feit, 2010). This is not a universal distinction<sup>100</sup> and requires further exploration. Yet Chapter Four shows clearly that even though the Crown set up venues to address the policy issues of offshore wind, oil shipping, and Indian Reserves, one concern was raised over and over: 'The Haida Nation is the rightful heir to Haida Gwaii'

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100 Indeed, recent research critiquing the utility of the not-in-my-backyard or NIMBY concept in planning has attempted to highlight the importance of understanding place and place attachment in planning controversies (e.g. Devine-Wright, 2011).

(Council of the Haida Nation, 2010). In other words, even though policy agendas have been subject to change from one year to the next in Ottawa and Victoria<sup>101</sup>, statements that the Haida have title to Haida Gwaii have been presented in these venues over and over again for more than a century.

### ***Limits to institutional research on reconciliation***

This research places significant emphasis on the role of institutions in understanding change in relation to reconciliation. The conceptualisation of the institutional structures considered in this research is based upon the institutional dynamics literature that relies upon a western lens. Since the Crown generally comes from this perspective, is this research vulnerable to privileging the Crown's perspective? Furthermore, reconciliation is not simply about how institutions or even organizations relate to one another. Reconciliation is also a process focused on social cohesion and solidarity (Borrows, 2001). So, can an institutional approach really tell us anything useful about the 'middle ground' (Borrows, 2001)? This section examines the limitations of adopting an institutional lens and offers direction for future research.

Chapter Three is clear that institutions are a type of social practice that shape and are shaped by discourse. Discourse may act cumulatively on institutions 'sustaining them or changing them', so the act of tracing discourse over time shows this reproductive effect (Fairclough, 1996, p. 163). This concern for social practice as constitutive of planning institutions very much attends to the notion of social cohesion. It is the actions and routines of individuals and groups of people that create, change, and dissolve institutions. The tensions that arise between individuals and groups are represented in institutional venues where arguments take place – or sites of argumentation. Hajer (2006, p. 70) argues that when a particular 'discourse starts to dominate the way' a certain actor group 'conceptualises the world', then we may achieve the first step, what he calls 'discourse structuration', in a two-step process towards a change in the institutional arrangement, what he calls 'discourse institutionalisation'. In the second step, new perspectives on certain institutions, like rights for example, will be deployed, measured, and defined differently. In this way, new

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<sup>101</sup> Victoria is the capital city of British Columbia.

perspectives on reconciliation may be more formally adopted within Canada's policy and planning systems.

Reconciliation is very much dominated by a rights-based discourse in Canada. This is highlighted in Borrows (2001) and was evident throughout the Haida Gwaii cases presented in this research. There are important alternative ways that this discourse of reconciliation has been represented in the case study that begins to move beyond a rights-based one. Haida ethics and storytelling used at the oral hearings, for example, offered alternative approaches to asserting authority over the decision process. And social cohesion across Haida Gwaii demonstrate reconciliation despite the Crown. This is demonstrated in a public speech presented by the President of the Haida Nation highlighting the importance of interpersonal relationships amongst the individuals involved in the collaborative regime. He suggests that these relationships are the key to its long-term success:

We've been fighting governments all these years. Now we are working alongside them, and we are going to do what we can to make it work... The local people here accept that. They've worked beside us. Our kids go to school together. This is all about better management of the land (Guujaaw quoted in Mickleburgh, 2011).

Metzger (2011) points out that ideas grow beyond a venue to have influence on policy and broader governance regimes. He uses this observation to argue that policy analysts cannot restrict their analysis to the planning venue itself. An analysis that draws upon discourse and Indigenous research methodologies, such as narrative inquiry (Castledon, 2012), allow for a more contextualized analysis of these broad factors influencing the process of reconciliation. These methods are more likely to pick up on the nuances of interpersonal relationships that develop beyond the formal planning venue, something that this research did not deliberately attend to. Research methods such as focus groups or more detailed observations taken at the oral hearings may have revealed these nuances. This research did, however, consider the linkages between the arguments presented in a planning venue and arguments constituting the wider policy discourse. While the analytical focus linked Aboriginal rights and venue shopping with broader discourse on planning reform, more research is needed to analyse the quality of social cohesion in the process of planning reform. One avenue might be focusing on the economic development discourse emphasized by the Conservative government, which purports to aim to 'to unlock the economic potential of First Nations' (AANDC, 2013; Natural

Resources Canada, 2013). The so-called Calgary School that has ties with conservative politics, notably the work of Tom Flanagan (e.g. Flanagan, 2010), may have had important influence over federal government policy on some of these issues. Examining the discourse tied to the Calgary School with what has emerged out of recent natural resources policies, touched upon in Chapter Four, may help to further explain Canada's shift in policy. Alternatively, an examination of the social networks that work towards reconciliation might reveal strong connections in the community and weaker connections amongst those involved in those parts of the bureaucracy where satellite offices are not located in the community. This leads us to further possibilities for future research considered in the next section.

### ***Opportunities for further research as planning events unfold***

Since many of the observations presented in Chapters Four and Five are based on recent and changing events, there are opportunities to confirm and extend these research findings and conclusions. The final decision for the Enbridge project was only issued in June 2014 with judicial reviews submitted at the time of writing (July 2014), and those involved in the land regime established out of *Kunst'aa Guu Kunst'aayah* continue to implement the agreement and modify processes as they learn from experience. A draft regional marine plan was also released in June 2013 with a final plan expected later in 2014. Researchers may wish to follow up with the very same research questions and cases posed here or test some of the pertinent findings. Specifically, what are the actual effects of planning reforms as they are implemented and tested over the years? How exactly do opportunity structures change as they are used within a shifting governance regime? What about venue shopping patterns? Other strategies may be observed as political activity adapts to the new environmental laws and the 2014 Tsilhqot'in ruling across the Province of BC and Canada. A comparison of the EIA planning reforms that took place in BC just before the pivotal *Haida v. BC* (2004) ruling may also be useful. A longer-term and more detailed analysis of federal policy reforms that have taken place since environmental assessment was first introduced into federal law in 1992 might offer an equally useful analysis.

Another pertinent line of inquiry would consider the relationship between any of the effects of reform and present and future conflict erupting out of these reforms. Research on how this

conflict shapes opportunity structures and patterns of venue shopping in planning processes will be useful. However, the Tsilhqot'in (2014) ruling may have a stronger influence. More detailed research on the perceived legitimacy of planning before and after these reforms may also be instructive for improving our understanding of planning as a venue for pursuing reconciliation. Indeed, perceived legitimacy may, in turn, change the behaviour of actors interacting with these venues. In his research on the dispute over planning reforms in the UK, Andy Inch (2012) suggests that these kinds of planning disputes will likely produce 'a generation of nimbys'<sup>102</sup>. In the context of Indigenous planning where distrust of the Crown has continued for generations, the effect may be more acute and will have repercussions for reconciliation.

The limits to reconciliation will also need to be scrutinised. A critical analysis of the agonistic approach adopted by those involved with *Kunst'aa Guu Kunst'aayah* is warranted as they continue their work and, perhaps, adapt to the Tsilhqot'in (2014) court ruling. In this 'good example' case study, where do Aboriginal rights and the sovereignty of the Crown come into conflict? As Canada seeks to engage at this or a similar decision table, it would be useful to consider how this inclusion might influence the existing Haida–BC relationship. This is an intriguing model for working towards reconciliation through planning, with exciting possibilities that others may wish to learn from and build upon in different jurisdictions.

### ***What would be done differently***

Several lessons were learned throughout the process of this research, many of which were helpful in shaping the selected research design. Some lessons, however, came too late to influence the research. In retrospect, the research could have been done differently to improve its quality had these lessons been applied. The community-based aspect of this research was the most challenging and resulted in the most disappointment for the researcher. The primary lesson learned from this experience is that sufficient resources and a long-term commitment to the community are required to ensure that community-based research will be successful. These lessons are outlined in some of the community-based /

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<sup>102</sup> NIMBY refers to 'not-in-my-backyard' a discursive tool used to marginalise critics of developments in planning processes (Wolsink, 2006) and / or a useful concept characterising a group of people holding a particular attitudes towards a development (Hubbard, 2006).

participatory / Indigenous research literature (e.g. Castledon et al., 2012; Markey et al., 2009). Castledon et al. (2012, p. 173) highlight the 'substantial time (and often) financial commitment to undertake the critical activities' of community-based research. Critical activities include building a relationship and a rapport with a community – a task that can take several years. This is essential for success in undertaking other critical activities, such as: co-creating a research design, mutual learning and exchange (rather than linear data collection process from the 'researched' to the researcher), developing a collaborative approach to data analysis and/or review of written findings, and partnering on disseminating knowledge (where both parties engage with academic, practitioner/policy, and local communities). Unfortunately, such an approach was not feasible within the time constraints of a three-year PhD.

In an over-researched place with a legacy of its people and land having been subject to unethical research practices, community-based research on Haida Gwaii was a central goal for this researcher. On Haida Gwaii, the research relationship is often unequal; the already substantial demands of those who are interested and able to participate in research in rural communities are even further strained by the demands that research brings upon communities (Markey et al., 2009). As outlined in Chapter Three, efforts were made at the start to engage the community to co-create a research project, though without much success. Instead, the 'Conversation on Research' was undertaken to create a document that would have some benefit to the community. The researcher is also personally committed to following through on some of the lessons learned from this Conversation. Furthermore, the design was shaped in a way that would attend to community interests as the research progressed. Upon reflection, these benefits do not adequately compensate for the substantial amount of information and time donated by research participants, as well as the resources (e.g. office space, internet access, information, referrals to key informants, etc.) that were necessary for this kind of work to be successful. For research to offer equal benefit to the community, more intensive relationship building at the start of the research would have been required to develop a project that would satisfy one or more of the community research priorities. At this time, these research priorities are not well-defined and it would require some work to distill what they might look like. To learn about these priorities, the researcher could have attended classes associated with the Haida Gwaii Semester Program (where the



researcher was later enrolled as an instructor) or offered to intern with a community organization. More effort might also have been made to find grant monies to support this kind of research and to employ a community partner. Several other multi-year research projects on Haida Gwaii employ summer field workers or hire locals to conduct interviews or surveys (e.g. Walker et al., 2007). While there is limited funding available as a Canadian researcher enrolled in a UK institution, a partnership with a Canadian institution could have been forged to open up more opportunities. This knowledge would have been required prior to the initiation of the first-year of the PhD programme to ensure adequate funding was available prior to the start of the second-year field programme. It is important to acknowledge, however, that the PhD programme is limited in time and, so, these wider commitments are very difficult to make as an individual student.

### ***Final thoughts***

There is an important critical element to these findings that must be emphasised in the final paragraphs of this document. In each case study, the disagreement over title shapes the very roots of why political actors do what they do and, specifically, why they use planning in a particular way. In each planning case, the dispute is set aside. This exclusion happens either explicitly, in a mutually agreed manner, or implicitly in a way that creates tension and opportunity for resistance. This research finds that, *while planning institutions may offer important opportunities to pursue reconciliation goals, they may also be used to constrain them.*

This dual purpose of planning is evident in both cases. The Enbridge case offers the most compelling evidence for how reconciliation goals might be constrained in planning. The 2012 planning reforms have had important effects upon the way the Crown's consultation and accommodation duties can be practiced. The reforms have simplified the 'multiple channels of influence' (Constantelos, 2010, p. 461) that were once available, giving reason for many to see these large institutional spaces as increasingly impervious to change (following Baumgartner and Jones, 1991). Some policy analysts suggest these reforms may reduce federal government jurisdiction over reconciliation mechanisms available in planning (Doelle, 2012, p. 12).

The dual function of planning in the case of *Kunst'aa Guu Kunst'aayah* is also evident. Here, the underlying dispute over title is set aside:

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The Parties hold differing views with regard to sovereignty, title, ownership, and jurisdiction over Haida Gwaii (Council of the Haida Nation and Province of BC, 2009, s.A).

It is argued that because the title dispute is set aside, so too is the goal of reconciliation of this dispute. Blackburn's (2007) five criteria for a reconciliation framework, outlined in Chapter Two, is useful to highlight how reconciliation may be even further constrained. The criteria – justice, accountability for wrongdoers, dismantling of hegemonic silences, greater public knowledge about the past, and new formulas for the coexistence of differences within a polity – are not all expressly part of the practice within this regime today. There are no mechanisms available in any of the governance tables to address past wrongs, for example, though the notion of justice is likely reflected upon by participants in their day-to-day activities. More detailed research on the implementation of *Kunst'aa Guu Kunst'aayah* is required to confirm these arguments and, more importantly, systematically to interrogate the opportunities for and constraints on reconciliation in this regime<sup>103</sup>. For the purposes of this research, however, there has been considerable emphasis on the notion of title and how it is considered and accommodated in the legalistic framing adopted by the Crown. The dispute over title, in this case, is deferred to another time and, possibly, to another venue. This deferment, it is argued, allows some time for common ground to begin to be forged out of respect and an understanding of co-existence in the same place. However, the underlying disagreement remains apparent and hovers over every utterance at all levels of the decision process.

Mouffe (2000, p. 127) usefully points out that even under these agonistic conditions, any attempt at consensus can be seen 'only as the temporary result of a provisional hegemony, as a stabilization of power, and always entails some form of exclusion'. The obvious exclusion here is the title dispute, but Chapter Five points out that some areas of policy and decision making are also excluded. That is, some policies are considered 'off the table' by the provincial government, such as those policy areas that overlap with federal jurisdiction. This finding cautiously adopts Coulthard's (2007, p. 439) critique that Crown governments reproduce colonial structures of dominance by enticing Indigenous peoples to 'identify... with the profoundly asymmetrical and non-reciprocal forms of recognition either imposed on or granted to them by the colonial-state and society'. In defence of the regime, it does offer an

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103 A recent PhD dissertation attempts to do this, focusing instead on a First Nations-led, contemporary regional monitoring process, the Watchmen Program, adopted by Coastal First Nations of which the Haida Nation are a member (Kotaska, 2013).

important beginning – as it is so aptly named – and an institutional structure that has the potential to expand to all areas of policy and jurisdiction. Also, the actions undertaken by the Haida to achieve this beginning relied upon venue shopping and opportunity structures. In no way was this regime simply 'granted' to the Haida Nation. Coulthard offers important insights on the limitations of the Crown institutions that are made available to Indigenous communities in Canada. One of the novel contributions of this research is its emphasis on opportunities for change within institutions that offer impoverished forms of recognition. Indeed, one of the exogenous *conditions* necessary for change (following Kingdon, 1995; 2003) appears to be a certain level of tension between this impoverished view of rights within institutions and the objectives and actions of political actors working through them.

The way in which planning *ought* to be used as a venue for reconciliation is hotly contested in other examples of environmental assessment in Canada as well. There appears to be an increasingly divisive rhetoric surrounding this debate, but more research is required to confirm whether or not rhetoric is indeed changing and, if so, how. Such rhetoric is evident in a more recent example of an environmental assessment for a proposed open pit mine in British Columbia, in the Tsilhqot'in Nation's territory. In this example, a review panel rejected the proposed mining project, finding significant and adverse effects 'on the current use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title' (Morin et al, 2010, p. ii). The 'right to culture' definition of Indigenous rights, in this case, combined with title, led to a rare 'no-go' decision. The parallel provincial process<sup>104</sup>, however, issued a 'go' decision. These different decisions between the two Crown governments holding jurisdiction in BC highlight the differences in the quality of opportunity structures available in what are ostensibly overlapping planning venues, and supports one of the findings in this research.

It is important to point out that there are several crucial differences between federal and provincial environmental assessment that can be used to explain why the decision outcomes are so different; Haddock (2011) offers a useful and detailed analysis. One of these differences is the role played by the oral hearings, similar to those held in Haida Gwaii for the Enbridge

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104 In this example, the federal and provincial governments issued separate decisions. In the Enbridge case, the Government of BC opted out of the assessment process altogether. In other examples, the provincial and federal governments harmonise processes or one jurisdiction is 'substituted' for another.

project. A key difference identified by Haddock (2011) was that hearings phase of the process only featured in the federal decision. It was the hearings that led the panel to decide that the effects on culture and rights were too great. Yet the provincial government issued the decision before the federal panel held their hearings. The province did not consider the more than seventeen days of hearings in their decision despite the fact that provincial and federal governments share constitutional obligations to First Nations. In their decision report, the federally-appointed panel stated that they received 'the majority of information related to current use and cultural heritage' and 'on potential and established Aboriginal rights and title' from First Nations during the hearings (p. 10). Even the company admitted that new information became available at that time (Morin et al., 2010). In issuing its decision, the provincial authority did not draw upon these formal hearings. Instead, they relied upon written evidence and a working group. The federal panel noted that the working group, an advice-giving group composed of government bureaucrats, First Nations, and local governments, had 'limited participation of First Nations' (Haddock, 2011, p. 10).

What is disappointing in this case, however, is the rhetoric adopted by the mining company, Taseko, for the *second* federal environmental assessment for the proposed mining project. Following the federal decision, Taseko submitted a modified design intended to address the concerns identified by the original panel. The federal government decided to appoint a new panel to review the project, offering yet another important venue for the Indigenous peoples affected by the development to voice their concerns. In a letter filed with the panel on the final day of hearings for this second review process, however, Taseko accused Indigenous participants of misusing the hearings. These accusations were later published in the national press (i.e. Moore, 2013). The company argued that 'the panel have been misled', some First Nations 'have used culture and heritage inappropriately as a weapon by exaggerating the value of the areas that will be impacted by the mine and their use of those particular lands and resources for cultural purposes' (Moore, 2013; also see O'Neill, 2012). Unlike the Enbridge case where the federal government targeted opponents who delayed the planning process, Taseko directly targeted Indigenous opponents for misusing the hearing process. This striking accusation demonstrates the immense challenges in the face of achieving meaningful engagement with the Crown and the industry players to whom they delegate much of this task. It appears that attempts at enforcing Taseko's view of appropriate use in environmental

assessment may create conditions that constrain (or even break down) the process of reconciliation. The panel rejected the project for a second time, citing 'several significant adverse environmental effects; the key ones being effects on water quality in Fish Lake (Teztan Biny), on fish and fish habitat in Fish Lake, on current use of lands and resources for traditional purposes by Aboriginal groups, and on their cultural heritage' (Federal Review Panel for New Prosperity Gold-Copper Mine Project, 2013, p. 3).

As noted earlier, planning institutions are used in different ways to achieve different purposes. The process by which one use prevails over another is the central research problem considered in this dissertation. Situated within the Indigenous planning literature, this research has focused on the ways in which the concept of reconciliation is used in planning, how certain approaches to this end prevail over others, and how some interpretations and approaches are actively constrained. Because there is a disagreement over the appropriate way to use planning for reconciliation, planning offers an important setting for examining the dynamic nature of reconciliation in Canada. There remains an important disconnect between Indigenous political actors and the Crown (and, in some examples, industry) on how environmental planning institutions *ought* to be used. The dominant planning system does not often attend to alternative interpretations to the prevailing planning tradition, despite reconciliation policies used in planning today (e.g. McCreary and Milligan, 2013). The dissertation has sought to attend to multiple planning traditions in a way that might begin to reveal a path towards reconciliation.

Borrows (2002, p. 138) calls for an 'Indigenous declaration of interdependence'. From this view, the current relationship is rebalanced through greater Indigenous control and Aboriginal identity is included as a fundamental component shaping dominant Canadian society. The objective is social cohesion rather than the rights-based reconciliation imposed by the Crown governments. This latter approach to reconciliation has, however, given rise to important opportunities for public debate over the many interpretations of this social relationship. Considerable time and resources have been devoted to formal planning venues, giving rise to influential decisions and practices that have changed the way reconciliation takes place. For these reasons, planning will remain one of most promising venues available for shaping the way reconciliation takes place in Canada today and in the near future.

***A brief note on events unfolding at the time of writing***

This research points to the potential for change, the potential for rights to open up opportunities that move the vantage point of reconciliation closer to a 'middle ground'. As noted earlier, there is more reason for this optimistic tone following a landmark Supreme Court of Canada decision that granted title to a small portion of the Tsilhqot'in Nation's territory in June 2014. The decision resulted from a conflict in the early 1980s where the province 'failed to meet its duty to consult with the Tsilhqot'in Nation over timber licenses and forestry planning in the area' (JFK Law, 2014, p. 1). The ruling has implications for the viability of the proposed Enbridge project and places significant limits on the federal government's powers to fully implement the planning reforms introduced in 2012.

This decision opens up the meaning of Aboriginal title to include large historic territories, not small pieces of land subject to intensive 'cultural' uses. The definition begins to move beyond the 'right to culture' to the right to self-determination. Indeed, the decision comes closer to meeting the objective of Free and Prior Informed Consent in the UN General Assembly's Declaration on the Rights of Indigenous Peoples (2007). If title is recognized, the collective right holders have a right to: 'decide how the land will be used; the enjoyment and occupancy of the land; possession of the land; the economic benefits of the land; and the use and management of the land' (JFK Law, 2014, p. 1). The decision does not explicitly require consent where Aboriginal title has not yet been recognized, but 'the court encourages governments and industry to get consent from Aboriginal groups if they want to avoid legal wrangling in the courts over failure to consult' (JFK Law, 2014, p. 2).

The court encourages consent by requiring the Crown to justify 'incursions on Aboriginal title lands' and sets out strict requirements that the Crown must comply with. First and foremost, the Crown must be able to demonstrate 'a compelling and substantial public purpose' for this incursion (s. 2). If this is satisfied, then all three of the following must also be satisfied: (1) the 'incursion is necessary to achieve the government's goal'; (2) 'the government [must] go no further than necessary to achieve it'; and, (3) 'the benefits that may be expected to flow from that goal are not be outweighed by adverse effects on the Aboriginal interest' (s. 87). The Crown must also comply with its existing procedural duties of consultation and accommodation and the requirements of section 35 of the *Constitution Act*. The ruling was

issued by the time this dissertation was nearly finalized, so is not integrated into the analysis of this research but referenced throughout as an important factor that has implications for this research. It is posited that this decision will give rise to new opportunity structures both within, alongside, and in place of the consultation and accommodation process in planning. It is uncertain if the reconciliation process will continue to be implemented mainly through the planning system or if a new institutional framework will be developed to satisfy the requirements of this ruling. Given that the provincial and federal political leaders at the time of writing (July 2014) have not been attentive to Aboriginal rights and interests, a dramatic shift to accommodate Indigenous interests is unlikely. It is more likely that the Crown will deny permission to industrial projects with a little more frequency and put more pressure on industry proponents to gain consent from First Nations before issuing its permission.

This ruling may provide the Crown with enough justification to deny the Enbridge oil pipeline and shipping project. The Haida have a very strong claim to Haida Gwaii and several other nations that would be affected by the project also have strong claims. In applying the *Tsilhqot'in* decision in this case, the Crown must either gain consent from these nations or satisfy the three, rather strict requirements. However, there are few statutory decision points available to the Crown to deploy this new interpretation. Only a few days before the court ruling, the Minister issued his decision to approve the project subject to the Panel conditions. It is too soon to tell whether or not the federal government will enforce the court ruling now that the decision is issued. It is not certain if the federal government will enforce the Panel conditions either, given the conditions are required in addition to statutory requirements that are subject to Aboriginal rights. At the time of writing, the only statutory decision points that would compel government to gain consent (or, more likely, deny Enbridge the right to construct the project) are legally-required licenses and permits typically issued by federal and provincial governments following an environmental assessment decision. With the recent ruling, issuing permits of any kind without consent could be interpreted as unjustifiably infringing on Aboriginal rights.

It is also too soon to tell how the collaborative *Kunst'aa Guu Kunst'aayah* regime will be affected as well. The Council of the Haida Nation were intervenors in the *Tsilhqot'in* case and the President, Peter Lantin, issued a public statement immediately after the ruling from

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Ottawa. In it, he hopefully suggested there would be new opportunities for pursuing reconciliation of titles and jurisdictions:

'Today's decision creates the legal spaces to pursue the Xaayda [Haida] goal of mutual recognition and reconciliation of Xaayda and Crown titles and co-existing jurisdictions in a manner that considers the Xaayda and the non-Xaayda residents of Haida Gwaii, the Province of British Columbia, and Canada' (Lantin, 2014)



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**APPENDICES**

## **APPENDIX A. THE PATH TO A RESEARCH DESIGN**

Between 2009 and 2013, two decision points were key in moving me towards the final research design. First, a personal learning process on many of the values and interests represented on Haida Gwaii were learned. These included a series of moments that challenged the underlying purpose of my research and my worldview. I felt that the value of my original research topic was not shared with most of those who I was speaking with. Instead, I was directed to the history of the relationship between the Haida Nation and the Crown and how the conflict has recently changed to a more conciliatory tone, largely engaged through the co-managed land use arrangement, now the subject of Case 1. The second decision point relates to the unfolding of the Enbridge case narrative. The technical report was finally submitted to the review Panel and a national opposition campaign resulted in significant opposition and a strong-handed government response. This eventually led to dramatic environmental planning and policy reforms and an opposition campaign that linked with other conflicts across the country in a social movement labeled 'Idle No More'.

It was decided to focus on the two cases described herein, after much of the empirical work and information was collected on the earlier case study selected - the NaiKun offshore wind farm review. The selected cases were far superior for understanding reconciliation in the planning process, as outlined in section 2 of Chapter Three. Much of the information collected, then, was archived and saved. Some of it has been analyzed and used in a co-authored paper for publication. And some of it provides context in Chapter Four. The research process and key decision points are outlined in more detail in Table 11, below.

APPENDIX A. THE PATH TO A RESEARCH DESIGN

Research step or methodology	Research method or source of information
<p>Topic area 1. Map policy networks influencing dynamics of energy planning under 'urgent' climate change agenda, and consider the implications of planning reform.</p>	<ul style="list-style-type: none"> <li>- Review academic literature on policy networks</li> <li>- Conduct pilot study, including helicopter interviews with key informants who make up the 'green energy' policy networks, including those involved from Haida Gwaii in the NaiKun Offshore Wind Farm and its impact assessment</li> <li>- Issue basic online survey to identify ties between participants</li> </ul>
<p><i>Key decision point that changed the research design:</i> Conversations and meetings with various individuals and groups involved in the research directed me towards the history of the relationship between the Haida Nation and the Crown and how the conflict has recently changed to a more conciliatory tone through a planning process.</p>	
<p>Topic area 2. Consider the history of Indigenous-settler geographies in planning in BC, discovered Indigenous planning literature. Refocused exclusively on NaiKun planning event, highlight nature of planning within the context of conflict and recent successes of planning</p>	<p>Create an in-depth narrative, from start to finish, of the NaiKun planning process. Conducted interviews and other data collection over a six month period. Many interviews were directed to the history and politics of Haida Gwaii with many highlighting the success of the new co-managed land use management regime.</p>
<p><i>Key decision point that changed the research design:</i> In addition to the emphasis placed on the co-management land use regime (selected as case 1), the politics around the Enbridge case unfolded with the release of a highly divisive letter issued by Minister Joe Oliver. Returning to Haida Gwaii a few weeks after the letter was issued to present the research findings, I was able to attend the oral hearings for Enbridge in Haida Gwaii.</p>	
<p>Final topic area. Presented in dissertation.</p>	<p>Presented in Chapter Three.</p>

Table 9: The research process, 2009-2013

## APPENDIX B. THE 'PROBLEM' WITH RESEARCH

### *Conducting research in Haida Gwaii*

The time and effort participants donate to social research is substantial in small communities (Markey et al., 2009). In Haida Gwaii, it is common to encounter graduate students who have recently arrived on the islands looking to conduct interviews. Since many universities are usually based in urban centres, research is often conducted by people who have very little understanding of the local economy and community life and require the expertise of community members who are often already stretched to their limit in managing their own affairs (Markey et al., 2009).

Researchers may not only place strain on the time and resources in a community, but they may also have the potential to inflict harm. Residents of Haida Gwaii often associate research with negative effects on their community; numerous examples exist. In a classic example, George Dawson's geological research characterized the large amounts of natural resources on Haida Gwaii (referred to by Dawson in 1880 as the Queen Charlotte Islands), but the ethnographic component of his research tells the story of a rapidly 'vanishing' Haida population, lending credibility to the creation of new settler spaces that will benefit from resource extraction on Haida Gwaii (Grek-Martin, 2007). More recently, research has been published on the intimate details of the social lives of Haida community members without informed consent of all participants.

Research is also considered to be useful for the community, helping to facilitate objectives shared by both the community and the researcher. Most notably, large amounts of environmental research has been undertaken to demonstrate the widespread negative effects of clear cut logging and the value of conservation (Martineau, 1999) and policy papers have been written to document policy processes that other places and future community leaders may learn from (Dale, 1999; Jones et al., 2010). Throughout my PhD research, I grappled with how to make my research valuable to the community in a way that would also avoid harm. This section reflects upon this experience and considers the ethics of conducting research in communities similar to Haida Gwaii.

## ***My experience***

In an early interview, I was told that Haida Gwaii was 'getting inundated by researchers'. This participant – with whom I had built a good rapport – compared researchers to the resource companies exploring Haida territory that make money and leave. In interviews and conversations, community members would frequently express their thoughts on research in the community. This experience is similar to the analogy recounted by a university researcher working in a remote Indigenous community in Canada (Castledon, 2012, p.169):

There is a playful analogy [about] researchers and snow geese [in the community]... snow geese [and researchers] arrive in the beginning of the summer, they make a mess of everything—and you know what kind of mess I mean—and then they leave at the end of the summer without saying goodbye ... only to come up the following summer without invitation to make a mess all over again.

In Haida Gwaii, researchers are blamed for never returning to the islands and never returning their research. There continues to be an undesirable flow of knowledge that moves from the islands to researchers who then publish in the academic literature. This literature is not only inaccessible in its jargon-filled language but also in its location in password protected university libraries. This is not the only challenge. Research is often undertaken with a universalistic lens constructed in a western scholarly setting with little reflection upon local ways of knowing or systems of intellectual property rights.

I was aware of the challenges facing small communities in Canada prior to arriving on Haida Gwaii. In June, 2010, three months prior to my preliminary field visit, I sought advice from researchers who have experience working in Haida Gwaii. Through these individuals, I was able to connect with two community members who were willing to talk with me about my research. I expressed to them my hope to engage those responsible for vetting research undertaken in Haida territory, possibly the Council of the Haida Nation (CHN), outlining the research licensing protocol in the Northwest Territories (NWT) that I was familiar with.<sup>105</sup> I was told that, unlike the NWT, Haida Gwaii did not have a formal application process. With the help of community members, however, my proposal was reviewed and permitted by the CHN Executive Committee. I was advised that this also satisfied the requirements for research

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<sup>105</sup> The NWT has a legislated research licensing process. For more information, see <http://www.nwtresearch.com/>

## APPENDIX B. THE 'PROBLEM' WITH RESEARCH

undertaken within the jurisdiction of the Old Massett Village Council. While the topic of research appealed to a few community members I initially engaged with, I was unable to identify a research process or outcome that might be of value to the community or could be developed into a research partnership. Through this initial engagement, however, I was struck by the overarching interest in the problem of research – researchers kept coming and nothing was left behind. How could I help solve *that* problem?

After much thought and discussion, I agreed that this problem was the one I would focus on, though would act as an addendum to my PhD. I suggested I would create a document that summarised much of the research on environmental governance on Haida Gwaii – a task I was already engaged in for my PhD. Some of this research had been effectively 'lost' from the islands. I also held a 'public conversation' on the research problem as it was framed to me. Through this work, I was able to reflect on my own research practice 'to better address the history of unethical research' on Haida Gwaii (Castledon, 2012, p.177). The lessons I learned through this process are describe in the following document, 'A Conversation on Research', developed for Haida Gwaii, and circulated to the public in 2011 and 2012. This document is included in this Appendix, though it is my intention to continue a discussion in this topic area on Haida Gwaii.



## A conversation on research:

### Environmental decision-making on Haida Gwaii

It has been 25 Years since Athlii Gwaii and much has changed between then and now. The Kunst'aa Guu Kunst'aayah (the beginning) Reconciliation Protocol was signed in 2009 and the Land Use Objectives Order was passed through the Haida House of Assembly and the BC Legislature last year. Haida Gwaii is undergoing significant changes in the way decisions are being made.

These changes to environmental decision-making on Haida Gwaii has attracted researchers from across the globe. From the 1970s to today, the people of Haida Gwaii have built their own pathway towards a more sustainable future. To learn from this experience, researchers have focused on the islands' history of battles, alliances, and negotiations. While much of this research has focused on the role of the Haida Nation in this change, it is important to recognize the role of all of the communities of Haida Gwaii. These communities “have a history of working together”<sup>1</sup> and they have a long future of working together as well.

This document responds to a common concern: a lot of research on Haida Gwaii has been conducted and little evidence of it remains on the islands. The Old Massett Five Year Plan<sup>2</sup> outlines six objectives related to this concern (right panel).

This document considers this research in an attempt to both construct a catalogue and guide a conversation with the individuals who contributed their knowledge and experience to make this research possible. One such

#### Six objectives:

1. To conduct research in ways respectful to Haida culture and tradition
2. To ensure that communities are aware of the research being done on the islands
3. To encourage collaboration and create knowledge that is useful to the Haida
4. To make research results available to communities
5. To support local economic activity
6. To support training & employment for career development

<sup>1</sup> Gaaysiigang: An ocean forum for Haida Gwaii, 2009, page 7.

<sup>2</sup> See Appendix 6 of the Five Year Plan for more information on these objectives. The CHN had started a draft Heritage Policy in the mid-1990s, drawing upon the Sto:lo Nation Heritage Policy.



conversation was held at Haida Rose on May 17, 2011. Since this research recounts events and processes that islanders are familiar with, the conversation allowed islanders to both consider and challenge this work. A summary of this conversation is included at the end of this document.

Some questions that were pondered:

What is your experience with researchers?

How could this experience be improved?

Do you have examples on how research has been disseminated successfully?

### Research on environmental decision-making

Most of the research included in this document focuses on the time following the 1970s, which is said to be a modern ‘turning point’ in the history of Haida Gwaii resource exploitation. We must acknowledge that Haida Gwaii has a very long history, including a long and enduring colonial history, much of which centres on resource exploitation.

Much of this research considers how the Haida have used western science and law, and political pressure to reposition themselves within the environmental decision-making regime of the Province of BC. This move also helped to change the way people view Haida claims. Evelyn Pinkerton's PhD research article, “Taking the Minister to Court”, relies on data she collected between 1972 and 1979. In this research, she traces how key myths about the Provincial tree farm licensing regime were uncovered by the Islands Protection Committee. These efforts eventually led to a court challenge against the Forestry Minister in 1979. The challenge helped islanders to become more aware of their right to demand sound environmental management and to exercise their rights through law.

Joel Martineau's PhD research, “Islands at the Boundary of the World”, describes how three actions led to general support for protecting Gwaii Haanas: funding



scientific research on South Moresby, distributing photographs of forestry operations, and forging strong alliances with scientists, artists, and politicians. Other research has been conducted on the events surrounding the establishment of Gwaii Haanas and the Archipelago Management Board, such as Alex Grzybowski and Scott Slocombe's analysis of the island's complex social and

environmental “system” dynamics and Susan Porter-Bopp's Master's examination of the tension between ideas about nature, nation, and colonialism.

Subsequent to the establishment of Gwaii Haanas, a significant number of studies have been published on its success, such as Wendy Wheatley's Master's on how it has linked cultural and ecological sustainabilities, Brent Doberstein and Sarah Devin's paper on its use of traditional ecological knowledge, and Suzanne Hawke's paper that argues it has been an “alternative means for resolving a deeply entrenched land-use dispute”. Gwaii Haanas has also been used as a subject of comparison to conservation initiatives across Canada, as in David McVetty and Michele Deakin's comparison to Aulavik, Viviane Weitzner and Micheline Manseau's comparison to Kluane, Tuktut Nogait, and Wapusk National Parks, Philip Deardon and Lawrence Berg's comparison to Pacific Rim and Mingan Archipelago, and Joleen Timko and Terre Satterfield's comparison between Canadian and South African initiatives.

Norman Dale focuses on the negotiations to establish Gwaii Trust in his book chapter entitled “Cross-Cultural Community-Based Planning: Negotiating the Future of Haida Gwaii”. In this chapter, he describes his experience as community liaison in 1990 following the South Moresby Agreement. Here, he shows how consensus building can be facilitated through story-telling.



In this chapter he recreates a dialogue between islanders and a single Haida representative who tells the story of the Wasco. This story leads to more conversation and greater understanding of negotiation expectations and ultimately leads to better outcomes. He criticizes professional negotiation approaches that bypass personal relations for the sake of efficiency. He argues that personal relationships are fundamental for resolving cross-cultural conflict.

More recently, research has been undertaken on the collaborative land use planning process. Louise Takeda's PhD research, “Power and contestation in collaborative ecosystem-based management: The case of Haida Gwaii”, highlights the need for conflict in planning, providing a clear overview of the

events leading up to the signing of the Haida Gwaii Strategic Land Use Agreement. She suggests that numerous factors played important roles in this historic event, notably:

- (a) alliances with environmental groups and island communities,
- (b) the adoption of ecosystem-based management principles that reflects Haida principles outlined in the Haida Land Use Vision, and
- (c) power and contestation that played out through the Supreme Court Decision, (Haida vs. Ministry of Forests), a Provincial election campaign, and the 2005 Island Spirit Rising road block.

Justine Townsend has also considered these events. In her Master's thesis, she explores how the Province reproduces myths about state sovereignty, and reinforces the legitimacy of Western legal, political, and economic regimes. She goes on to demonstrate how the Haida challenged these premises in the context of land use planning while strengthening Haida autonomy and local influence on the islands.

It is expected that research on the Marine Use Plan will also be undertaken as it seems to express Haida interests over decisions affecting the marine



environment of Haida Gwaii. How these interests are being integrated into the Pacific North Coast Integrated Management Area has been considered in a recent article written by Russ Jones, Catherine Riggs, and Lynn Lee.

Another area of research has been on decision making for climate change on Haida Gwaii, such as the work on coastal vulnerability and community resilience to climate change conducted by Ian Walker. While far-reaching decisions related to reducing greenhouse gas emissions or adapting to climate change have yet to be made on Haida Gwaii, concerns for climate change has been

raised by citizens and leaders around specific energy projects, notably the NaiKun offshore wind project and the Enbridge Northern Gateway project.

Lindsay Galbraith's ongoing PhD research will examine the case of the NaiKun offshore wind proposal to understand how debates over climate change impacts, vulnerabilities, and technologies aimed at reducing greenhouse gas emissions might alter existing pathway towards a more sustainable future.<sup>3</sup>

In summary, this research on environmental decision-making has helped to document the very recent history of Haida Gwaii. Also, these lessons learned from Haida Gwaii have helped students and other researchers understand that environmental decision-making can:

- (a) use story-telling to cross cultural divisions
- (b) bridge Haida and scientific principles, and
- (c) raise the recognition of the Haida as the rightful heirs of Haida Gwaii.

As this knowledge is applied in new places, the lessons learned on Haida Gwaii will resonate across the globe.

### **The conversation on research**

A small group of island residents gathered in Haida Rose on May 17<sup>th</sup>, 2011, to participate in an informal conversation on research and a draft of this document. It is hoped that further conversations like this might take place in order to address a concern shared by numerous residents over research that is conducted on the islands. The following is a summary of this conversation.

Researchers have been gathering knowledge from Haida Gwaii and moving it around the world for nearly two centuries. Much of this work has had little regard for Haida protocol or interests and much of it has been locked away in far-away libraries and offices. Some of this research has been completed in respectful and useful ways, notably the research undertaken as part of the island-wide public forums for the Haida Gwaii land use planning process. It is hoped that research on environmental decision-making might help other communities learn from the experience of Haida Gwaii both on and off island.

Some particular challenges facing researchers and communities who interact with them are discussed below.

- (a) The goals of researchers and communities are different. This difference is important and must be acknowledged. For example, most researchers aim

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<sup>3</sup> For additional information on this research, visit: <https://sites.google.com/site/galbraithlindsay>

- to collect and interpret knowledge and bring new knowledge to their discipline and to the communities or people with which they work. Individuals and groups involved in environmental decision-making, on the other hand, are working to make these decisions and working to implement them.
- (b) Researchers should reflect upon the context of Haida Gwaii. While researchers should be given the freedom to pursue topics of their choosing, if they have decided to conduct some or all of their research on Haida Gwaii, they should take some time to consider the long and complex history of this place as well as Haida protocols and interests.
  - (c) Research dissemination is challenging. Many researchers who spend time on Haida Gwaii are students who are working towards a degree (e.g. Master's, Doctorate). This degree will usually require writing a dissertation and articles to be read by other researchers in the same field. Since the language that is used in these documents can be inaccessible to those unfamiliar with that area of work, residents who have offered their knowledge to these researchers might consider circulation of such documents as disrespectful. Research dissemination is a worthwhile effort, though it does take substantial time and can be quite expensive. Researchers should be prepared for this.
  - (d) The utility of research is limited by many things. In Haida Gwaii, communities are currently experiencing a significant transition. Staff time is devoted to implementing new frameworks and projects rather than stepping back to consider how research might be incorporated into their work in a constructive way.
  - (e) Who owns the research? While many people are happy to share their knowledge for the sake of research, the resulting publications are often held under a copyright and often remain inaccessible to those who work outside of a university. Research should be housed on island in a way that is accessible to everyone, such as in existing libraries (Masset, Charlotte, Port Clements), at the Haida Heritage Archives, and / or online.
  - (f) Perhaps an island-wide research protocol is desirable. Most research would require a permit or some other formal application and reporting procedure. While the process should not discourage researchers or influence their results, it should require the researcher to consider how to approach knowledge sharing and learning in a reciprocal and respectful way.

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This document was compiled by Lindsay Galbraith. An online version is available here: <https://sites.google.com/site/researchhaidagwaii/>

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The opinions expressed in this document do not necessarily reflect those of the author. The research included in this document only concerns environmental decision-making. This includes studies on the politics, law, science, economics, and geographies of (i) protecting and managing Gwaii Haanas and (ii) completing and implementing local initiatives, especially land and marine use and conservation initiatives across the islands. It excludes the large amount of research on the biophysical environment as well as research that focuses on the North and Central Coasts of which Haida Gwaii is one part of this region. There are very significant amounts of research that has been conducted on Haida Gwaii such as title law, archaeology and anthropology, health, and engineering that are not included here.



## **APPENDIX C. PRELIMINARY INTERVIEW GUIDE**

## Interview Guide

Generally, my research concerns whether or not the issue of climate change can transform the way we understand energy policy issues and democracy. Using the NaiKun offshore wind project as a case study I will explore how such a renewable energy project planning event produces knowledge relevant to energy policy, where it comes from, and how it becomes more or less important when making decisions, especially when the development in question is proposed within indigenous lands. Does climate change alter the way we use knowledge to make decisions? Does it shift historic (e.g. colonial) relations? More information can be found on my website, here: <https://sites.google.com/site/galbraithlindsay/Home>

The purpose of this interview is to collect details of the assessments and discussions used in the environmental assessment and related activities that took place for the NaiKun offshore wind project, derived from your direct experience and observation.

### Questions

1. How did you get involved in the NaiKun EA?
2. How would you describe your role in the NaiKun EA and related processes?
3. If you could identify just one issue, what was the issue of greatest concern assessed this process?
4. How did CHN's involvement influence the EA process and related negotiations? Or was the CHN process entirely separate?

I am interested in how climate change issues were discussed in the EIA. I understand that coastal erosion and ocean acidification are concerns for residents of Haida Gwaii as is diesel electricity generation.

5. Do you recall how the coastal erosion and sediment transfer issues were raised in the EA?
  - a. Did you consult with outside parties, like citizens, scientists or stakeholders on this issue? If so, can you give me an example of how this helped to shape your assessment?
  - b. What information did you consult in your assessment of this issue? Can you give me an example?
6. Do you recall how the impacts to seafood was raised in the EA?
  - a. Did you consult with outside parties, like citizens, scientists or stakeholders on this issue? If so, can you give me an example of how this helped to shape your assessment?
  - b. What information did you consult in your assessment of this issue? Can you give me an example?
7. I understand that self-sufficiency is a shared goal amongst Haida and the others living on Haida Gwaii. Do you recall how this idea was discussed in the EA?
  - a. Did you consult with outside parties, like citizens, business people, experts, or stakeholders on this issue? If so, can you give me an example of how this helped to shape your assessment?
  - b. What information did you consult in your assessment of this issue? Can you give me an example?
8. [Ask, if relevant] What was learned in the UK visit? Did any of this help you better understand:
  - a. Coastal erosion?
  - b. Impacts on seafood?
  - c. Self-sufficiency?
9. Is there any other information about your involvement in the NaiKun EA that I should be aware of?

## Research Ethics

The following guidelines will be followed when undertaking this research.

- 1) Informed consent will be obtained from participants through verbal agreement, email, or written confirmation. Any written assurances regarding consent, confidentiality, and data storage and handling will be provided to the participant upon request.
- 2) Participants will be asked if they are comfortable with having an audio recording device at the interview. If this is not acceptable, I will ask permission to take notes using pen and paper.
- 3) Participants will be assured that I will be the only person with access to the interview recording and/or notes.
- 4) A copy of the interview transcript will be provided to the participant upon request. Any changes that the participant wishes to make to the transcript at this time will be made and will replace the original transcript.
- 5) If the participant requests that their identity not be revealed, I will see if they are comfortable with a number of techniques researchers use to hide the identity of individuals. First, I will ask if they are comfortable with me identifying them as a participant in the study, where I will not tie their name to what they have said to me. Second, I will ask if they are comfortable with me tying their words to the name of their organization (e.g. leader from the Council of the Haida Nation) or a more general category (e.g. staff member of a Haida Nation organization), that in no way reveals their personal identity. Any request regarding confidentiality will be respected.
- 6) Interview recordings and/or notes will be transcribed as soon as is possible and stored on a password-protected computer and backed up on a password-protected external hard drive. Original recordings and notes will be stored in a secure (locked and fireproof) location only accessible to the researcher.
- 7) Research will be reported to the community in a number of presentations to various groups. A short, Plain English report will also be circulated to participant organizations (e.g. Council of the Haida Nation), if it is something that will be read by the participants.
- 8) Ethics are discussed as part of a yearly reporting requirement to my Supervisor, Professor Susan Owens, and my committee members. Additional assurances from these individuals on my consideration of research ethics can be produced upon request.

## **APPENDIX D. CHRONOLOGY AND DESCRIPTION OF KEY EVENTS**

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Planning process	Decision date	Decision outcome	Process description	Authority/ies
<b>Case 1. Collaborative Land Use Planning and Decision-making</b>				
Supreme Court Case: Haida v. BC	2004	Upheld Crown's duty to consult and accommodate, adding the duty exists even where these interests are not yet proven.	Haida went to court to challenge BC transfer of Tree Farm License 39 in 1995.	Supreme Court of Canada
Islands Spirit Rising Road Blockade and Agreement	2005	The Province agreed to many of the Haida terms, facilitating the land use planning process.	BC appeared to directly contravene the 2004 court case, leading to a road blockade for forestry operations. The political climate gave the Haida an advantage.	Council of the Haida Nation (CHN) and Province
Haida Gwaii Strategic Land Use Agreement	2007	New protected areas and management strategies were established to conserve cultural and ecological values.	Guided by the Haida principle <i>Yah'guudang</i> (Respect) and EBM.	CHN and Province
Kunst'aa guu – Kunstaayah – The Beginning – Reconciliation Protocol	2009	An agreement to share power in policy-level decisions involving natural resources on Haida Gwaii.	Negotiations were part of the Provincial policy of The New Relationship and in line with the interests of the Haida Nation to gain greater control over these decisions.	CHN and Province
Annual Allowable (Timber) Cut Determination	2012	The 2013 allowable cut would be 47.8% of the previous year's allowable cut.	The first major policy decision coming out of the jointly run CHN-BC Haida Gwaii Management Council.	Haida Gwaii Management Council
<b>Environmental Assessment for NaiKun Offshore Wind Farm</b>				
BC Environmental Assessment	November 2009	NaiKun was awarded a certificate authorizing the project to proceed under certain conditions	After initiating the process in 2003, NaiKun submitted their assessment report to the office in May 2009. The working groups, information requests, community meetings, and public comment period all wrapped up within the year.	Ministry of Environment
Haida Environmental	Rescan Report,	Two independent reports concurred	Three-tiered process:	CHN

APPENDIX D. CHRONOLOGY AND DESCRIPTION OF KEY EVENTS

Assessments and General Vote	September 2009  Gunton Report, August 2011  General Vote, December 2011	with the provincial and federal environmental assessment decisions.  A general vote on whether or not the project should proceed (specifically if the Haida Nation should invest in the 40% stake), is pending.	1. Independent review of the NaiKun EA submission by Rescan Consultants.  2. Independent review of the full EA by Professor Tom Gunton at Simon Fraser University.  3. General vote resulted in resounding 'no' to the commercial deal part of the project.	
Canadian Environmental Assessment	March 2011	Federal authorities agreed that the project may proceed under certain conditions.	While the process was coordinated with the BC process, additional time was needed to satisfy federal requirements.	Ministry of Fisheries and Oceans, Transport Canada, and Natural Resources Canada
BC Hydro Clean Power Call	June 2010	27 projects were selected in 2010. NaiKun was not selected.	In June 2008, a call for power projects was issued in response to the demand for electricity identified in the most recent long term electricity plan. In November 2008, over 68 proposals were submitted.	BC Hydro (Crown Corporation)
<b><i>Haida Gwaii Marine Use Planning</i></b>				
Haida Gwaii Marine Use Plan	Expected late-2013	Unknown at this time.	Guided by the 2007 Towards a Marine Use Plan. Haida public engaged at Gaaysiigang Ocean Forum in 2009, through a marine working group, and a future public consultation process. The process will establish a marine spatial plan and protected area network.	CHN
Pacific North Coast Integrated Management Area	Expected late 2013	Unknown at this time.	Started as an honourable process aimed at engaging First Nations on marine planning, including integrating sub-regional processes. Half-way through the process, the federal government removed funding so the new 'streamlined' process will now simply inform sub-regional processes.	Chaired by Fisheries and Oceans Canada and Coastal First Nations
Marine Planning	Expected	Expected December	Aims to inform the federal	CHN and Province

APPENDIX D. CHRONOLOGY AND DESCRIPTION OF KEY EVENTS

Partnership (MaPP)	December 2013	2013	'streamlined' process in a collaborative way, yet early reports suggest there will be challenges in addressing policy sectors that are clearly outside provincial jurisdiction (e.g. marine shipping and fisheries).	
<b>Case 2. See Table 6 in Chapter Five for a description of events for the Enbridge case.</b>				

**APPENDIX E. OFFSHORE OIL GOVERNANCE TIMELINE**



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Time period	Characteristics of offshore oil policy
1913-1958	In 1913, the first oil well was drilled off of the west coast of Canada in the Queen Charlotte Basin, on the north island (Graham Island) of Haida Gwaii. More wells were drilled onshore until 1958 when seismic activity was first recorded in the area (MacConnachie 2007).
1960s	The Province declared its right to control offshore oil exploration activities being permitted by the federal government. A few years later, the province backed down on this declaration and the federal government allowed drilling in the offshore for a short period (MacConnachie 2007).
1969-1972	<p>In 1969, the US proposed to ship oil from Alaska through BC coastal waters. 'In 1972, the Government of Canada imposed a moratorium on crude oil tanker traffic through the Dixon Entrance, Hecate Strait, and Queen Charlotte Sound due to concerns over the potential environmental impacts. The moratorium was subsequently extended to include all offshore oil and gas activities. This was followed by a prohibition by the Government of British Columbia' (Priddle, 2004, p.2). The tanker moratorium was passed as a resolution in the House of Commons under the government of Prime Minister Pierre Trudeau, where it was stated 'the movement of oil by tanker along the coast of British Columbia from Valdez Alaska to Cherry Point in Washington is inimical to Canadian interests especially those of an environmental nature' (House of Commons Debates, May 15, 1972, at 2245, in De Mestral, 1974).<sup>106</sup> 'In bilateral talks in the Trudeau era, it was made clear to the U.S. that Canada would similarly ban east-west tanker traffic to Canadian West Coast ports' though small shipments of crude from Vancouver terminals 'were allowed under a grandfather clause' - 'it was the tanker ban that was the catalyst for the companion moratorium on offshore oil development' (David Anderson, retired Liberal Environment Minister, quoted in Sutherland, 2007).</p> <p>A voluntary tanker exclusion zone has existed since the 1970s as a shipping industry code of practice, where crude oil tankers traveling from Valdez, Alaska, to the US west coast must not travel within this exclusion zone in Canada to avoid tanker grounding.</p>
1976-2002	In an effort to clarify the federal-provincial jurisdiction in BC's coastal waters, the federal Court of Appeal decided that the Strait of Georgia (to the south of Hecate Strait) and the wider territorial sea (excluding bays, harbours and inland waters) belongs <sup>107</sup> to Canada. This 1976 decision does not provide clarity on whether or not the Hecate Strait is considered to be 'inland waters' and, thus, whether it is provincial or federal territory (Finkle 1990). The province maintains its claim to these waters, having passed three separate Orders-in-Council declaring the territorial sea an Inland Marine Zone (Hudec 2002). Legal experts have been calling for a Pacific Accord to resolve the jurisdictional dispute in a similar manner to the Arctic and Atlantic coasts <sup>108</sup> (Finkle 1990; Hudec 2002).

106 According to De Mestral (1974), attempts were made to formalize the declaration through the International Joint Commission but this was rejected by the Nixon government.

107 This is not only a question of ownership. According to the Law of the Sea Treaty, the dispute is over the "authority to control exploration and exploitation" (Finkle 1990, p.39).

108 These include the Atlantic Accord with Newfoundland and Labrador in 2005 and the Northern Accord with Yukon and Northwest Territories in 1988.

APPENDIX E. OFFSHORE OIL GOVERNANCE TIMELINE

Time period	Characteristics of offshore oil policy
2002-2010	<p>BC's 2002 Energy Plan signalled to Canada that they were willing to take steps necessary to lift the federal-provincial moratorium on offshore oil and gas activities. Canada followed more cautiously, undertaking a strategic environmental assessment on this question between 2003 and 2005 (Noble, 2009). However, the assessment reports make clear that the public held "vigorously polarized views" (Priddle et al., 2004) and First Nations "felt that lifting the moratorium would not be in their best interests" (McAlpine, 2005).<sup>109</sup></p> <p>Despite these concerns, however, then Minister of Natural Resources, Gary Lunn, stated that "[t]here actually is no moratorium for (oil tanker) traffic coming into the West Coast" in 2006. He pointed instead to 'a voluntary exclusion zone' that applies to US tankers carrying Alaska oil to terminals in Washington state (Sutherland, 2007). The BC Minister of Energy, Mines and Petroleum Resources, Richard Neufeld, made similar statements highlighting the fact that the moratorium was just 'a policy' and 'not based on legislation' (The Vancouver Province, 2007). In 2010, Prime Minister Harper followed suit, suggesting that the Government of Canada is not legally bound to any moratorium and will not formalize one<sup>110</sup>.</p> <p>Following earlier motions put forward in Parliament, a non-binding motion was passed in Canada's House of Commons in 2010 by opposition parties concerned with the increasingly vocal opposition to the Enbridge project (McCarthy, 2010). The opposition parties called on the government to formalize the moratorium on oil tanker traffic in Pacific north coast waters. In response, Canada's Prime Minister stated that any tanker traffic ban would result in blocking delivery of heating oil to coastal communities, Aboriginal people, and Vancouver Island (House of Commons, 2010). Soon after making this statement, an election campaign was called and Prime Minister Harper campaigned on the commitment to not formalize the moratorium if he won a majority, which he did in May 2011. Today, the government claims to be bound only the a 'voluntary tanker exclusion zone' that was created in 1985 between US and Canada for tankers transiting between Valdez, Alaska, and Puget Sound, Washington, and 'does not apply to oil tankers travelling to or from Canadian ports' (Sutherland, 2007; Transport Canada, 2012). At the time of writing this, Canada also adheres to the offshore oil and gas exploration moratorium (Transport Canada, 2012).</p>

109 The review was three-pronged made up of scientific, First Nation, and public consultation panels. The public consultation review concluded there is not '...a ready basis for any kind of public policy compromise at this time in regard to keeping or lifting the moratorium' (Priddle et al., 2004).

110 In response declaration issued by Coastal First Nations, a non-binding motion passed through the House of Commons in December, 2010, to formalize the moratorium to ban tanker traffic in the northwest coast waters. In response, Harper stated in the House, 'Yesterday the opposition's idea on tanker traffic was a blanket ban, so we would not be able to deliver heating oil to coastal communities, aboriginal people, or deliver fuel to Vancouver Island. None of this is well thought out' (40:3, House of Commons, 2010). During the election campaign called shortly after, Harper committed to not formalizing the moratorium if he won a majority.

## APPENDIX F. HISTORY OF ENVIRONMENTAL ASSESSMENT IN CANADA

Since the Berger Inquiry in the 1970s, EIA has become increasingly important to governments when planning resource and infrastructure developments. At that time, the federal government was seeking to establish a legislated EIA process, to replace the much less prescriptive federal environmental assessment and review process (EARP) cabinet policy directive from 1973. Throughout the 1980s and 1990s, the concern was over how to develop a process that would avoid duplicating the functions of provincial agencies. The result was a body of EIA policies rather than any new legislation (Sadar & Stolte, 1996). A series of court rulings<sup>111</sup> and public disenchantment with the EIA process<sup>112</sup>, however, forced the government to expand its role<sup>113</sup> and conduct assessments even after provinces had given projects the go-ahead (Greenwood, 2004, p.70-71). This resulted in the passing of the 1992 *Canadian Environmental Assessment Act* that required any project to be assessed if it occurred on federal lands, involved federal funding, or requires the federal government to issue a permit or license (1992, c.37, s.5(1)). Until 1994, BC relied upon three major project review processes (BC Special Office for Environment, 1995) but introduced *Environmental Assessment Act*, which was considered to be one of the most robust in Canada (Boyd, 2003).

A significant applied and grey literature has since accumulated on these processes (e.g. Nikiforuk, 1997; Sadler, 1996; Office of the Auditor General of Canada, 2009; Office of the Auditor General of BC, 2011) and their role in Aboriginal governance and government Aboriginal policies (e.g. Galbraith et al., 2007; Jepson et al., 2005; Joseph, 2005). Much of this literature has been critical and the public perception of EIA in BC and Canada has been rather poor; the prevailing view 'was that it was not possible to recommend against a project, only to approve it or mitigate its effects' (Boyd, 2003; Nikiforuk, 1997; Turkel, 2007, p.53). Within

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111 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3; *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309; *Eastmain Band v. Canada (Federal Administrator)*, [1993] 1 FC 501

112 Bill Rees (1980) offers a comprehensive critique of EARP as it was being applied to a controversial plan to develop hydrocarbons in the Beaufort Sea for the first time. He suggests that despite EARP receiving worldwide acclaim, 'public interest groups and native organizations... are abandoning the process en masse' (p. 355).

113 Federal involvement in EIA expanded largely because cases ruled that federal jurisdiction clearly applied, notably fisheries and Aboriginal reserve lands, where EIAs did not previously consider these elements in any systematic way. Provinces protested over concerns the federal government was encroaching into their jurisdiction and ownership over natural resources (Greenwood, 2004).

this literature, more specialised research in the area of 'traditional knowledge' (TK) developed, bound by legislation (CEAA, 1992, s.16.1) and guidelines (MVEIRB, 2005) as well as broader concerns over the Crown's duty towards Aboriginal peoples through EIA (FNEMC, 2009). Paci et al. (2002, p.112) argue that 'Aboriginal people will continue to seek ways of including their knowledge and input to improve environmental relations and assessments of development projects in their traditional territories'.

Much of the conflict between First Nations and the state over the purpose of EIA can be framed as a disagreement over the meaning of 'reconciliation', discussed above. Scholars have considered the theoretical basis of this disagreement and how it impacts institutions set up to address this goal, like treaty negotiations (e.g. Egan, 2012; Irlbacher-Fox, 2009). This is discussed in greater detail in the second chapter. In Van der Peet, reconciliation is confirmed as 'bridging of aboriginal and non-aboriginal cultures' taking in the perspectives of both aboriginal claims and common law, such that '[t]rue reconciliation will, equally, place weight on each' (paras. 42, 49-50, cited in *Delgamuukw v. BC*, 1997).

These goals are identified in consultation policies for EIAs but rely upon judgements that are influenced by the dominant culture controlling EIAs. 'The intention of the [EIA] process is honorable enough; the problem is with the underlying values of the culture which administers it. That is why the case is consistently argued; land ownership must be settled before environmental impact assessment makes sense for Native people' (Shapcott, 1989, p.61). But what happens when EIA has the potential to offer greater benefits and more control over development than the Treaty process or other venues that are expressly designed to 'settle' land ownership? A summary for the basis of this conflict between the state and First Nations, expressed through EIA, is included in Table 2.1 in Chapter Two. This summary by no means represents the varied opinions of First Nations across BC.

Numerous best practice guidelines have been written for developers and First Nations to address these critiques (e.g. FNEATWG, 2009; Joseph, 2005; Plate et al., 2009; Tobias, 2000). However, case law has been pivotal in defining the Crown's duty towards First Nations in EIA and environmental planning (FNEMC, 2009; Paci et al., 2002) with most cases over EIA being brought to court by First Nations (Haddock, 2010). While these decisions have created layer upon layer of evidence for each side to interpret and defend their different policy positions –

indeed the Province and Canada have divergent views on what constitutes appropriate consultation and accommodation and other areas in the EIA process (Plate et al., 2009) - both perspectives have far greater expectations for the work and care required to address Aboriginal rights in EIAs since their inception. Table 3 outlines a number of key decisions and outline how they apply to EIAs.

**Consultation and accommodation is an enforceable legal duty:** *Haida v BC* (2004) and *Taku v BC* (2004) were the first to create 'a practical legal framework to work towards reconciliation of aboriginal and Crown title' (McDade and Giltrow, 2007). *Mikisew v. Canada* (2005) extended this ruling from non-treaty to Treaty areas, so it applied more broadly across Canada. McDade and Giltrow (2007) summarize the procedural obligation outlined in *Haida v BC* (2004) as being one that focuses on 'addressing effects upon aboriginal interests' and may require the Crown to 'make changes to its proposed actions' (p. 5). 'The obligation arises in relation to an activity and at the earliest stages of contemplation of that activity. Consultation must also be meaningful: it requires consideration of First Nation input and must involve the real possibility of changing or cancelling the proposed activity' (p.2)

**Limits to producing scientific evidence relating to Aboriginal rights in EIA:** The case of *George v. Marczyk*<sup>114</sup> (1998) offers insights on the scientific data required in EIAs. Predictive wildlife and habitat mapping was required to 'make a reasonable assessment' of the development's 'impact on their people and territories, and the exercises of their rights in those territories' (para 70). In this case, the decision to approve the Huckleberry Mine through an EIA may affect 'hunting, trapping, fishing, and harvesting vegetables, berries, herbs, food and medicinal plants... or any spiritual or cultural sites, travel corridors, general lodging sites, and other aspects of their lives which are inextricably linked to wildlife issues' (para 54). The judge added that demands for further information must not be 'unreasonable', and should not 'defy generally accepted professional, scientific and commercial practices and standards' citing that in this case, the information in the EIA fell below certain professional standards in ways supported by non-aboriginal participants who agreed the need for further information was 'reasonable' (para 72). *Humber v. Canada* (2002)<sup>115</sup> notes that a court cannot make a decision unless parties provide 'precise and useful narratives of fact on which the Court could base a finding' (para 28).

**Procedural requirements for consultation in EIA:** In *Taku v. BC* (2004)<sup>116</sup>, the judge ruled that the process set out in the 1995 BC *Environmental Assessment Act* requiring 'consultation with affected Aboriginal peoples' (para 40) ensured BC met its duty to consult and accommodate (para 22). In support of this claim, the judge also referenced the purposes of the Act that calls for 'participation' of First Nations and the requirements for including First Nations on the project committees formed to coordinate and oversee the EIA (para 6). Although the Taku River Tlingit First Nation were concerned that BC should have recognized their jurisdiction to issue a permit to build a road to the proposed Tulsequah Chief Mine under assessment, the judge ruled that the 'Province was under no duty to reach agreement with the TRTFN' (para 22). Such requirements are also pertinent to federal EIA, where 'consultations about Aboriginal interests' were determined to be 'an integral part of the Crown's obligations to consult with respect to the overall (project) and should not be severed from that process' (*Leighton v. Canada*, 2007, para 69).<sup>117</sup> As outlined in *Haida v. BC* (2004)<sup>118</sup>, the Crown may have duty to accommodate 'by adapting decisions or policies in response' but the Crown must 'balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims' (para 45). It is also clear that 'consultation is a two-way street' and there are no grounds for complaint when consultation is refused 'in an effective forum created in good faith for such consultation' (*George v. Marczyk*, 1998, para 73). This ruling was based on the 1994 BC EA legislation and may not hold up today (Haddock, 2010). Indeed, *Kwikwetlem* (2009)<sup>119</sup> recognized this fact, stating, '[f]unctionally, the environmental assessment process is not the same process considered in Taku'.

**No enforceable substantive requirements in EIA:** Where there have been substantive complaints over EIAs, like infringement to Aboriginal title, these complaints have been severed from the case (e.g. *Taku v. BC*, 2004; Haddock, 2010). This means that substantive issues, like impacts to communities and control over resources; 'the courts have stopped short of making formal declarations of Aboriginal title and have

114 *George V. Marczyk*, 1998 Canlii 6737 (BC SC)

115 *Humber Environmental Action Group v. Canada* (Minister of Fisheries and Oceans Coast Guard), 2002 FCT 421

116 *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74.

117 *Leighton v. Canada*, 2007 FC 553

118 *Haida Nation v. British Columbia* (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511

119 *Kwikwetlem First Nation v. British Columbia* (Utilities Commission), 2009 BCCA 68

tended to throw the issue back to Crown and First Nation negotiators, arguing that questions about land rights are best resolved through political negotiations between the concerned parties' (Egan, 2012, p.18). According to McDade and Giltrow (2007), this is because the federal court rules (i.e. Rule 302) limit the court's ability to consider consultation issues that 'often arise in multi-decision large scale' decision processes (p. 2). Often, the complaint is 'of a failure to consult in respect of the process of the whole project', which often involves multiple agencies issuing multiple, separate decisions, the judicial review must be limited to a single decision. This 'artificially frames the issue as though only a discrete decision were the problem. Such a multiple decision complaint is 'beyond the Court's purview'. 'First Nations can find themselves in a continually shifting landscape, in which they never get the benefit of a Court actually looking at the core issue (consultation) because the focus will always be on discrete statutory decisions' (p. 9). While 'few major projects today require only one permit or governmental decision', the EIA process 'creates, by statute, a single window assessment process which precedes all other permits. No such statutory structure exists for aboriginal accommodation' (p. 9), meaning that EIA is plays a very central role in ensuring the Crown meets its obligations. This also has implications for courts to dismiss past infringements, where such historic infringement can only be considered in consultation over present decisions when additional infringement is likely (Carrier Sekani v. BCUC, 2009).

Table 10: Select case law guiding the role of EIA in 'reconciling' Aboriginal rights with the Crown

As case law accumulated, a series of legislative changes to EIA were introduced in Canada and BC. First, BC's newly elected Liberal government replaced the *Environmental Assessment Act* in 2002, reducing the total number of projects reviewed, and other significant changes aimed at 'allowing for a more streamlined and efficient review process... to ensure environmental assessments are more focused and cost-effective' (Haddock, 2010; EAO 2003, in Rutherford, 2009, p.301; WCEL, 2004). Of significance to this chapter is the purpose of EIA was in question. First, the new Act omitted the purposes section of the Act that had previously included normative principles like promoting sustainability, protecting the environment, and providing an open and neutral process (Sadler, 1996, p. 13; WCEL, 2004, p.3). Second, it eliminated the formal role for First Nations to sit on EIA committees<sup>120</sup> and includes no provisions for involving First Nation at any stage in the process (FNEMC, 2009). While First Nations 'are typically consulted more extensively than the public at large', it is 'not the same' as the legally defined role 'in making recommendations to the ministers' (Haddock, 2010, p. 70). And, third, it added a provision requiring that the scope and methods of an assessment must reflect government policy. While the prevailing government view saw this latter change as 'consistent with all government programs' in that they must conform to government policy and goals (Haddock, 2010, p.15), critics pointed to the political interference in what should be a neutral and objective EIA process (e.g. FNEMC, 2009; WCEL, 2004). That is, EIA could be used as a tool to fulfil natural resource development and economic policies rather than EIA's normative 'goals of environmental protection and sustainable development' (Sadler, 1996, p. 120 Section 2(e) of the 1992 EAA, cited in *George v. Marczyk*, 1998 6737 (BC SC) (Haddock, 2010).

13; WCEL, 2004).

Around the same time, Canada introduced changes to their EIA laws. After a regular, five-year Parliamentary review of the Act that included participation of environmental groups, industry, and First Nations, a number of rather uncontroversial changes to the Act were introduced through amendments in 2003 to improve quality control and coordination amongst federal agencies, and to create an online document registry.

Between 2002 and 2012, differences between EIA in Canada and BC resulted in conflict between jurisdictions with Aboriginal rights at the centre of these disputes. The most widely cited case demonstrating this conflict is Taseko's Prosperity Mining Project in which the Minister recommended the project proceed based on the BC EIA process, despite opposition from the Tsilhqot'in First Nation and uncertainties over wildlife and groundwater effects related to use two productive fish-bearing lakes as mine tailings ponds (Haddock, 2010, p. 47). The project was later rejected by an independent review panel appointed by the federal government on the grounds that the project would have a significant negative effect on the rights and title of the Tsilhqot'in First Nation, specifically the right to access Teztan Biny (Fish Lake) for the purpose of fishing (Morin et al., 2010). Both levels of government have pointed to this project as an example of a duplicative and wasteful process, and using this and similar examples to justify their call for a 'One Project, One Process' alternative (Government of BC, 2010; Government of Canada, 2012). This research focuses on the discursive link between these reforms and the Joint Review Panel environmental assessment set up for the Enbridge Northern Gateway Project, so is not discussed here.