

COAST SALISH LAW AND JURISDICTION OVER NATURAL RESOURCES:

A CASE STUDY WITH THE TSLEIL-WAUTUTH NATION

by

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Abstract

In this thesis, I consider the impacts and implications of the legally-mandated Crown-Indigenous consultation process as experienced by the Tsleil-Waututh Nation, a Coast Salish First Nation based in greater Vancouver. Each year, Tsleil-Waututh receives approximately four hundred new development proposals in its territory, requiring daily negotiations on projects from forestry operations to pipelines. Consultation thus becomes a regularly-occurring, everyday site of jurisdictional interaction, where legal orders meet and governments enter into dialogue regarding the uses of territory.

I ask how Tsleil-Waututh is able to enact their jurisdiction over natural resources in their territory, given their territory is currently the site of multiple colonial legal orders and jurisdictional assertions which seek to eliminate or otherwise limit Indigenous authority. Based on ethnographic research with the Tsleil-Waututh Nation, I argue that the legalization of the consultation process reduces Indigenous groups to mere participants within a Crown decision-making process, therefore rendering consultation in its current form unable to achieve its stated purpose of reconciliation. My research demonstrates that challenges inherent in Indigenous-Crown consultation are not a result of insufficient capacity on the part of First Nations but rather an element of the consultation process itself. Canadian law's failure to define the outcome of consultation causes a disproportionate focus on procedural elements of consultation to secure certainty for the Crown; as a result, consultation disproportionately benefits the Crown and industry, and remains inadequate to protect Tsleil-Waututh's rights, title, and interests from infringement over time. Regardless, Tsleil-Waututh does not participate in consultation as mere participants in a Crown process but rather does so as an assertion of its jurisdictional authority in order to uphold its own legal obligations to Tsleil-Waututh people and territory.

Lay Summary

In this thesis, I consider how the Tsleil-Waututh Nation, an Indigenous group based in greater Vancouver, asserts its own decision-making authority in response to resource development in its territory. Each year, Tsleil-Waututh receives approximately four hundred new development proposals in its territory, requiring daily negotiations on projects from forestry operations to pipelines. I therefore focus on the legally-mandated Crown-Indigenous consultation process as a site of regularly-occurring jurisdictional interaction where governments enter into dialogue regarding the uses of territory.

Based on ethnographic research with the Tsleil-Waututh Nation, I argue that consultation disproportionately benefits the Crown and industry, and remains inadequate to protect Tsleil-Waututh's Aboriginal rights, title, and interests from infringement over time. Regardless, Tsleil-Waututh does not engage in consultation as a mere participant in a Crown process but rather does so as an assertion of its jurisdictional authority in order to uphold its own legal obligations to its people and territory.

Preface

This thesis is an original, unpublished, independent work by the author, Erin Michelle Hanson. This research project and fieldwork were approved by the University of British Columbia's Research Ethics Board under Certificate H1601451, and by the Tsleil-Waututh Nation in accordance with the Tsleil-Waututh Nation Research Agreement (signed May 12, 2016).

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List of Acronyms

LNG Liquefied Natural Gas

TEK Traditional Ecological Knowledge

TLR Treaty, Lands and Resources Department

TWN Tsleil-Waututh Nation

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Haḡ ce:p qa.

1. Introduction: Tsleil-Waututh Law in Action

While this territory was never ceded, nor our responsibility to this area ever abdicated, its resources have been exploited and damaged through industrialization and urbanization.

Tsleil-Waututh Nation, 2012

On a cool, cloudy day in September 2016, Tsleil-Waututh Nation (“TWN”) members, cultural workers, and band office staff travelled by boat through calm grey waters, alongside the forested mountains of Burrard Inlet and Indian Arm. We stopped at a rocky beach in the heart of TWN territory and disembarked. That afternoon, cultural workers blessed the clam beds that TWN had recently re-established in anticipation of revitalizing an ancestral economy: the shellfish harvest. TWN was conducting this work to uphold its stewardship obligations to its people and its territory to restore the health of Burrard Inlet. TWN members maintain their deep obligations and responsibilities to restore the health of their territory for past, present and future generations, an obligation they call their “sacred trust” (TWN 2015).¹ Flowing from their longstanding presence and governance of their territory, TWN leadership maintain their jurisdictional authority in planning for present and future generations of TWN members. As a result of this work, in February 2017, TWN members conducted the first successful clam harvest in a generation. Standing on the beach that day, I realized I was witnessing Tsleil-Waututh law in action.

* * *

Aboriginal² rights are Constitutionally-protected in Canada, and as a result, Crown governments must consult with Indigenous groups and, when required, accommodate them when making decisions that may impact these rights. TWN currently receives over 400 new consultation requests per year from industry, proponents, and Crown agencies proposing new developments throughout the territory. TWN territory encompasses much of the greater Vancouver region, an area that each year experiences increased urban, residential, and industrial growth and development. TWN must therefore undertake their work in the context of numerous, often conflicting agendas of

many parties including municipal, provincial, and federal governments, non-Indigenous residents, business and industry, and other First Nations. Consultation thus becomes a regularly-occurring, everyday site of jurisdictional interaction, where legal orders meet and governments enter into dialogue regarding the uses of territory.³ This process is however governed by Canadian jurisprudence, which denies and circumscribes Indigenous sovereignty, thus limiting TWN from engaging in land use decisions as governments with their own laws and jurisdictional authority.

In this thesis, I therefore ask: how does TWN assert its own jurisdiction, legal orders and decision-making authority over natural resources in its territory? Specifically, I consider how TWN is able to do this given the dominance of the Canadian legal system which, despite the Crown's increased political rhetoric of reconciliation and rights recognition, facilitates and justifies the ongoing infringement of Indigenous rights for the purposes of resource extraction.

Although the Supreme Court proposed consultation as a reconciliatory process (*Haida Nation v. British Columbia*), I argue that it is limited in its ability to protect Indigenous access to territory from being infringed upon, as it limits Indigenous groups from upholding their own laws and stewardship obligations to their territory in the face of development. Canadian law infuses the consultation process to the point where active Indigenous governance is reduced to mere participation in what remains ultimately a Crown decision: First Nations are treated as *users* of territory but not as active governments with distinct legal orders. TWN nonetheless participates, not solely to *respond to* and provide information to the Crown, but to assert and uphold its own laws and jurisdictional authority.

My thesis, based on ethnographic research, provides a view of the day-to-day process of Crown-Indigenous consultation as experienced by TWN, including the high volume of referrals, tight timelines, and strain on resources this creates. Challenges in the consultation process are therefore often perceived as stemming from insufficient capacity within First Nations band offices. My research however demonstrates that sufficient capacity and expertise do not in fact resolve

limitations in the process. Rather, through several TWN case studies, I argue that increased capacity resolves hurdles as experienced by the *Crown and industry*, but are insufficient to address challenges experienced by Indigenous groups. TWN's expertise and multidisciplinary approaches to assess proposed developments in their territory disrupt the notion that if First Nations can process this information and communicate more effectively with the Crown, the outcomes will change.

My research demonstrates that Canadian law flattens Indigenous groups' multifaceted jurisdictional relations to strictly local scales of isolated knowledge that conform to Canadian legal categories of rights and infringements. Further, The Canadian courts' lack of clarity on the outcome of consultation causes it to become a predominantly *procedural* exercise, enabling the Crown to effectively *perform* consultation without addressing Indigenous concerns regardless their validity or supporting data.

Indigenous engagement with the state in rights-recognition frameworks have been critiqued by scholars as perpetuating a settler-colonial relationship rather than transcending it (Coulthard 2014, Simpson 2011, Nadasdy 2003, Povinelli 2002). I consider this critique while acknowledging that coercive elements of state power, particularly Canadian law, require Indigenous groups to participate regardless the problems within the process. Canadian law compels Indigenous groups to join the Crown at negotiating tables with numerous ramifications if they do not, including forfeiture of future legal recourse, having their silences interpreted as consent, and risking exclusion from subsequent decisions impacting their territories and rights.

TWN is actively restoring the health of their territory and revitalizing their legal institutions and cultural practices. Despite having Constitutionally-protected Aboriginal rights, however, projects proposed by external parties continue to threaten the health of TWN's territory and the ability of present and future generations of TWN people to use and benefit from their lands and waters. For TWN, consultation becomes a significant avenue of upholding their own legal obligations their people and territory, to create better a better Tsleil-Waututh present and future.

2. Methodology & Positionality

I undertook this research following nearly a decade of professional experience working for several Coast Salish communities (including TWN) in the Crown-First Nation consultation process. Throughout the course of my professional work, I have witnessed the barrage of consultation requests First Nations receive, the strain on resources this creates, and imbalanced power dynamics that play out between the Crown, industry, and First Nations at consultation tables. I decided to return to university to critically examine these dynamics through an anthropological and ethnographic lens. In moving from the everyday workplace of the band office to academia, I wanted to consider the intersections of settler-colonial theory and daily realities; of how Coast Salish governments are working to refuse colonial recognition politics which perpetuate the dispossession of Indigenous peoples from their lands (Simpson 2014, Coulthard 2014), while contending with persistent coercive elements and daily pressures that band offices must navigate (Christie 2013, Hoffmann 2017, Miller and Kew 1999, Turner 2006). I aimed to understand what Coast Salish resurgence looks like against these constraints, and how Coast Salish nations are nonetheless pursuing their own visions of Coast Salish futures in which their peoples thrive.

In 2015, I had been working at TWN for nearly four years managing consultation processes between TWN, the Crown, and proponents throughout the territory. I took educational leave and, now in the role of student, I entered into a formalized research agreement with TWN in which I agreed to adhere to their own research requirements based on the principles of reciprocal, respectful, and relevant research. Over the course of 2016-17 I conducted interviews with staff, consultants, and legal counsel who work for TWN's Treaty, Lands and Resources department ("TLR"). Much of my research was also based on participant-observation at TLR's office and with community members in TWN territory. I further reviewed documents such as publicly-filed letters and case law. (For a list of court cases I reference, see Appendix 2). The resulting analysis is, in one sense, an ethnographic view of the tables at which the Indigenous-Crown consultation process largely unfolds, as well as a

consideration of current Indigenous-led revitalizations of Coast Salish legal systems with regards to territory against the backdrop of colonial legal structures.

The work in this thesis reflects the insights that TLR representatives have generously shared with me. I humbly acknowledge that this thesis articulates in large part what TWN and other Coast Salish leaders and community members are actively doing, and do every day.⁴ This is work that they have considered deeply and have long strategized throughout the course of their lives and across generations.

The experiences articulated here do not represent the perspectives of all TWN people, nor do they represent official stances of the TWN government—in this research I do not speak on behalf of TWN but rather conduct my own interpretations and analyses in my role as a student. Further, not all staff I spoke with are TWN members nor are Indigenous; therefore, I specifically refer to research participants throughout my thesis as “TLR staff” or by their professional title. The attitudes and experiences articulated in this research are thus informed by TLR as a workplace, but not necessarily what it is like to be a *community member* experiencing the ongoing encroachment of lands and resources by outsider influences such as industry. Further, my research considers the experience and perspective of a First Nation government’s side of the consultation process. I have not interviewed Crown nor industry representatives.

I come into this work as a settler scholar of European descent who was born and raised in Coast Salish territories; I currently live and work within the territories of the Musqueam, Squamish and Tsleil-Waututh Nations. As a settler here, I am situated in a colonial web of relations; I therefore hold responsibilities to and within the territories I live on as an uninvited guest. I write this work aware that, as a settler who works with First Nations, my knowledge of Indigenous communities gained through my academic and professional experiences becomes a marketable skill from which I can profit, and which can contribute to existing inequities and exploitative colonial relations that disproportionately benefit non-Indigenous parties. In this post-Truth and Reconciliation era in

Canada, “reconciliation” is a term that can become so easily co-opted by status-quo, settler-centered projects, be they scholarship, governance, or economic development. I therefore seek to contribute to work that disrupts performative and insubstantial attempts at reconciliation by critically examining settler colonial relations — what perpetuates and potentially transforms them. I hope this work gives visibility to the relevance, vitality and active presence of Indigenous law.

Here, it is not my project to codify nor document Coast Salish laws but rather examine how they are (or are not) recognized and applied in existing structures. (For discussions of Coast Salish law, see Miller 2001, Clifford 2016, Clogg et. al. 2016). Scholars such as Borrows (2010), Napoleon and Friedland (2016) among others however argue that we must move beyond using Indigenous laws as mere symbols by which to critique colonial systems. Otherwise, we fall into the trappings of colonial logic in which we expend more energy simply justifying to the Crown and other colonial institutions that Indigenous laws *are* real and meet colonial notions of authenticity (see, for example, Povinelli 2002) rather than *applying* these laws to address critical and relevant matters facing their source communities (Napoleon and Friedland 2016). I have tried to bear this in mind both in my analysis and from a methodological standpoint. I therefore start this thesis with a depiction of TWN’s enactments of their own stewardship laws within their territory. In order to consider the intersections (and lack thereof) of these two legal orders, I then provide an overview of Canadian consultation law, which sets up the dominant framework within which band offices are engaged over natural resource development within their territories.

3. Background: The Tsleil-Waututh Nation and Governance Structure

Tsleil-Waututh, “the People of the Inlet,” is a Coast Salish Nation of approximately 550 members whose territory centres on Burrard Inlet and Indian Arm and extends outward to encompass much of what is currently the Lower Mainland of British Columbia, from approximately the Sea to Sky corridor in the north to the United States border in the south (TWN 2009; Morin 2015, 39). TWN asserts title to eastern Burrard Inlet and Indian Arm (Morin 2015). Most of TWN’s membership live on their reserve in what is currently North Vancouver. TWN’s territorial authority flows from its longstanding presence in eastern Burrard Inlet; TWN people will tell you that they are here, have always been here, and they will always be here. TWN’s creation stories occur here, with the first TWN woman created from the Inlet’s sediments (Morin 2015, 43). TWN members claim that governance over their territory is their “birthright:” they hold a “sacred trust” to care for their territory for present, past and future generations, encompassing the human as well as non-human in a cyclical temporality (TWN 2015). Their deep knowledge of Burrard Inlet and their long history of active governance over these lands, waters, and the beings therein demonstrates their governance authority, an authority that is ongoing and continually maintained.

Since the arrival of settlers in TWN territory from the late nineteenth century onward, industrial and urban pollution has degraded Burrard Inlet to the point that TWN members can no longer harvest the foods that sustained them for thousands of years. Historically abundant salmon, herring, and shellfish populations have since declined drastically (Morin 2015; TWN 2015). The federal government formally closed shellfish harvesting for human consumption in 1972; TWN’s Chief and Council also declared the beaches closed to harvesting due to the health risk to their membership. As a result, an entire generation of Tsleil-Waututh people have grown up unable to partake in this significant social, cultural and economic practice. TWN is only one generation removed from harvesting the majority of their diet from Burrard Inlet; TWN members recall harvesting crabs and

clams along Burrard Inlet with their parents and grandparents, yet have not been able to pass this teaching down to their children.

Refusing the mainstream acceptance that Burrard Inlet is now too polluted to safely provide a marine-based diet, TWN is advancing a different narrative – both envisioning and enacting the restoration of the Inlet for future generations of Tsleil-Waututh people. The TWN government has been conducting long-term planning over several decades to revitalize the health of their waters. In 2005, the TWN band council worked with the community to develop their Marine Stewardship Goals and establish programs to achieve them. These goals include restoring the health of Burrard Inlet so future generations can once again harvest healthy, wild marine foods, and so TWN members can conduct ceremonial and spiritual work in clean and safe waters.

TWN delineates the territorial reach of their jurisdiction through their Consultation Area, which spans from the U.S. border in the south to Garibaldi in the north (see Appendix 1).⁵ TWN territory encompasses much of the greater Vancouver region, urban and industrial areas that consistently undergo rapid development. Despite having Constitutionally-protected rights, TWN's access to their lands and resources have been consistently and cumulatively disrupted over time from development and resource extraction by external parties. TWN assert that any decisions or activities that hold potential to impact TWN's rights, title, and interests within the Consultation Area must be brought to them for review and consultation (2009). While TWN is actively restoring the health of their lands and waters, in part to revitalize and strengthen cultural practices, projects proposed by external parties continue to threaten the health of their lands and waters. TWN describes the competing interests within their territory as a “unique challenge:”

The core of the territory over which the Nation holds aboriginal title is in the middle of what is now a highly urbanized area, which it shares with a huge number of private and public interests. Finding equitable ways to assert constitutionally protected aboriginal rights over the area involves a multifaceted approach, but one that prescribes Tsleil-Waututh inclusion in all decision-making processes involving our traditional territory. (TWN 2012)

TWN asserts this authority in part through their Stewardship Policy, which sets out TWN's own laws and obligations to its territory (2009). The Policy is provided to each entity which contacts TWN requesting consultation, and includes TWN's requirements for meaningful consultation, an overview of its review process, and TWN's standards and conditions upon which it would approve project proposals. TWN's day-to-day governance over their territory outside of reserve boundaries is managed by the Treaty, Lands and Resources Department (TLR), one of five departments within the TWN government.⁶

The TLR Department has been mandated by TWN leadership to put TWN's "face back on the territory," as colonisation rendered TWN essentially invisible within their own homelands. This includes asserting and protecting TWN's interests in the territory off-reserve, which span environmental, social, spiritual and cultural values, thus requiring governance through both *proactive* natural resource management as well as engagement in Crown consultation to ensure that TWN peoples' rights, title, and interests are protected and revitalized (see TWN 2009, 2015). The TLR Department is divided into several programs to carry out this work, including Consultation and Accommodation, Cultural Heritage and Archaeology, Land Water and Environment, and Natural Resources Planning.

We can understand TWN's decision-making structure broadly (and coarsely) in three tiers. Foundationally, TWN's work is guided by Coast Salish law. It is this law that imbues TWN with its authority. TWN law further instills TWN with "a sacred obligation to protect, defend, and steward the water, land, air and resources of the territory" (TWN 2015, 53). According to TWN, this requires "maintaining and restoring conditions in our territory that provide the environmental, cultural, spiritual and economic foundation" for future generations of TWN people; this includes the ability to harvest and consume "safe, abundant wild foods from Tsleil-Waututh waters [for] the present community, our ancestors, and other beings," as well as "control over and sharing of resources according to Tsleil-Waututh and Coast Salish protocols" (54).

From here, TWN's technical staff (at TLR) build and utilize baseline data to guide their territorial management, including assessing potential impacts from projects proposed in the territory, designing and carrying out restoration projects, and restoring cultural health and opportunities for Nation members to access and use their lands, waters, and resources. The grounding in TWN law and the technical analysis thus inform recommendations to the decision-makers, the elected leadership at a governance level.

TWN consistently emphasizes that they, as a government, are not against development, but rather supportive of sustainable development (2009). Guided by this principle, TWN does not generally oppose projects outright but rather assesses potential impacts, then engages in dialogue with proponents and regulatory agencies (frequently the Crown) to determine how to avoid impacts and improve the project in such a way that it contributes positively to the territory and the Nation. TWN further set out a fee schedule for financially resourcing the capacity required, to ensure that the resulting onslaught of referrals and project information would not drain the already-strained resources of the community (TWN 2009). The Stewardship Policy and TWN's process does not simply conform to Canadian legal requirements but rather premises consultation as an opportunity for two legal orders to meet and collaboratively plan for the future. It has since been described by both TWN and legal scholars as "an expression of the nation's inherent jurisdiction and law." (Clogg et al. 2016, 246; Christie et al. 2015; TWN 2015, 6).

4. Consultation as Sites of Everyday Jurisdictional Interaction

The Canadian Constitution recognizes and affirms Aboriginal rights: inherent collective rights which flow from Indigenous groups' longstanding occupation of and governance over their territories millennia prior to the assertion of Canadian sovereignty (Hanson 2011). While the Constitution recognizes Aboriginal rights, it does not define what these rights are, leaving the Canadian courts to define them on a case-by-case basis. Aboriginal rights have therefore become highly legalized, resulting in a relationship that is primarily defined by Canadian courts rather than political relationships between nations and jurisdictions. Indigenous groups must therefore pursue litigation to have their rights recognized, and thus protected from infringement.

The Supreme Court of Canada in *R. v. Sparrow*, however, determined that the Crown could legally infringe upon an Aboriginal right if it could justify that the infringement served a valid legislative objective, and that the infringement was consistent with the honour of the Crown. Subsequent Supreme Court decisions would go on to determine that valid infringements could include anything from "agriculture, forestry [and] mining" to environmental conservation to "general economic development," including the "resettlement of foreign populations to support those aims" (*Tsilhqot'in Nation v. British Columbia* [2014]; *Delgamuukw v. British Columbia*, [1997]).

Yet while Aboriginal rights would have to go through lengthy and costly litigation to be recognized, industry and government continued to encroach upon Indigenous territories and potentially infringe Aboriginal rights, even while these issues were before the courts. In 2004, the Supreme Court of Canada in *Haida Nation v. British Columbia* therefore stated that, when the Crown has knowledge of the *potential* for an Aboriginal right to exist, Crown governments must consult and, when required, accommodate Aboriginal groups when a project or decision may infringe upon their rights and title. This moved negotiations over Aboriginal rights out of the dramatic events of litigation into daily spaces of negotiation. Consultation law aims to bring Aboriginal groups, governments and industry into dialogue, to avoid unjustified infringement on

Aboriginal rights and title, and to clarify consultation requirements for the stated purpose of reconciliation (*Haida Nation. v. British Columbia* [2004]; Passelac-Ross and Potes 2007, 3).

Canadian law's consultation requirement has since created a day-to-day venue in which discussions between Indigenous groups, Crown governments, and industry over Aboriginal rights, title, and claims to land and governance occur on a regular basis. The Crown holds the legal duty to consult, though it can delegate procedural duties to the project proponent. First Nations, the Crown, and proponents therefore correspond daily over projects that range from the mundane and miniscule such as ditch realignments or telephone pole replacements⁷ to large-scale, complex and long-term projects such as port expansions, transportation infrastructure, forestry operations, and pipelines.

Canadian law upholds assertions of Canadian sovereignty, with Aboriginal groups as holding *sui generis* rights yet nonetheless bound by Crown laws and jurisdiction. This contrasts with Indigenous assertions of maintaining sovereign jurisdiction over their peoples and territory, as they have done since time out of mind (see for example Borrows 2010, Simpson 2014, Tennant 1990). Here, I consider jurisdiction as the enactment of legal and decision-making authority (Valverde 2009). Canadian law however treats Indigenous groups as what Audra Simpson describes as “nested sovereignties” (2014)— groups that ultimately fall under Crown authority with limited jurisdictional authority over its own membership on reserves, and virtually none over territorial matters off-reserve.⁸ Bruce Miller characterizes these overlapping and partially-recognized jurisdictions that characterise Indigenous-Crown relations in the settler-colonial present as “legal entanglements” over both “geographic area and substantive issues” (2014, 991). As a result, the Crown uses consultation as an opportunity to reconcile “the pre-existence of aboriginal societies with the sovereignty of the Crown” (*Haida Nation v. British Columbia* [2004], para. 17). Consultation thus becomes a Crown duty to solicit Indigenous feedback on what is ultimately a Crown decision.⁹ This ignores and negates Indigenous groups' own understandings of the continued vitality of their governance and law, as well as of Indigenous jurisdiction as *could* be exercised in Canada.¹⁰ To date, the political

will of the Crown has not implemented Indigenous jurisdiction over off-reserve land and resources beyond preliminary, exploratory dialogues (see, for example, Hogg & Turpel 1995). Indigenous expressions of jurisdiction which do not conform to Canadian legal categories can thus be either invisible or be dismissed as simply unworkable in the settler-colonial present, as they are incompatible with the Crown's notions of sovereignty.

Legal scholars have highlighted the shaky legal foundations of the Crown's asserted sovereignty (Borrows 1999, Culhane 1998). Canadian colonial legitimacy was established through the Doctrine of Discovery and *terra nullius*, the latter of which has since been dismissed by the Canadian courts as illegitimate (*Tsilhqot'in* 2014, para. 69) despite having been the very foundation upon which the Canadian legal system was built. John Borrows describes Canadian sovereignty as "a legal fiction," established by "words, as bare assertions [that are] pulled out of the air to justify... colonialism" (1999, 568-9). Indigenous sovereignty has remained uninterrupted in Canada (Borrows 1999, Simpson 2014, 20) and yet the Canadian settler state exercises what they understand as exclusive jurisdiction.

Indigenous assertions of authority over their lands, including assertions of Indigenous law, requests for joint decision-making, and expressions of non-capitalist agendas have historically been seen by Canada as direct threats to Crown sovereignty and thus unworkable (Christie 2013; Pasternak 2015, 11). In other words, a fight for Indigenous rights is often responded to by the Canadian legal and political system as a challenge to Crown authority first and foremost. Shiri Pasternak argues that the gradual conflation of territorial boundaries, jurisdiction, and sovereignty since colonization renders Indigenous challenges to Crown jurisdiction largely unimaginable to the Canadian mainstream: the British and then Canadian governments effectively drew political boundaries over Indigenous nations, uniformly blanketing asserted sovereignty over expansive and varied people and places despite the disparate and largely regional experiences of how this authority would be carried out (2013; also see Harris 2004). Instead, however, Indigenous assertions of

sovereignty remain legitimate even within the logics of Canadian law, as sovereignty had never been extinguished and, as Simpson argues, create such shutdown precisely because they expose the cracks in the foundation of “what is perceived as settled:” namely, the settler-colonial project in which land is perceived to be, and has been, entirely transferred over to the authority of the Crown (2014, 11). As Pasternak writes, “Canadian assertions of sovereignty did not obliterate Indigenous governance authority, and as such, encounters between settler and Indigenous law reveal the unfinished project of perfecting settler colonial sovereignty claims” (2014, 147). Pasternak’s work demonstrates how separating the concepts of territoriality, jurisdiction and sovereignty clarify how decolonizing and legally pluralistic moves towards operationalizing Indigenous jurisdictions are in fact possible.

What happens when these varying legal logics meet and come into dialogue? Power underlays these dialogues, prioritizing some claims to authority over others. Of course, due to the pervasiveness of colonialism, Indigenous peoples who adhere to their own legal systems must still engage with Canadian law. Groups however may view a legal system as illegitimate and fraudulent, even though they are enmeshed within it. They may instead understand their *own* legal system or legal logics as authentic, the only one that they are truly bound by. Individuals’ ideological or ethical clashes with the law have been characterized by legal anthropologists Ewick and Silbey as playing “with the law” or “against the law” (in contrast to “before the law,” as they categorize legal adherence) (1998). Yet these categories remain insufficient to accurately capture the legally plural experiences within contemporary Coast Salish territories, in which we may see refusal of one legal system and recognition of, or adherence to, another. Here, there is not one monolithic “law” that one stands *before*, as Ewick and Silbey’s categories imply (1998). TWN’s engagement with Canadian law over resource management shows, not a group uncritically adhering to “the law,” nor organizing against “the law,” but rather groups situating themselves outside of one legal system, and holding up their own legal orders like a mirror to another, within which they are nonetheless enmeshed. Here, settler-colonial (and thus legally plural) states such as British Columbia present particularly rich case

studies to consider complex and paradoxical relations with law, in part because they are home to simultaneously-occurring legal orders which, in various moments, may parallel or be in conflict with one another.

Despite the highly imbalanced power dynamics, consultation provides an interface in which we see multiple governments discussing issues of jurisdictional interest. In these dialogues, governments express themselves in both legal and informal, extralegal languages, while governed by the Canadian legal frameworks that bring people to the table in the first place and set the terms of their discussions.

5. Hovering Legality

The ongoing dominance of Canada's legal system has transformed the Crown-Indigenous relationship from what should be a predominantly political, nation-to-nation relationship to one that is highly legalized (Pasternak 2015, 152). Canadian law regulates Indigenous-Crown relations to the point where it renders invisible the active governance and continuing sovereignty of Indigenous nations. The legality of the relationship hovers over Crown-Indigenous consultation, consciously or otherwise. TWN staff often remind me that parties come to the table, not necessarily because they want to be there, but because legally, they *have* to be there. Each party's legal requirements within the relationship set the priorities for discussions. Consultation, for example, often starts with an initial negotiation over whether a more substantial negotiation is even warranted, dependant on the Crown's assessment of TWN's strength of claim to rights and title. These often informal discussions also serve to reinforce and co-produce legal precedent, even as they occur outside of court decisions and other formal legal channels (Kew and Miller 1999). In Aboriginal rights negotiations, discussions oscillate between litigation and negotiations, each pointing to the other and relying upon the other as motivation—e.g, negotiations between the Crown and First Nations occur largely against an implicit threat of litigation; litigation in turn defines further parameters and often sends the parties back to the negotiating table.

The legalization of the Crown-Indigenous relationship as it relates to Aboriginal rights to territory further means that the minimum legal requirements become the blueprint to achieve legal certainty, reducing incentive or political will to move above and beyond the bare minimum. Yet legal requirements alone rarely add up to meaningful consultation and, as legal scholar Dwight Newman argues, are in fact detrimental to building relationships of mutual benefit (2014, 80-88).

By using Canadian law as our starting point, Indigenous law becomes necessarily constrained (Miller 2001, Friedland and Napoleon 2016). By starting with Canadian law, the worldviews, rationalities, rigour and expansive possibilities of Indigenous law become rendered invisible because

the dominance, rationales and pervasiveness of Canadian law has already defined limits to its applicability (Borrows 2010). Canadian law determines which forms of Indigeneity are acceptable and which are not (Povinelli 2002, Hamilton 2008). Canadian law may recognize Aboriginal rights to resource harvesting such as fishing for example, but it asserts that governance over off-reserve territorial matters such as natural resources remain the exclusive jurisdiction of the Crown.¹¹

6. “Death by A Thousand Cuts:” Consultation Process as Experienced Day-to-Day

Consultation requests, commonly known as “referrals,” are sent to TWN in writing from any number of entities; predominantly the Crown, a Crown regulatory agency, or a proponent. The initial referral typically contains a brief overview of a proposed project including maps, diagrams, and preliminary environmental or archaeological assessments, a request for TWN to submit information regarding TWN interests that may be impacted, and a proposed date for comments. The ensuing consultation process depends on the size and scale of the proposed project, and the potential impacts to TWN’s rights, title and interests: consultation can be as brief as a written response, or require a multi-year assessment in which TWN reviews technical documents through a variety of lenses, and, should the project meet their approval, TWN may enter into a benefits agreement as a result of the project in their territory, though this does not necessarily occur regularly.

TWN’s review is a collaborative and multidisciplinary endeavour – TWN’s team of full-time staff include biologists and environmental scientists who review potential impacts to TWN’s territory from an ecological perspective, archaeologists who review impacts to cultural heritage, planners who manage TWN’s own initiatives (which often rely on collaboration with other jurisdictions), and cultural advisors who hold TWN knowledge, consider impacts from a cultural perspective, and ensure adherence to Coast Salish protocols. TWN’s longstanding presence in Burrard Inlet allows for a uniquely long-term perspective. Rather than simply duplicate efforts often already undertaken by a proponent’s consultants, TWN instead reviews their documents while considering information gaps and addressing them with supplementary information. As TWN writes, “Tsleil-Waututh has collected and analyzed more information about the lands and resources of the traditional territory than any federal or provincial government agency, any local government or any present user of lands and resources” (2009, 11).

The very structure of consultation means that staff are consistently preoccupied with responding to projects from a defensive and reactionary position. These projects represent agendas

of outside interests, and TLR staff must evaluate which ones are worthy of further participation given that the requests for their time and input exceed their capacity to respond to each one. Whether or not they are reviewed, each project represents some degree of incursion on TWN's territory. TLR staff have referred to this experience as "death by a thousand cuts." TLR staff identified several persistent challenges TWN experience with the consultation process including burdensome volume and accelerated timelines. In addition, the Canadian courts' lack of clarity on outcomes cause consultation to be a predominantly *procedural* exercise, enabling a type of performative recognition that disproportionately benefits the Crown. I explore these further below.

a. Volume and Timelines

The high volume of referrals that TWN receives is a common experience across band offices in B.C. When the Supreme Court ruled in *Haida v. British Columbia* that consultation was a legal duty, it did not sufficiently address the institutional capacity and structures required to sustain this process. This hurdle was particularly high for Indigenous groups which suddenly found themselves on the receiving end of requests from outside interests, requesting substantial amounts of their time, energy, and information (TWN 2009, 14). The Supreme Court further failed to address how Indigenous groups would be expected to fund the processes they would now be legally required to engage in. Despite numerous cases further defining consultation since 2004's *Haida* decision, band offices continue to struggle with managing the volume of referrals they receive. TWN for example received 440 new referrals in 2016; these would be added to the many active referrals from previous years for which consultation remains ongoing.¹² This constant onslaught of consultation requests makes it virtually impossible for a First Nation to review or respond to them all, even with dedicated referrals staff.

The volume issue is compounded by rapid timelines within which Indigenous groups are expected to provide comment to have their input considered. Regulatory agencies and Crown entities often pose strict timelines (sometimes legislated) informed by what they consider reasonable due

process, predominantly defined by economic interests. It is common for a regulatory agency to request that TWN respond within a unilaterally-imposed deadline; often two weeks, sometimes thirty days, sometimes less than ten.¹³ Otherwise, as some letters caution, the regulatory authority will assume there are no impacts to TWN and they will proceed on their decision. They are saying, in essence, that they will accept TWN's silence as consent.¹⁴ This relatively common practice disregards the reality that many band offices are small, understaffed and under-resourced in relation to the demands on their time. It may take a week or more for a referral to even be read, let alone be reviewed and an initial assessment conducted. For TWN this initial correspondence has been status quo for years, and disregards the fact that Indigenous groups, like other governments, have their own regulatory processes and require time to conduct their due diligence on each file, while balancing multiple simultaneous demands. In trying to manage this continuous onslaught, TLR has set up their referral process to send an automated response, triggered by each incoming referral, that informs the sender that their file is in process but that capacity funding is needed to engage in consultation. They further send a copy of their Stewardship Policy which outlines their standards for project approval and the step-by-step process. In this way, by requesting time and resourcing, and by outlining their own consultation procedures, TWN disrupts the assumption that their silence equals consent.

The burden of the high volume of referrals is thus disproportionately borne by First Nations and, compounded by imposed and unrelenting timelines, creates a situation that may often favour proponents, because an Indigenous group's inability to respond does not preclude a project from proceeding. Canadian courts have ruled in *Ahousaht First Nation v. Canada (Fisheries and Oceans)* 2008 (para. 54) , *R. v. Douglas et. al.* 2007 (paras. 21 and 45) and *R. v. Lefthand* [2007] (para. 43), that, should a First Nation not respond to a referral, the duty to consult may have nonetheless been met (Newman 2014; 70, 95).¹⁵ These rulings in effect enable a Crown regulatory and/or permitting process to legally proceed without Indigenous input, yet they fail to address the procedural challenges that the litigation sought to address in the first place. These decisions do not acknowledge

nor address the challenges that band offices face in simply managing referrals. The onus then rests with the Indigenous group to respond to the referrals which they deem likely to impact their interests in a timely manner or risk the project proceeding in accordance with Canadian law, even if the project or process violates their own Indigenous law.

b. Diagnosing Capacity Issues

It is not necessarily that band offices are simply under-resourced and low-capacity, but rather, they are under-resourced and low-capacity *in relation to the demands on their time by external parties*. TLR has a relatively significant amount of internal capacity, both in terms of staff resources and internal expertise which, as a case study, illustrates how increased capacity alleviates certain challenges and not others. It is critical to parse out what types of capacity is required in consultation processes. For example, the numerous demands on staff time present a constant strain on existing human resources; however, TWN has developed significant in-house expertise. Overarching discussion of capacity issues often conflate these differing resources. As a result, non-Indigenous parties may underestimate the technical capacity and expertise of a Nation when it is actually the staff/time capacity that is strained.

“Capacity” as a broad, overarching concept is widely accepted as a limitation that must be addressed. Despite the courts’ failure to address capacity imbalances in key decisions over consultation, proponents and regulatory agencies will often provide First Nations with funding for staff, consultants and other relevant experts in order to alleviate capacity issues, increasingly accepting it as a cost of doing business.¹⁶ Capacity funding can thus enable First Nations to participate in processes and thus resolve hurdles in the process—including delays to project approvals. TWN leaders have made a decision to use capacity funding primarily to build in-house, long-term capacity by hiring full-time staff to consistently engage in consultation. Yet it would be misguided and myopic to diagnose the challenges inherent in consultation processes as solely issues of capacity imbalances. The challenges of consultation are not solely borne out of capacity issues but

are rather “inherent in the structure of those relations themselves and in the assumptions underlying land claims and co-management” (Nadasdy 2003, 9).

Most capacity funding for example comes in on a project-by-project basis, making it difficult for TWN and other Indigenous groups to ensure predictable and stable funding sources to support full-time staff and build institutional knowledge and resiliency. Capacity funding thus solves a significant problem on the part of *industry*—consultation can proceed to grant the proponent and Crown legal certainty—but this solution typically only goes so far to resolve challenges experienced by First Nations.¹⁷

Among First Nations in B.C., TWN’s TLR department has a relatively large staff dedicated to referrals. While numbers may fluctuate slightly, at the time of this writing, four to five staff were dedicated solely to referrals. Other TLR staff engage in referrals as needed, in addition to their other duties managing proactive TWN initiatives such as intergovernmental relations, fisheries management and environmental restoration. This includes an information manager who processes incoming mail and finances, approximately seven to ten cultural and/or technical experts who review project proposals from their area of specialization as needed, and a director who oversees the entire department. While the size and makeup of the team alleviates some commonly-cited capacity issues, TLR staff have expressed that consultation processes still remain largely ineffective in achieving adequate protection of their Aboriginal rights and title.

TWN’s experience thus enables us to examine how the consultation process functions when there is adequate staff and technical expertise to review projects. Even with four or five people dealing exclusively with referrals and a large support team, capacity is stretched to the limit, because high volume of referrals is always greater than the staff’s capacity to process them all. Despite the relatively large and efficient team, one staff member remarked that “the capacity issue will always be there.” Another staff member mentioned, “Just because we have enough people to handle the

volume of referrals does not mean it's meaningful consultation. It's more than a volume problem.”

One other staff member told me,

Tsleil-Waututh has... five people now dedicated to referrals. And that's a *huge* effort. Yet to date, I haven't seen benefit for all that effort commensurate with the size of the effort... We haven't had a large enough impact on the actual *proposals* to really thoroughly address TWN interests and *protect* TWN interests.

This results in vastly imbalanced power dynamics of the process: given the pace and prioritization of resource development in Canada, band offices are consistently bombarded with project proposals, and each project brings with it its own inundation of technical information for the community to assess. The timelines within which a First Nation is expected to review and respond to projects are typically mandated by Crown regulatory processes and are styled to meet industry's needs (such as by concluding assessments in a timeframe that facilitates predictable development to reduce economic uncertainty), and not on First Nations' own needs and processes.

Yet capacity is merely a symptom of a more deeply problematic process, in which challenges are firmly rooted in the inherently colonial and thus paternalistic nature of current consultation processes. Further, I question the constant pointing to Indigenous “capacity” as though there is a deficiency on the part of Indigenous groups. Scholars (e.g., Barry and Porter 2016), band offices, and Crown representatives (e.g., Eyford 2013, 44) have all argued that the disproportionate focus on deficient capacity in band offices renders invisible deficient capacities on the part of Crown agencies to engage meaningfully with Indigenous groups. It is therefore critical to separate issues of capacity in terms of capacity for demands on time, capacity for expertise and knowledge, and process constraints, which are often conflated.

c. Consultation as Endless Process

Any attempts to increase or address capacity will be therefore insufficient as a matter of achieving meaningful consultation, in large part due to the overall failure to consensually define the *outcome* of consultation between affected Indigenous groups and the Crown. Although the Supreme

Court stated in *Haida* that the Crown must consult Indigenous groups, it failed to clarify the outcome of meaningful consultation. We may interpret consultation to be the required process, and accommodation as the outcome, as we see Justice Dillon specify in *Huu-ay-aht Nation v. British Columbia* (Christie 2006, 163). However, when Chief Justice MacLachlan outlined a spectrum in the initial *Haida* decision as a heuristic device to conceptualize consultation, she stated that on the low end of the spectrum, sufficient consultation may simply consist of information-sharing or notifying the affected Nation(s), thus implying that consultation is, at times, solely a procedural right (para. 43). Although some justices situate their decisions and interpretations of Section 35 within a larger framework of working towards reconciliation, this legalization of the relationship means there is less incentive to consult or accommodate above and beyond the bare legal requirements: the legal requirements become the focal point, ensuring consultation is *legally sound* rather than effectively working towards reconciliation and achieving reconciliatory outcomes. One legal counsel I spoke with referenced the *Coastal First Nations v. Enbridge 2016* decision as one instance of a larger pattern in which the Crown may in fact “find the floor, so to speak, of what consultation [is] and really *push* the floor to see how *badly* they could consult and still get Canadian court approval.”

Consultation as a legal duty is not consistently enforced; rather, it only becomes binding *in the event of litigation*. The constant risk that a development project may become the subject of litigation therefore means that the Crown, First Nations, and industry diligently document their participation in consultation processes. This legality constantly hovers over interactions between the parties, and often influences discussion. For example, rather than addressing substantive issues, correspondence between TWN and the Crown might disproportionately focus on whether the duty to consult had been fulfilled. This threat of law creates a performance in which parties involved focus energy on *presenting* that they’ve consulted; this performance plays out in “consultation logs” that document meetings and correspondence, often down to each voicemail left, regardless of whether they led to a discussion. Communications are thus quantified rather than assessed on how they may have

addressed a group's concerns. In this way, consultation becomes *procedural* duty, but not a substantive one (Bryant 2016, 223).

7. Asserting Jurisdiction: Scales of Knowledge and Jurisdictional Authority

In 2015, TWN conducted their own impact assessment on the proposed Kinder Morgan Trans Mountain pipeline, a project proposed within the heart of their territory. This assessment used uniquely Coast Salish lenses to assess and understand impacts. Measuring potential impacts against the long-term ecological trends of the region, TWN considered how the project may impact Coast Salish experiences and uses of their territory, within a framework of Coast Salish law. TWN determined that the risks the project posed to the health of the territory, including their own cultural wellbeing, were too great to accept (2015). Here, TWN did not participate in a Crown-led process mandated by Canadian law, but rather enacted their role and responsibility as a jurisdiction and as a Coast Salish Nation.

TWN, as a First Nation government, is in a unique position to conduct impact assessments regionally and cumulatively—over space, ecosystems, and time. Band governments must consistently deal with a wide breadth of matters in relation to the relatively small size of their staff, membership and territory, particularly when contrasted with provincial or federal governments (Miller and Kew 1999). The Crown’s legal obligation to consult means that First Nations are privy to a wider cross-section of land use and policy proposals than any other level of government. Further, TWN holds deep, holistic knowledge about their territory spanning countless generations.

In order to adequately assess the impacts of project proposals, TLR’s analyses oscillate between scales of territorialized knowledge; from highly localized, community-held information (such as knowledge of sacred and other culturally-significant sites, local ecosystems, community land use plans, and so on) to broad-scale, transboundary information such as economic trends, relations between ecosystems, neighbouring jurisdictional interests, and long-term environmental patterns including climate change. In order to protect their rights and interests in the face of development, TLR often triangulates and evaluates these numerous and intersecting factors to inform their

responses as well as their own initiatives. TWN oscillates between scales of knowledge as a function of asserting jurisdiction.

We can think of the consultation process and its piecemeal approach like a jigsaw puzzle: project proposals come in to band offices one-by-one, generally conforming to regulatory agencies' processes which evaluate and permit projects in isolation from one another. This piecemeal format is the *de facto* means of referring projects to band offices.¹⁸ And, like a puzzle, TLR staff can piece these project proposals back together on their end, gradually bringing into focus the long-term, regional picture of market trends and how they manifest as developments and resulting impacts throughout the territory.

TLR's overview of development within the territory means TWN is able to evaluate and consider cumulative impacts in their decision-making processes. Such a holistic view informs TWN's assessments of project proposals, including their assessment of potential impacts to their rights and title, impacts to future desired land uses, understanding impacts in comparison to historic (pre-contact) ecological baselines; opportunities for impact avoidance or mitigations, and opportunities to improve projects such as by incorporating habitat restoration projects and other elements that contribute to net environmental gain. TWN is able to piece together and evaluate otherwise disparate development projects and their impacts on a cumulative, holistic, and territorial level that accords with their Coast Salish legal obligations and approaches to stewardship and governance. Their analyses are multidisciplinary, using ethnohistory, archaeology, environmental sciences, social sciences, cultural protocol, and natural resource planning, among other lenses.

TWN does not do this solely to *respond to* and provide information to the Crown, but to assert and uphold its own laws and jurisdiction. In this way, it is misleading to understand Indigenous responses to the Crown and proponents as merely isolated responses to supplement Crown decisions with Indigenous Traditional Ecological Knowledge ("TEK"), as is implied by Crown processes such as environmental assessments (CEAA 2012, 5[1][c]).¹⁹ Rather, Indigenous knowledge as shared in

these circumstances can be better understood as an inherent component of jurisdictional authority, one that becomes constrained through colonial regulatory processes. TLR staff however have experienced challenges at having their input incorporated into project plans despite the recognition they have gained from external parties as a consequence of the high calibre of their assessments, a point I elaborate upon below.

In these processes, Canadian law treats Indigenous groups as though they only operate at a local level. Yet local scales of jurisdiction are not necessarily “quantitatively small,” nor are they simplistic or unsophisticated, but rather operate “alongside, and intertwined with, national and international scales of governance” (Valverde 2009, 143). Local governance decision-making often requires concurrent evaluations on national and international scales even if these latter scales are deemed beyond one’s jurisdiction (143). Jurisdictions necessarily situate themselves within networks of governance relations that are subjected to multiple intersecting forces including economic, environmental, political and militaristic influences, among others. Canadian law, however, circumscribes Indigenous jurisdictional action by reducing the scale at which their input is recognized. Consultation remains driven by rights-based litigation. As Canadian law defines Aboriginal rights as activity-based, such as rights to fish, hunt and harvest (see *R. v. Van der Peet*), broader rights such as self-governance remain limited and under-conceptualized within Canadian jurisprudence.²⁰ For example, Canadian law can only imagine Indigenous self-governance if it is tied to specific harvesting rights; otherwise, the Supreme Court deems Indigenous self-governance excessively general to be recognized as an Aboriginal right under Section 35 of the Constitution (*R. v. Pamajewon*). This means Crown consultation often assesses impacts to Aboriginal rights and title in a way that mirrors these legal definitions, resulting in an “inventory-oriented” approach which conforms to colonial notions of Indigeneity rather than to Indigenous groups as jurisdictions (McIlwraith and Cormier 2016, 39). Indigenous information gets subsumed as data-points, and the vitality and dynamism of active land use planning for the future becomes flattened. This limiting

view of Aboriginal rights in Canadian law simply does not match how Indigenous groups understand and experience their own obligations or rights to territory (McIlwraith and Cormier 2016).

Regulatory agencies therefore continue to solicit Aboriginal groups' knowledge to inform their own assessments of how projects may impact "traditional" land uses and impacts to cultural heritage, emphasizing TEK as the primary contribution that Indigenous governments can make (MacIlwraith and Cormier 2016; CEAA 2012, 5[1][c]; Nadasdy 2003).²¹ At a policy level, this implies Indigenous peoples are unable to comment on broader processes than their immediate territorial uses. To frame Indigenous worldviews, laws, and engagements with territory as "traditional knowledge" fundamentally narrows it and forces it into a limited scope, leading some to question the usage of this term (Cruikshank 2005; Stevenson 2013, 115; Nadasdy 2003, 63). Tables and charts for example, commonly found in environmental assessments' consultation logs, strip the knowledge of its dynamism and contexts. A Nation may evaluate how a proposed development may affect the carrying capacity of an area's resources, for example, which is inextricably linked to the Nation's laws of resource management, distribution and access. Providing this information to a Crown regulatory agency not only risks that the information will become disembodied and decontextualized, it will be further disconnected from the authority and enforcement ability of the First Nation who holds it. The knowledge then appears bounded, easily documented, and available to be mobilized by external parties with or without further involvement from the source community.

In addition, the current consultation regime collapses the multiple levels of information-gathering and decision-making which enables TWN to enact jurisdictional authority. At its base, TWN's decision-making process is founded on and guided by Coast Salish law. At a technical level, assessments are informed by scientific analyses using baseline data—the scientific and technical data TWN holds spanning across disciplines such as geography, biology, archaeology and anthropology. These two levels – law and technical analysis – inform recommendations to elected leadership at a

political and governance level. These three tiers are however flattened when oversimplified by others as “traditional knowledge.”

TWN does not tend to employ the term TEK. At the technical level, TLR staff describe their approach as using “Indigenous science and the best tools from Western science to protect [TWN] rights and interests.” They provide responses based on multidisciplinary analyses which stem from numerous epistemological sources, Coast Salish and otherwise. These disciplines include Coast Salish cultural and ecological knowledge, ecosystems-based science, land use planning, and archaeological expertise. Across each discipline and its methods, these analyses are conducted in accordance with Coast Salish laws and principles to uphold TWN’s own legal obligations (see, for example, TWN 2015). Regardless, several interview participants told me that some consulting bodies including regulatory agencies continue to understand Indigenous contributions as only pertaining to traditional uses of territory, thus sometimes excluding TWN from various parts of the project review process. In one such case, TWN were being consulted on a port expansion project that posed potentially significant impacts to their territory. As one staff member shared:

[This development] has been the subject of very intense study by a number of scientists. And these scientists were gathered into technical advisory groups on various subjects... and some of these subjects I’ve spent a fair amount of time researching... and I was really interested in what the Port was going to do, what research questions were they asking... what methods were they going to use... what were their objectives? What were they trying to accomplish? And these meetings were happening [without TWN participation so I asked] “why aren’t you inviting Tsleil-Waututh to participate in these technical advisory groups?” An engineer... said, “well, we only invited scientists to participate in the technical advisory groups.” And I became pretty livid at that point, and reminded everyone there that Tsleil-Waututh has several scientists. We had at the time like three archaeologists, we had two biologists, and that it was a bit of an insult to say that we weren’t scientists.

TLR staff commented that project proponents or Crown representatives are frequently unprepared to receive input from them on project impacts and considerations that extend beyond traditional uses of territory. While they said that individual Crown or industry representatives will often respond positively and encourage this feedback during face-to-face interactions, these

discussions rarely translate into implementation at the permitting stage. As one staff member described, however, when TLR is solicited for feedback on projects,

First Nations are sort of treated like, ‘you can have input to this part, but it’s not really your position to be providing input on the rest of it.’ I try to push those boundaries because why not? I mean, it’s Tsleil-Waututh territory, right? It’s [all] fair game to my mind.

Nonetheless, TWN continues to provide feedback on aspects of projects that impact their interests and obligations, because they view it as their inherent responsibility as a jurisdiction. This includes a range of comments, including how to avoid impacts to sacred sites and ancestral resting places through terrain stability engineering, to encouraging the incorporation of “smart road technologies” for sustainable highway design, to proposing the incorporation of fish and wildlife habitat restoration, to mitigating and addressing climate change issues (TWN 2017). Rather than responding directly to the limits set upon them by Canada’s Aboriginal rights jurisprudence – what *R. v. Van der Peet* set out to be isolated and distinct cultural activities—TWN views their territory holistically. By commenting on issues as varied as terrain stability, ecosystems vitality and long-term natural resource planning (among others), rather than the “inventory” approach to specific, isolated areas of harvesting uses, TWN upholds responsibilities to its territory *as a jurisdiction* (McIlwraith and Cormier 2016).

Some proponents or regulatory agencies would acknowledge the feedback and sometimes compliment TLR’s level of sophistication, effort and engagement, yet reject those same comments on the basis that it (the regulatory agency) has no authority to compel a proponent to do more than what is legally required. Hence the oft-heard comment that consultation is simply “ticking a box”—the Crown, then, ensures consultation is met procedurally but not substantively. In fact, we can see this in the federal government’s 2011 guidelines for consultation, in which they reference “Canada’s commitment to address *issues of Aboriginal consultation and accommodation*” (Canada 2011, 1; emphasis mine) but do not identify goals nor state the purpose of consultation, which is to address (avoid, mitigate, or otherwise justify) potential infringements to Aboriginal rights.

For example, TLR staff told me that at times, these external entities seemed surprised that TLR holds the technical proficiency to ask rigorous questions or provide technical advice on how to modify the project to avoid negative impacts. TLR staff claim that they receive “a lot of really positive feedback from other governments or proponents” regarding TWN’s level of effort in consultation, the calibre of their work, the rigour of their questions, and the sophistication of their analyses. TLR staff further said that some Crown and industry representatives told them that TWN keeps them “on their toes” and holds them accountable. Yet TLR staff described this feedback as mostly “patronizing” and “condescending,” in large part because, when pressed upon for responses to these outstanding questions, the same party offering compliments is often unprepared to either provide TWN with responses or alter project plans. While they are prepared to compliment the calibre of TWN’s questions, they are not prepared to answer them. These conversations however can be logged quantitatively by the proponent or Crown as evidence of consultation, regardless the qualitative substance of the discussion.

This dynamic likely stems from a misunderstanding of what Indigenous governments are capable of in terms of contributing to decision-making in consultation. This results in a paternalism that strips agency from the First Nation being consulted. Again, the perception of deficient capacity overshadows the outcomes of consultation. As one staff member describes:

All too often the capacity argument turns around into the proponents and regulators doing the analysis and assessment *for* us and presenting us with their predetermined conclusions. And I’ve spent months trying to backtrack one project back to the options analysis stage, and ... we finally got there and they’re like “Oh! We didn’t know that you wanted to be a part of that process” kind of thing.

Several interview participants felt that TWN is often “underestimated” in their governance role. One claimed it is a constant struggle to “be recognized as an equal player in the game,” to be viewed by others as a legitimate government with internal expertise and a critical decision-making role. These experiences demonstrate how consultation is enacted in a way that constrains and limits

Indigenous jurisdictional authority, depicting Indigenous input as participation or feedback but not as decisions. Consultation in its current form is thus unable to uphold nation-to-nation relationships and misconstrues Indigenous jurisdiction as knowledge to be isolated, de-contextualized and input into Crown-led processes at the discretion of the Crown or proponent.

Following a 2015 review of federal consultation guidelines, the Special Representative to the then-Minister of Aboriginal Affairs and Northern Development Canada differentiated between *infringements* and *impacts*, noting that while Indigenous groups often seek to avoid impacts, the Crown's legal obligation is to avoid or accommodate *infringements* of rights (Gray 2016). Here, we see Canadian legal definitions of the Crown's constitutional obligations frame and ultimately dictate the conceptual boundaries of impacts on Indigenous peoples, lands and territories, and differentiate between what Canada recognizes as rights infringement as opposed to how those impacts are experienced. Essentially, what is acceptable and what is not. These legal definitions then manifest spatially and materially across the landscape, as some concerns are addressed (because the legal definition creates sufficient pressure for a project to be altered or relocated, for example) and some are not (if the legal definition does not deem an impact severe enough to compel any mitigations). These concepts as they are defined in Canadian law are pervasive throughout consultation, whether directly acknowledged or not, serving as a constant backdrop to these conversations, in what I describe as a hovering legality. While an Indigenous group may have valid concerns over project impacts, if the impact does not meet the definition of infringement, the Crown will be substantially less compelled to address it.

Crown and industry are largely compelled to consult with Indigenous groups by Canadian law, as well as a desire to achieve certainty against a backdrop of outstanding Indigenous claims to land, rights and title. Securing this legal certainty allows some predictability for the flow of capital to support economic development. Certainty is often touted by the Crown and Canadian courts as a universal benefit of Crown-First Nations negotiations, and in the interest of everyone, as it appears

to clarify outstanding questions that stall economic development such as who holds rights to land (Woolford 2005). Anthropologist Carole Blackburn however argues that the seemingly neutral, economics-driven language of “certainty” masks the fact that one function of this process is the securing of *Crown sovereignty*, as it formalizes who holds particular rights and how they are delineated. Certainty, therefore, reasserts the Crown’s jurisdictional authority, and ultimately provides a land base for economic development unobstructed by Indigenous groups (Blackburn, 593). What is perceived as increased certainty for Crown or non-Indigenous interests can therefore mean increased *uncertainty* for Indigenous groups (Woolford 2005; Blackburn 2005). This is particularly the case for First Nations who wish to secure lands and resources for the benefits of present and future generations, particularly in stewardship roles which may not align with projected land uses of industry or non-Indigenous governments. The pursuit of certainty may therefore contradict the Supreme Court’s initial intention for consultation—to secure Indigenous groups’ right to protect their lands and resources for future generations.

Certainty in the context of consultation is not only expressed in terms of Crown sovereignty and land claims. The mere act of participating in consultation, even if it fails to resolve a First Nation’s concerns, secures an increased degree of legal certainty for participants which tends to disproportionately benefit proponents and the Crown. Consultation varies in accordance with the *Haida* spectrum—i.e., if the potential for infringement of Indigenous rights or the Indigenous interest is deemed to be low, the Supreme Court suggested in *Haida* that consultation may only consist of a procedural duty. Here, then, consultation negotiations ensure that proponents and the Crown have met their legal requirements at least *procedurally*, but not substantively, which nonetheless provides an inviting and secure investment climate in resource development by reducing risk to projects (Blackburn 2005, 586). Here, we see how “certainty” appeals to capitalist economic systems and Crown authority. The consultation process has thus been set up to meet the needs of capitalist economic systems rather than the needs of Indigenous communities. If delays to projects’

approvals are understood to be costly, then we must ask, costly to whom? Who bears costs of expedited projects and project *approvals*? (Woolford 2005). What does “certainty” look like if defined within Indigenous notions of jurisdiction, governance, and land use?

8. Consultation as Performative Recognition

In 2015, the British Columbia Environmental Assessment Office (BCEAO) certified the Eagle Mountain-Woodfibre pipeline, approving the twinning of a pipeline to bring liquefied natural gas (LNG) through the heart of TWN territory. Despite several years of consultation, however, the permit was issued largely without TWN's input. Throughout the process, TWN had submitted information in the form of technical analyses and TWN-authored land use plans that both identified concerns (such as impacts to environmentally or culturally significant areas) and proposed solutions to inform alternate routings. Following two years of rigorous consultation, the project was approved despite TWN's objections. TWN was not necessarily opposed to the project in principle, but rather sought adjustments that would ensure their rights, title and interests were protected, such as protection of spiritually and archaeologically significant areas (George 2016). When I asked about the day of the BCEAO approval, TLR staff described something of a grieving process. One staff member said, "there was a lineup at [the project manager's] door expressing almost *condolences*... There was a lot of reflection on the energy that went into this."

I spoke with another staff person about this project. Our interview occurred months after the permit approval, yet she began to cry, reflecting that it felt as though "we let the community down." This moment was a powerful illustration of the effect of consultation on staff. Staff shared their sense that rigorous engagement was futile despite presenting thorough information in good faith, and presenting TWN's views in a way that would appear rational to the Crown and proponent. TLR staff were concerned that areas of critical importance, including sensitive ecosystems and sacred sites, would now be negatively impacted by the pipeline. Here, we see how decisions with long-term, critical implications on the Nation become routinized as bureaucratic processes that culminate in a stark yes/no approval, yet continue to have long-term implications borne by local Indigenous groups. The Eagle Mountain-Woodfibre LNG example is a large project that provided a focal point for

discussion, but it is in many ways representative of the larger pattern of referrals: the constant need to participate in a process which consistently sidelines Indigenous input.

Staff described consultation as a constant “battle,” one which requires a collective effort due to the emotional and intellectual strain on band office staff. TLR’s director stated that, in order to sustain the work and avoid burnout, immense trust was required “to push forward [and to] create... a safe room for all of us so that we can all brainstorm around something, get through certain things ...and really feel like we’re not alone.” The director also noted that he pays particular attention to the risk of staff burnout, “because it’s relentless. It doesn’t stop... the big juggernauts of the governments and proponents, they don’t stop.” He said,

I go up to my staff that handle referrals and I would ask them, how do you feel about coming to fight every day at work? Does that wear you out? Does that discourage you? ... It’s tough going to battle every day, and I’m just quite lucky in this community and this community’s quite lucky to have the people we have, doing that day-to-day fight. But it does get tiring.

Disagreements or conflicts between the Crown or proponents and Indigenous groups, short of overt opposition, have commonly been misdiagnosed as issues of cultural (mis)translation (McCreary and Milligan 2014, 121; Gupta and Ferguson 1992). Like many scholars and Indigenous leaders, I reject the notion that if Indigenous groups can only communicate better,²² then the system will voluntarily change (Turner 2006; Coulthard 2008, 2014; Povinelli 2002). As Indigenous nations and the Canadian state operate from unequal positions of power, Coulthard argues that calls for improved Indigenous discourse with political and legal apparatuses of the state (such as advocated by Turner 2006) do not sufficiently address or disrupt the various non-discursive forms of power that contribute to these systems of relations, such as economic and militaristic power (2008; 2014, 46). TWN’s experience in consultation affirms this. Despite communicating in languages, formats and disciplines that the state recognizes, understands and deems legitimate (such as economic studies, scientific analyses, and letters that do not oppose a project but may instead offer viable mitigations

to minimize impact), this presents no guarantee that TWN's input will be incorporated into Crown decision-making.

In November 2016, TWN travelled to Ottawa to present the federal government with economic studies and oil spill analyses they had commissioned to supplement their 2015 assessment on the proposed Trans Mountain pipeline. TWN met with Natural Resources Minister Carr, and personally handed him their reports. These documents supported TWN's initial findings that the proposed pipeline would pose an unacceptable risk to their Nation. The very next day, Canada announced their approval of the Trans Mountain pipeline. I was interested in how Canada would justify this decision in light of the new information TWN had presented to them, and I eagerly watched the news, waiting for Canada's press conference. I, perhaps naively, expected Canada to address TWN's reports, and provide a counter-argument supported by their own scientific and technical analyses. Finally, Minister Carr appeared on the television. When asked by a reporter how Canada could approve the Trans Mountain pipeline while TWN still had these outstanding concerns, Minister Carr responded:

I have been enriched by my relationship with the Tsleil-Waututh from the moment I met them... and I understand very well the sacred relationship that the Tsleil-Waututh feel with the air, the water and the land, and it is a value and a lesson, and a teaching, that I think should be important for all Canadians, not just Indigenous Canadians.” (De Souza 2016)

Note that Carr described Tsleil-Waututh *as feeling* a certain way about their territories, rather than as having made informed decisions. He did not respond to their arguments or data, and described their interactions as personally rewarding, rather than as, for example, an intergovernmental dialogue. Minister Carr's response illustrates how mainstream Canada continues to imagine Indigenous groups: as culture groups, ones who *occupy* territory, but not necessarily who govern it; rather, one whose relationship is primarily determined by cultural difference expressed largely in intangible feelings, rather than by governance, or legal authority (Gupta and Ferguson 1992). Framing frictions between legal orders as merely a difference in *culture* or *tradition* has the potential to flatten Indigenous legal systems and render invisible First Nations' active governance of

territory, as well as other relations of power both within and between these groups (Coulthard 2014, 52; Miller 2001; Simpson 2014, 71-76). It further obscures how law works to produce and normalize power-laden discourses. This attitude is crystallized in Canadian law, in which Aboriginal rights are defined as measures of Aboriginality or Indigeneity (Hamilton 2008, Christie 2006, 147).²³ TWN is framed as passively inhabiting territory rather than actively managing it.

The result is Aboriginal engagement or consultation that operates on a predominantly performative level—Crown representatives can speak of meeting with First Nations, yet not substantively address their concerns. McCreary and Milligan argue this creates a contemporary *terra nullius*: the Crown can recognize Indigenous groups and simultaneously ensure they do not stand in the way of economic development (2014, 122). This is a feature of settler-colonialism, in which Indigenous displacement is ongoing and structural, rather than a discreet, historic event (Wolfe 2006). Despite formal shifts in policy, Coulthard argues Canadian governments' actions have sought the same outcome since colonization: to displace Indigenous peoples from their lands and resources for the Crown to access capital (Coulthard 2014, 125). These actions are rationalized as necessary within current social, legal and political discourses (Wolfe 2006). For example, the Crown enables Constitutionally-protected Aboriginal rights to be infringed upon if they can be justified under Canadian legal requirements (*R. v. Sparrow*, *Delgamuukw v. British Columbia*). Economic benefits of resource extraction are considered justifiable as is the “building of infrastructure” and even “settlement of foreign populations” (*Delgamuukw v. British Columbia*). As Coulthard writes,

Although the *means* by which the colonial state has sought to eliminate Indigenous peoples in order to gain access to our lands and resources have modified over the last two centuries... the *ends* have always remained the same: to shore up continued access to Indigenous peoples' territories for the purposes of state formation, settlement, and capitalist development. (Coulthard, 2014, 125)

9. Why do Indigenous Groups Participate? Consultation as Coercive Process

Given the constraints described above, and that increased capacity often does not resolve these issues, we see how Canada and industry benefit disproportionately from the Crown-Indigenous consultation process. Scholars such as Coulthard and Nadasdy (2003) caution that Indigenous participation in state-led frameworks ultimately hold “assimilative power,” ultimately reproducing “the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples’ demands for recognition have historically sought to transcend” (Coulthard 2014, 3, 46).

So why do Indigenous groups participate? Simply refusing to enter into negotiations with the state is frequently not an option. Coulthard (2014) and Simpson (2014) propose notions of “turning away” from state-sanctioned recognition frameworks towards Indigenous legal orders and authority. Yet discussions of what “turning away” looks like repeatedly brought up a hypothetical question in both academic circles and in the Treaty, Lands and Resources department: What happens when you refuse to participate, and they put a pipeline through your territory?²⁴

The rapid pace of development in Coast Salish territories bring persistent, daily demands for First Nations participation in regulatory processes which come with risks and ramifications should one not participate.²⁵ This daily reality creates challenges in how a Nation’s government may incorporate critiques such as Nadasdy’s and Coulthard’s into their territorial management and responsibilities. Canadian case law sets consultation up as an ultimately coercive process, in which an Indigenous group is legally obligated to participate in consultation (e.g., *Mikisew Cree v. Canada*, para 65), or face numerous potential ramifications should they refuse or otherwise fail to participate. I explore several of these potential ramifications below.

a. Legal Obligation to Participate

The Supreme Court has deemed consultation a reciprocal duty: First Nations must participate (Passelac-Ross and Potes 2007, 12; *Mikisew Cree v. Canada* para. 65). While it is unlikely that a proponent or the Crown would litigate against a First Nation for not participating in consultation on

a standalone basis, Canadian courts may compel Indigenous groups to participate if they are legally found to be “frustrating” the process (*Haida v. British Columbia* para 42; *Halfway River v. British Columbia*, para. 161). Alternatively, a First Nation who refuses or is unable to participate will have a weaker legal standing should they decide to pursue legal action in Canadian courts at a later point. If, for example, a project is found to infringe upon a First Nation’s rights, their recourse may be compromised because they did not avail themselves of the opportunity to consult when it was available. When TWN took the National Energy Board (NEB) to court in 2016, for example, they argued that the process the NEB set up and framed as consultation was in fact inadequate. The Court of Appeal, in its decision, however, argued that TWN should have voiced their concern to the NEB prior to pursuing legal action (*TWN v. NEB* 2016, paras. 96, 99).²⁶ Here, we see the courts compelling Indigenous groups to participate in processes that they may deem flawed and with institutions that a First Nation may feel is not sufficiently equipped to engage in meaningful nation-to-nation dialogue regarding project impacts.²⁷ What is deemed as a satisfactory consultation process, however, remains to be seen.

b. Silence is Consent

In written correspondence TWN has received, the Crown has equated silence or non-participation with consent, even when the high volume of consultation requests First Nations receive makes it nearly impossible to read, review, and respond to them all. As discussed above, the Crown may, for example, specify a timeline at which they expect a response. Should no response arrive by that date, they may state they will proceed with a decision regardless. Here, deadlines are unilaterally imposed.

And, despite consultation requirements, Canadian law has set up a system in which a project may legally proceed with or without an Indigenous group’s input so long as the Crown’s due process is followed and impacts meet the justifiable infringement test. The Alberta Court of Appeal, for example, ruled that if the Crown attempts to contact a First Nation repeatedly to no avail, they may

proceed without breaching their consultation duties (Newman 2014, 70; *R. v Lefthand*, para 43).²⁸

The court, in *Ahousat Indian Band v. Canada* (2004) found that Ahousat's failure to participate (by missing initial consultation meetings) meant that Ahousat failed in their reciprocal duty and forfeit their opportunity to provide input. Yet it appears as though the courts failed to meaningfully consider a First Nation's lack of response *in the context of First Nations' experiences of consultation*, rather than strict reading of Canadian law, or a prescriptive and detached consultation policy. For example, how might the expectations that Indigenous groups participate be tempered by the unmanageable volume of referrals, as well as the power of the Crown (and proponents) to unilaterally develop schedules with consultation deadlines?

In this way, Canadian law coerces Indigenous groups to participate in Crown-led consultation by stating that they are required to engage, by allowing for Crown decisions to proceed without Indigenous input, and by maintaining potential that the courts will interpret Indigenous non-participation as forfeiture of legal recourse. While their participation may change, Indigenous communities nonetheless remain implicated in the impacts of the project, potentially for generations.

c. Litigation and Consultation as Cyclical Loop

The law's characterisation of consultation as a reciprocal process disregards imbalanced power relations. As discussed above, if a First Nation fails to participate, it risks forfeiting any future legal recourse should it find the project negatively impacts its land and rights (Newman 2014). Yet for many First Nations, litigation is simply too prohibitive: Aboriginal rights litigation is not only costly, but can take decades before a court decision, meaning that litigation becomes intergenerational and ineffective for dealing with pressing environmental concerns. Given the hurdles of litigation, consultation becomes a preferable alternative in which First Nations such as TWN willingly participate to protect their territory and secure benefits for their communities, even though their opportunities to influence project outcomes are constrained. Their participation produces a legitimizing narrative of reconciliatory and cooperative (capitalist) nation-building that can be

mobilized by either industry or the Crown to imply Indigenous endorsement of the project and secure public approval.

Should an Indigenous group feel a particular consultation process is flawed or inadequate and decide to pursue litigation as an alternative, the court will often funnel them and the Crown back to negotiating tables in order to further discuss the issues at hand, thus creating a cyclical loop. With each cycle, however, the Court may include additional directives to guide these negotiations. We see this throughout Aboriginal case law; the most recent notable case is *Tsilhqot'in* which stated that in some situations, an Indigenous group's consent would be required. We see this in smaller cases, as well, such as TWN's litigation with the NEB in which they were sent back to participate in the NEB's process. Through interviews and other personal discussions, many band office staff have found that the court's directives do not trickle down into day-to-day practice, thus repeating the negotiation-litigation-negotiation loop.

d. Constant Need for Assertion

One staff member commented that the consultation process is not simply about protecting rights but is a consistent battle of asserting that their rights even exist in the first place. Regardless of its legal defensibility, TLR staff perceived a risk that being absent from discussions over activities within the territory could potentially set an informal precedent that would normalize their exclusion from certain decisions should they fail to maintain a constant presence in certain conversations. This risk is compounded by the relative lack of TWN presence in the anthropological canon or other written records. Often, when TWN has to fight for recognition of rights, it is in response to the Crown arguing that TWN does not belong in a part of their own territory in the first place (often through environmental assessments or similar extralegal documents). Referring to fishing rights, one staff member commented, "you're asserting this right [which] you constantly have to fight to assert... and it's a constant."

One reason TWN argues that its participation is required is to demonstrate to the general non-Indigenous public as well as to the Crown that it exists at all. As TWN's Stewardship Policy describes, colonization has rendered Tsleil-Waututh essentially invisible in their own homelands, and therefore TLR's mandate includes putting Tsleil-Waututh's "face" back on their territory (TWN 2009, 1). Responding to consultation requests becomes an immediate forum for assertion, and one which is imperative in the eyes of TLR. If TWN did not consistently respond to project proposals by asserting their rights and title, and the importance for others to come to TWN as a government, then TWN would effectively forfeit their "seat at the table." Beyond the immediate consultation process, the consultation record has the ability to build a broader record of Aboriginal interests in that project's vicinity.

10. Disrupting the Optics of Endorsement: Refusals and Upholding Indigenous Laws

When faced with a barrage of consultation requests from proponents, First Nations must decide: participate in a process which largely perpetuates a colonial relationship predicated on dispossessing themselves from their lands and resources, or refuse to participate in the process, yet contravene Canadian law's consultation requirements, running the risk that the project may proceed and damage their territory without their input at all.

An Indigenous group's decision to participate in consultation should therefore not be necessarily viewed as seeking state-based recognition, as endorsement of a process, or as endorsement of a project, but can be better understood as a complex navigation of various constraining factors including the coercive authority of the law and the need for assertion in a colonial present which renders invisible Indigenous presence and governance.

To speak of the dialogues and assertions of law, rights and jurisdiction that occur during these processes as strictly coercive, however, risks rendering invisible the varying flows of power between the parties. It is critical to understand the consultation process as necessarily constrained, but we cannot render invisible the active governance that occurs here. If we understand Indigenous groups as consistently *resisting* hegemonic Crown interests, we may inadvertently recentre the Crown as an all-encompassing entity to which a marginalized person or group merely reacts to and mobilizes against. In the case of Indigenous groups in Canada, resisting the Canadian legal system often requires attention and energy that could have otherwise been put towards revitalizing Indigenous legal orders and applying them to critical issues beyond the purview of Canadian law (Miller 2001, 46; Simpson 2011). As Val Napoleon writes, the constant engagement with Canadian law and colonialism, despite being in many cases necessary, has prevented Indigenous groups from imagining "who are we beyond colonialism?" (2007, 20).

I therefore consider Audra Simpson's concept of refusal, which makes visible the spectrum of simultaneous approaches that can include Indigenous engagement with colonial legal frameworks

while refusing to accept the Crown's claims to sovereignty and supporting narratives (2014). Simpson proposes selectively refusing the colonial state's laws to maintain the legitimacy and vibrancy of Indigenous legal orders—refusal therefore, while resisting colonialism, also includes generative and productive elements (2014).²⁹ The relationship between an Indigenous group and the Crown then becomes one of resistance *with* and *over* power. The Crown may respond to these enactments of Coast Salish law in any number of ways, including violence. However, this framing allows us to see that the flows of power can oscillate. Refusal brings into focus the often simultaneous and multi-pronged approaches of participation, rejection, and resurgence.

In the case of the Trans Mountain Pipeline, for example, TWN may not view their actions as solely resisting the Crown, but rather as upholding their own truths, and thus enacting their own legal orders. While there is certainly an element of resistance, by the very nature that TWN had to mobilize against a pending threat, there is a creative resurgence in which they work to envision and uphold a Coast Salish reality. TWN's work is led by a team of leaders Turner (2006) would characterise as “word warriors,” in dialogue with the state. The risks and limitations to state engagement that Coulthard (2008; 2014) and Nadasdy (2003) highlight – specifically, that state engagement leads to assimilation – might be mitigated by TWN's simultaneous “turning away” by asserting their own governance authority to create space for resurgent practices. TWN's own impact assessment and subsequent rejection of the Trans Mountain Pipeline, for example, was grounded in their own laws and in accordance with own priorities and standards, to create space for a TWN-led future. In this way, I wish to complicate arguments that Indigenous governments' participation in state bureaucracy is inherently assimilative and alien (Nadasdy 2003). TWN's experience in the settler-colonial present, in one of Canada's largest urban centres, positions them within a particular series of legal entanglements which requires a set of strategies specific to their circumstance. TWN is already embedded within these relationships; how do they move within them while simultaneously considering a future beyond them? TWN's engagements are not solely with the Crown—they have

aligned with other Indigenous governments, including Coast Salish nations on either side of the U.S.-Canada border, to formalize legal agreements against the pipeline based in their own legal orders, including the Save the Fraser Declaration (signed 2012), and the International Treaty to Protect the Sacred from Tar Sands Projects (signed 2013).

Simpson's pairing of "turning away" with *refusal* therefore presents one means of upholding Indigenous sovereignty while facing the coercive elements that compel Indigenous groups to participate in problematic Crown-led processes (2014). This disrupts the optics of Indigenous participation as endorsement, a conflation we see mobilized by settler governments and industry to perform reconciliation in the pursuit of certainty. It further demonstrates how these actions can and must occur alongside Indigenous cultural and political resurgence: diverting energies otherwise spent responding to the Canadian state toward creating, building, and sustaining Indigenous lifeworlds *independent* of the Canadian state (Simpson 2014, Simpson 2011).

It is therefore critical to differentiate between a First Nation's *endorsement* of a project because a group believes it is a *positive contribution* in line with their own priorities, and negotiations over *mitigations* to address concerns regarding impacts to rights and title. I spoke with one negotiator who claimed that reaching consensus between parties is *not* endorsement. Yet reaching agreement with First Nations can be easily conflated by outside observers with Indigenous endorsement of a project. Indigenous groups may however refuse to provide their express consent, yet participate in the design of mitigation measures to protect what they can if they feel a development is inevitable. Although there may be certain areas in which Indigenous governments can make binding decisions—on their reserve, for example, or in various justice initiatives (Miller 2001), Canadian law simply does not allow for Indigenous jurisdiction over non-reserve lands that would be *binding on non-Indigenous populations* (Christie 2013).

At this stage in the settler-colonial present, in which Canadian law restricts TWN from binding non-Indigenous groups to their laws (Christie 2013),³⁰ TWN's assertion of jurisdiction relies upon

the cooperation of other neighbours. These enactments of jurisdiction move away from a notion of jurisdiction as necessarily *territorial* but rather one enacted *relationally* (Woolford 2005, 177; Pasternak 2013, Borrows 2016, 802). Although Indigenous groups may approve and deny projects in accordance with their own laws, to enforce their decisions currently requires strategic engagement within the Canadian legal system, leveraging of Canadian legal requirements, and cooperation with other jurisdictions. In Canada, jurisdictions must engage with others and develop the terms and circumstances of this dialogue in order to function *as* jurisdiction (Miller 2003). Therefore, Indigenous groups may rely on bi- or multi-lateral agreements to binding commitments short of institutional jurisdictional authority.

11. Consent and Future Land Use Planning

TWN has long conducted proactive natural resource management in their territories in accordance with their own Coast Salish laws. TWN's 2016 shellfish harvest, for example, represents proactive fulfilment of their legal obligations, including stewarding the lands and resources, and ensuring that TWN people are able to harvest resources, benefit from ancestral economies, and engage in social networks and cultural work, despite the Crown's imposition of exclusive jurisdiction over most of Burrard Inlet's waters and shoreline³¹. The shellfish harvest is only one example of the many proactive initiatives TWN is leading. TWN developed a Burrard Inlet Action Plan, to work within their laws and obligations achieve their Marine Stewardship Goals. In addition, TWN is working with neighbouring First Nations and neighbouring jurisdictions to build the Burrard Inlet Stewardship Council, a collective that would work together to pursue these goals, set by TWN laws and values. TWN has further been gathering scientific data to establish a pre-contact ecological baseline, to disrupt accepted mainstream practices of basing natural resource management decisions on short-term, shifting baselines that are more of a current snapshot-in-time than a long-term view to the capacity of the lands, waters and beings therein. TWN draws on archaeological information including analyses of ecological remains, oral histories and traditional ecological knowledge to establish a deep history. As TWN representatives shared at their annual Burrard Inlet Science Symposium in 2017, TWN is not pushing for a return to a pre-contact era, but rather envisioning a future in which Tseil-Waututh people and their ancestral territories can not only survive but thrive.

Some staff refer to these restoration initiatives as the “‘yes’ agenda,” a deliberate response to disrupt common mischaracterisations of Indigenous groups as always saying “no.” This shifts the focus from Indigenous groups as not organizing against existing Canadian legal orders but rather gives visibility to the fact that TWN situates themselves within their own legal system, which they are actively upholding.

As discussed earlier, given the undue hardship and unrealistic timelines that would come from proving each Aboriginal right through litigation, the consultation process was proposed by the Supreme Court in part to ensure that Aboriginal rights which had not yet been proven or affirmed through the court system would not be infringed upon (*Haida v. British Columbia*, para. 14). Yet, following the *Tsilhqot'in* decision, if we know that following a title declaration, one such right is “the exclusive right to decide how the land is used and the right to benefit from those uses,” including “the enjoyment of the land by future generations” (*Tsilhqot'in v. British Columbia* 2014, para. 88) —why in TWN’s experience, are First Nations’ projected land use decisions not being addressed via consultation? Here, the initial purpose of consultation—to provide a negotiation that enables rights to be protected short of requiring a court declaration—falls short. Here, we see a gap between consultation, the rights conferred on Indigenous groups through proving title, and the triggers that require proponents to alter their projects. Until Indigenous groups are held up as decision-makers over their own territories, operating within their own laws and able to uphold their standards, the consultation process appears inherently inadequate to sufficiently protect Indigenous lands, resources, and governing authorities from gradual encroachment over time.

12. Conclusion

My research provides an ethnographic account of the Crown consultation process over resource development projects from the perspective of one Coast Salish Nation, the Tsleil-Waututh. In examining consultation as a site of jurisdictional interaction, my thesis demonstrates how, despite the Supreme Court's stated intention for consultation to be an avenue for reconciliation, Canadian law has framed the consultation process in a way that reduces Indigenous jurisdictional authority to mere input into what are ultimately Crown decisions. My research has identified several persistent challenges TWN experiences with the consultation process including high volume of referrals, concise timelines, and an overall exclusion from decision-making. Canadian law's failure to define the outcome of consultation results in a process that becomes entirely *procedural*, but not one that must substantively address impacts to Indigenous groups (Bryant 2016). TWN's experience therefore demonstrates that these issues are not solely a result of capacity imbalances but are rather inherent in the consultation process itself. Regardless, TWN participates because of its legal obligations in two separate legal orders: Canadian law compels Indigenous groups to participate, and TWN holds a responsibility to assert and protect TWN's interests in accordance with its own laws. It is therefore important to understand that TWN does not participate in consultation as a mere participant in a Crown process but rather does so as an assertion of its jurisdictional authority.

My research demonstrates that consultation in its current form is thus unable to uphold nation-to-nation relationships and misconstrues Indigenous jurisdiction as knowledge to be isolated, de-contextualized and input into Crown-led processes at the discretion of the Crown, the ultimate decision-maker. The Canadian jurisprudence that informs the Crown consultation process recognizes Aboriginal peoples as culturally distinct with *sui generis* rights yet is unable to create space for Indigenous sovereignty including decision-making authority.

Here we see a gap between Indigenous groups' aspirations for their homelands and the ability to reconcile these plans with those of others. When we more closely examine consultation in *practice*,

rather than examining consultation law, or procedures at the policy level, we see Indigenous assertions and refusals which push against settler-colonial depictions of Indigenous groups solely as *participants* in a Crown process. Rather, we see TWN as participating as one stream of their inherent legal obligations and responsibilities as a Coast Salish Nation; they are enacting their jurisdictional and legal authority to create a healthy and thriving Coast Salish present and future.

Endnotes

¹ See Christie 2013 for more information about Indigenous law as obligation.

² A note on terminology: Throughout this thesis, I use the term “Indigenous” to refer broadly to Indigenous groups across Canada as well as internationally. I use “Aboriginal” in reference to specific Canadian legal and government contexts, as this term is defined in the Canadian Constitution as including First Nations, Inuit, and Métis peoples with recognized rights in Canada. I endeavour to be as specific as possible; I will therefore specify First Nations by their chosen name when I write about one group (i.e., the Tsleil-Waututh). In contexts where Tsleil-Waututh may share various laws, worldviews, and experiences with their neighbouring Nations, I will more broadly refer to the Coast Salish, an anthropological category of First Nations in the southwest of British Columbia who share cultural and linguistic similarities, of which Tsleil-Waututh is part.

I use the term “the Crown” to encompass the federal and provincial governments of Canada. I deliberately use this term throughout this thesis to disrupt colloquial usage of the term “the government,” which normalizes Canadian sovereignty as a monolith and erases Indigenous groups as legitimate governments.

³ I use here the term “legal orders” following Fiske and Patrick (2000) and Napoleon’s usage (2007). Napoleon’s differentiation between legal *orders* and legal *systems* provides a contrast with the “legal system” that Ewick and Silbey (1998) consider:

‘Legal system’ [describes] state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions. For example, Canada and other nation states have such central legal systems. In contrast, I use the term “legal order” to describe law that is embedded in social, political, economic, and spiritual institutions....In distinguishing between legal systems and legal orders, I hope to avoid imposing western legal ideas onto Indigenous societies.” (Napoleon 2007, 2)

⁴ I am reminded of Audra Simpson’s words; following her scholarly analysis of consent and settler-colonialism, Simpson writes: “the people I worked with and belong to know all this, and of course they know this in stratified ways” (Simpson 2016, 329).

⁵ This map of TWN’s consultation area was developed following a two-year traditional use and occupancy study, in which a team of TWN members interviewed elders and mapped the areas they hunted, gathered, and otherwise used the territory. After two years of lengthy interviews, the data points drawn on maps were consolidated into one. This project was initiated by the provincial government for the purpose of consultation over forestry operations.

⁶ TWN is currently governed by a Chief and Council in accordance with the federally imposed *Indian Act*, R.S.C. 1985. Throughout this thesis, I refer to the band council as the “TWN government” to distinguish it from actions of individual community members or the community as whole.

⁷ Of course, what I suggest as “mundane and miniscule” is not to suggest these projects are low-impact. Any project may pose serious and significant impacts depending on the circumstance; TWN has experienced situations in which a proponent perceives a project as low-impact and moves ahead without consulting, only to find that impacts have significant ramifications for TWN. Even a small and routine project may, for example, disturb an ancestral resting place, or disrupt environmental or socio-cultural initiatives.

⁸ Section 91(2) of the *Constitution Act, 1982* delegates “Indians and land reserves for Indians” to federal jurisdiction.

⁹ In 2017, the federal government released ten “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples,” to integrate select principles from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into Canadian law. One of these included recognizing Indigenous jurisdiction. It remains, however, unclear how this will occur given that Canadian law has largely treated Indigenous sovereignty as subordinate to that of the Crown (*R. v. Van der Peet*, *Delgamuukw v. B.C.*, *Tsilhqot’in v. B.C.*) In fact, Principle #2 reiterates that the purpose is to reconcile “the pre-existence of Indigenous peoples and their rights and the assertion of sovereignty of the Crown, including inherent rights, title, and jurisdiction.”

¹⁰ This vision was nearly realized in the Charlottetown Accord talks of the 1990s in which Indigenous groups were proposed as a third order of government alongside the federal and provincial Crown.

¹¹ In areas of title declaration, however, Aboriginal rights become a limit on that jurisdiction; a type of tempering of Crown authority (Mandell Pinder 2014).

¹² Consultation processes can be as brief as a single letter, or as long as a multi-year Crown-led environmental assessment.

¹³ Some consulting bodies are able to shift the deadline if a First Nation requests, typically by a few days or weeks. For larger-scale projects or with agencies with which a trusting relationship has been established, a consultation protocol and schedule can often be jointly negotiated, though it often remains within a broader Crown-imposed framework.

¹⁴ Words to this effect have been used, although these letters have not been made publicly available.

¹⁵ This would likely depend on the level of duty owed in accordance with the Haida spectrum (*Haida v. B.C.*). If the Supreme Court were to determine that a First Nation is owed a high level of consultation, but were unable to respond or delayed in responding due to a backlog, I would imagine the issue of the unmanageable volume of referrals would be explored in further detail.

¹⁶ Capacity funding has potential to alleviate staff/time *and* expertise constraints by allowing for a Nation to hire consultants, for example. Yet this practice of outsourcing this work to consultants has the potential to divert resources from building institutional resiliency through in-house technical expertise specifically guided by the Nation's own laws, protocols and standards.

¹⁷ Here I am bearing in mind Leanne Simpson's caution that "as reconciliation has become institutionalized, I worry our participation will benefit the state in an asymmetrical fashion" (2011, 22).

¹⁸ In some instances, TLR has worked with consulting bodies such as Crown corporations to alter this process, and to receive consultation requests in aggregated and more holistic formats. At the time of writing, staff had collaboratively developed one such process with one corporation in particular.

¹⁹ In 2018, the federal government announced that it would be replacing the Canadian Environmental Assessment Act with the Impact Assessment Act. At the time of writing, its implications on Indigenous groups and consultation was somewhat unclear; however, Canada emphasizes "protecting" and considering "Indigenous knowledge" which does not appear to alter the dynamics described within this paper.

²⁰ The SCC in *Van der Peet* further ruled that Aboriginal rights must be "integral to a distinctive culture" at the point of European contact, resulting in a frozen-in-time approach that ties Aboriginal rights to a specific moment of history. This means that not only courts but the extra-legal, day-to-day negotiations that flow from them become preoccupied with pointing to "originalism" to legitimize an Indigenous group's seat at the table. This trickles down into court-mandated negotiations such as consultation, as courts ruled that the duty to consult arises when there is an Aboriginal right which stands to be impacted. Borrows writes, "This approach has placed historical inquiries that search for 'original' understandings at the centre of the court's jurisprudence" (2017, 115). Therefore, on larger-scale regulatory regimes, such as environmental assessments, often the Crown will author a strength-of-claim report to determine the level of duty owed. This then diverts discussions from the project and its impacts, to establishing whether an Indigenous group holds rights in a particular location—effectively, whether they exist or not.

²¹ For example, see the British Columbia Environmental Assessment office's Proponents Guidance Application Information Requirements Template (2015), Sec 3.3, p 24, available at <http://www.eao.gov.bc.ca/guidance.html>. In addition, the Canadian Environmental Assessment Act (CEAA) 2012, 5(1)c further emphasizes the contribution Aboriginal communities can make to understanding environmental effects are from a traditional and heritage perspective. See <http://laws-lois.justice.gc.ca/eng/acts/C-15.21/page-2.html#h-5>

²² Dale Turner (2006) calls for more strategic "Aboriginal participation" in the political and legal discourses of the state to justify the legitimacy of Indigenous legal, political, and philosophical frameworks (31). Turner's solution then appears somewhat contradictory in order to realize a true nation-to-nation relationship that respects Aboriginal sovereignty, he

argues, Aboriginal peoples “will have to engage the Canadian state’s legal and political discourses in more effective ways” (5). Coulthard (2008) critiques this approach.

²³ As McCreary and Milligan write,

Incorporating an Indigeneity presumed to lack sovereign authority in order to sanction development on unceded territories, this move to recognition works quietly to re-establish a *terra nullius* open again to development but mildly constrained by discrete, localized patches of Indigeneity. (2014, 122)

²⁴ I attribute this specific question to Glen Coulthard who raised it for discussion periodically in class (2015), though variations of this question also arose with frequency in my discussions with TWN TLR staff. This question would regularly arise in TLR, particularly during reviews of problematic projects which violated aspects of TWN law.

²⁵ For another ethnographic analysis of this, see Hoffman 2017.

²⁶ The Court of Appeal, in its decision, did state that their decisions would not prejudice any further legal action TWN decided to take.

²⁷ The B.C. case *Chartrand v British Columbia* 2015 provides some nuance to this, in which an Indigenous group cannot be found at fault for refusing to participate in a faulty consultation process (McIvor 2015).

²⁸ Whether the duty is breached, however, will likely shift on a case-by-case basis according to the court’s determination of level of duty owed, according to the Haida Spectrum.

²⁹ While she writes about this in *Mohawk Interruptus* (2014), Audra Simpson’s March 17, 2017 presentation “The Architecture of Consent, the Anatomy of Refusal” at the University of Victoria’s conference Indigenous Resurgence in an Age of Reconciliation opened my eyes to how refusal is fundamentally generative. University of Victoria, March 17, 2017.

³⁰ Christie distinguishes between the ability of an Indigenous group to make decisions within their own laws, in what is often cited in media as a veto power, over specific projects, to the ability to make a decision that is *binding* on others (2006).

³¹ Such as through the federal Vancouver Fraser Port Authority and the Department of Fisheries and Oceans, or the provincial Ministry of Forest, Lands, and Natural Resource Operations.

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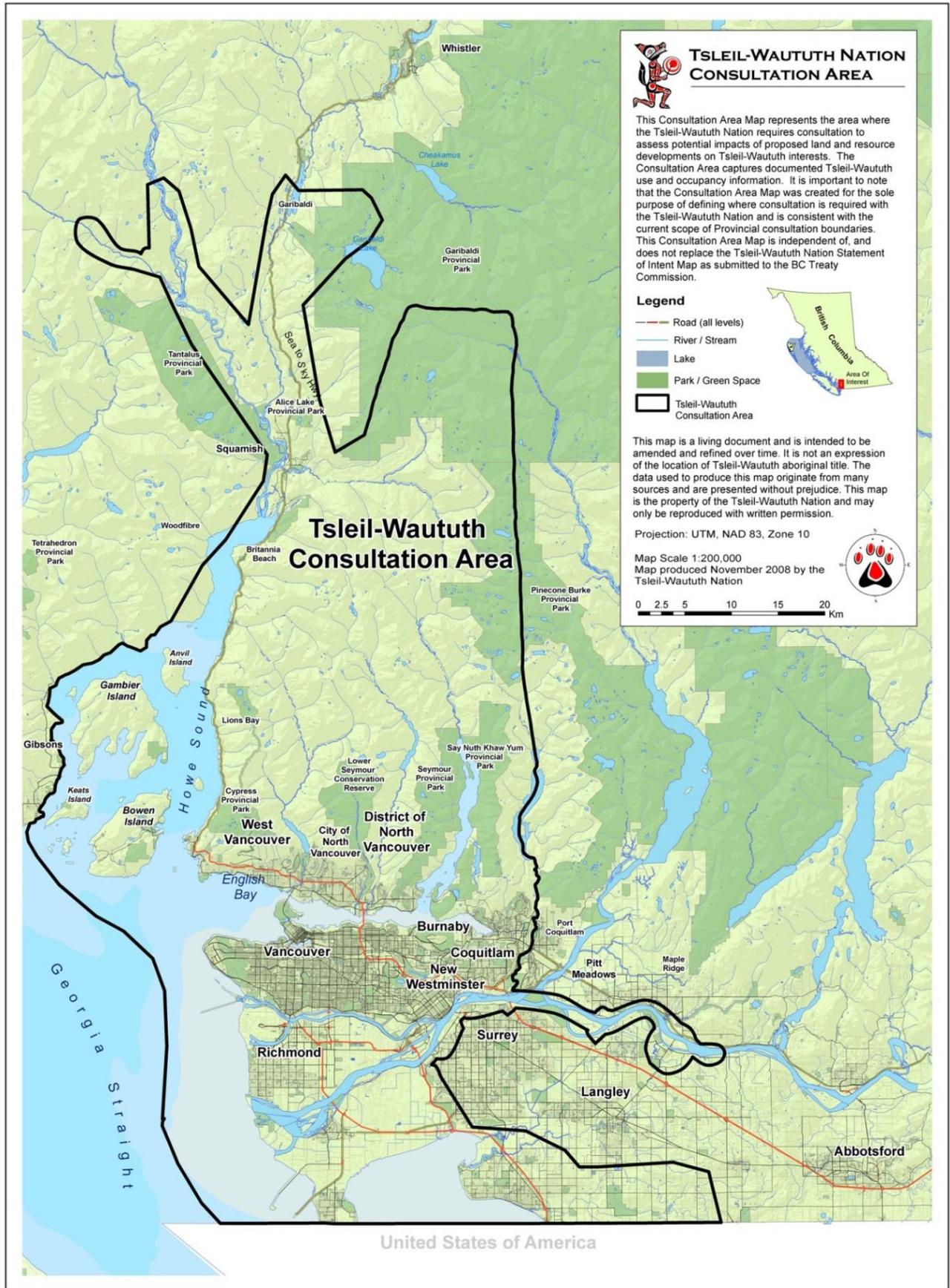
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Appendix 1: TWN Consultation Area as depicted in TWN's Stewardship Policy (2009)



Appendix 2: Cited Court Cases

Ahousaht First Nation v. Canada (Fisheries and Oceans) 2008 FCA 212

Chartrand v British Columbia 2015, BCCA 345

Coastal First Nations v. British Columbia (Environment), 2016 BCSC 804

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73

Halfway River v. British Columbia (Ministry of Forests), [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R.

Huu-ay-aht Nation v. British Columbia (Minister of Forests) 2005 BCSC 697

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

R. v. Douglas et. al, 2007 BCCA 265

R. v. Lefthand, [2007] ABCA 206

R. v. Pamajewon, [1996] 2 S.C.R. 821

R. v. Sparrow, [1990] 1 S.C.R. 1075

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

Tsleil-Waututh Nation vs National Energy Board 2016 FCA 219

R. v. Van der Peet, [1996] 2 S.C.R. 507