Protest for New Protocols: What the Debate on the Duty to Consult Says about the State of Indigenous-settler Relationships

by

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Author's Declaration

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

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Abstract

Indigenous-settler relationships in Canada are grounded in constitutional obligations. When actors dispute the terms of Indigenous-settler relationships, these actors are seeking to change the nature and scope of existing constitutional obligations. The Crown's duty to consult Indigenous peoples is a constitutional obligation that is disputed between Indigenous and non-Indigenous peoples. The practices that guide actors' behaviours when contesting constitutional obligations, such as the duty to consult, influence the development of Indigenous-settler relations. Two main groups of actors portray different behaviours and practices when disputing constitutional obligations. Actors within institutions and actors engaging in collective mobilization interact with each other to change the character of Indigenous-settler relationships. A case study analysis portrays the dialogical interactions between institutions and social movements. The results reveal that actors confront their differences in a manner that prevents Indigenous-settler relationships from improving. For instance, institutions do not consider Indigenous interpretations of proper consultation before articulating consultation protocols. Consequently, only crisis situations, which are often provoked by Indigenous social movements, signal to institutions that different interpretations of consultation exist. However, using crises to initiate engagement with constitutional disputes results in parties treating other perspectives with distrust. Hostility between parties is communicated within dialogical processes, preventing Indigenous-settler relationships from respecting differences and reconciling interests. A new advisory institution that respects and articulates different interests may facilitate reconciliation between Indigenous and non-Indigenous perspectives. Implementing this reform would transform the contestation of constitutional obligations into a regular practice of engaging with different perspectives to improve Indigenous-settler relationships.

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Introduction

Describing the current relationship between Indigenous peoples and the Canadian state is problematic. The evolution of this relationship includes initiatives that have achieved mixed results for improving Indigenous-settler relations. Indigenous peoples' rights are constitutionally protected, which provides a legal framework for ensuring that Indigenous interests are considered at the highest level of decision-making. Nevertheless, the socio-political position of Indigenous peoples distressingly reveals that Canada insufficiently addresses Indigenous interests.[1] Although material resources can address some problems faced by Indigenous peoples, reforming how government interacts with Indigenous peoples will also strengthen Indigenous nations. Indeed, the government's treatment of Indigenous perspectives reflects the character of Indigenous-settler relationships. The state's interactions with Indigenous peoples are guided by certain constitutional

[1] James Anaya, "The situation of indigenous peoples in Canada," *United Nations Human Rights Council*, 27th Session, Agenda Item 3 (May 7, 2014): at para. 81.

obligations that are entrenched in Canada's constitutional order. Consequently, Indigenous and non-Indigenous peoples dispute the terms of a just Indigenous-Crown relationship by reinterpreting those constitutional obligations.

The objective of this thesis is to examine the conflict between competing visions of Indigenous-settler relationships by shifting the focus of analysis; rather than discerning the interests of each party and proposing alternative objectives that reconcile those interests, this research analyzes the dialogical processes that guide actors' behaviour. The character of Indigenous-settler disputes reflects the practices Indigenous peoples and the Canadian state use to exchange different interests and contest the status quo. These practices are influenced by the specific roles actors may adopt. For instance, actors that operate in institutions behave differently than actors participating in collective mobilization; each role, such as a position in upholding institutions or collective mobilization, guides actors' behaviours. The behaviours of actors in specific roles are in a dialogical relationship with other actors in different roles. In order to identify actors' behaviours and the dialogical relationship with other behaviours, theories of institutional change and social movements are applied in the Indigenous-settler context. Together, these theories explain how different actors in specific roles that are responsible for reinterpreting Indigenous-settler relationships exchange their perspectives. The development of these exchanges may produce constitutional disputes; as such, reforming the practices that guide interaction between actors will transform how constitutional disputes are resolved.

Recognizing that different behaviours influence Indigenous-Crown interactions is essential to understanding the actions of Indigenous and non-Indigenous peoples when disagreements occur. Identifying each party's demands only partially explains why Indigenous-Crown relations trigger moments of conflict and tension. Each party's interests are influenced by the practices that

Indigenous and non-Indigenous actors use to communicate their values and engage with different perspectives. According to this approach, conflict is the product of specific practices of communicating interests and treating different perspectives that generate distrust and hostility with other actors. Analyzing interactions identifies the circumstances that may shift actors' behaviours to display more respect towards different interests. As such, an approach that emphasizes the dialogical interactions between Indigenous and non-Indigenous actors may expose more viable options for reforming Indigenous-Crown relations.

The Crown's constitutional duty to consult is an important dimension of Indigenous-Crown relations. This duty states that the Crown must consult Indigenous peoples when Indigenous rights or rights claims are affected by Crown proposals.[2] Indigenous peoples and the Canadian state exchange their different perspectives regarding the nature and scope of the duty to consult through specific practices or procedures. A case study approach that examines specific instances in which the duty to consult was disputed by actors will illustrate whether actors are developing new conventions for contesting constitutional obligations. Indeed, the duty to consult provides a unique perspective to understand the character of Indigenous-Crown interactions and embodies important principles that could improve existing practices of appropriate interaction.

This thesis depicts the broad patterns of actors' behaviours during interactions with other forces and actors, and the consequences of those interactions with regards to the state of Indigenous-settler relationships. This approach attempts to comprehensively illustrate the behavioural dynamics that underpin Indigenous-settler relations. The literature addressing Indigenous-state relationships has not considered how dialogical processes in themselves can alter the development of Indigenous-settler relationships. Instead, the literature uses the perspective of

[2] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 27.

one party to reveal points of contestation with other actors. This thesis integrates the perspectives of different actors by analyzing the dialogical relationship that engages those different perspectives. This thesis provides a model that uncovers the dialogical processes in Indigenous-settler relationships and raises propositions for improving the development of Indigenous-settler relationships.

The analysis in Chapter 1 begins with a review of the existing literature regarding the state of Indigenous-settler relationships. This literature clearly portrays the breadth of Indigenous constitutional demands. Indigenous peoples propose different reforms that promote a new vision of a just relationship with the Crown. However, Indigenous perspectives only partly constitute the system of Indigenous-settler relationships. The development of Canada's constitutional order is elaborated in Chapter 2. Canada's constitutional order establishes the parameters of Indigenous-settler relationships by determining how actors are encouraged to contest their constitutional obligations. In particular, the recognition of Indigenous rights in Canada's Constitution dramatically transformed the boundaries of status quo Indigenous-settler relationships. Together, the analysis on the existing literature regarding Indigenous constitutional demands and the evolution of Indigenous rights in Canada's constitutional order will provide the backdrop in which actors exchange different interpretations of constitutional obligations.

Chapters 3 and 4 reinterpret existing political theories within the context of Indigenous-settler relationships. Chapter 3 explores institutions' responses to external contestation regarding Indigenous-Crown constitutional obligations, and how those responses recreate the status quo of just Indigenous-settler relationships. Institutions are the mechanisms that recognize and protect Indigenous rights. As such, analyzing theories of institutional change explains how institutions address Indigenous visions of just constitutional relationships when current practices are disputed.

In particular, historical institutionalism is scrutinized to determine if it can explain institutional decision-making when confronted with external contestation. Case law pertaining to the duty to consult and the government's consultative guidelines represent institutional decision-making and practices. These case studies will demonstrate the evolution of institutions' understandings of the duty to consult and how institutions promote their vision of a just relationship in response to external contestation.

Chapter 4 articulates the role of social movement theories in understanding the interactions between actors disputing Indigenous-settler relationships. Social movement theory, in particular the political process model, is examined to determine whether the theory can explain how Indigenous peoples' constitutional demands are communicated to institutions. Moreover, the moment in which collective mobilization is triggered is often in a dialogical relationship with institutional decision-making. Social movement theory may detect how dialogical forces present both opportunities and constraints for reinterpreting constitutional obligations. For instance, institutions respond to external pressures, such as pressures provoked by collective mobilization; after institutions decide on a response, the future actions of groups are guided by the new opportunities and constraints created by the institutions' initial response. Analyzing case studies that represent Indigenous forms of social movements will detect how Indigenous groups interact with other actors, and how these interactions affect Indigenous groups' capacity to contest Indigenous-settler relationships in the future.

Chapter 5 connects the previous analyses on actors' exchanges that dispute status quo Indigenous-settler relationships. This connection reveals that the particular manner in which actors interact to express contestation over constitutional obligations influences the character of Indigenous-settler relationships. As the character of Indigenous-settler relationships shifts, actors'

future decision-making and actions are also transformed. Based on the development of institutions' interpretations of the duty to consult and subsequent Indigenous forms of social movements, Indigenous-settler relationships are not developing in a manner that promotes constructive exchanges between actors. Despite how Canada's constitutional order facilitates citizens' capacity to contest the constitutional status quo, certain practices within current Indigenous-Crown interactions prevent actors from reimagining a constitutional relationship that meaningfully recognizes different perspectives. The section concludes with the implications of this dilemma, and a possible institutional mechanism to remedy ineffectual interactions. When institutions fail to consider Indigenous interpretations of proper consultation, crisis situations are perceived as the only available mechanism to expose different interpretations of constitutional obligations. Crises often intensify distrust between parties, which undermines opportunities to reconcile competing Indigenous-settler interests. Implementing an advisory institution can facilitate reconciliation if the institution respectfully mediates between conflicting interests and enhances the perception of fair dealing between Indigenous and non-Indigenous actors.

CHAPTER 1

Literature Review

The Indigenous peoples of Canada seek to make constitutional space for their vision of a just political order. When mobilizing to engage the Canadian government in the legal and political arenas of the Canadian state, Indigenous peoples, like other citizen groups, have ceaselessly articulated clear and sophisticated arguments for recognition and respect of their constitutional vision. Political and legal mobilization to change the fundamental character of the Canadian constitutional order remains a current issue for certain prominent groups, despite assertions that the era of "mega-constitutional politics"[3] is over. The current literature on the subject of Indigenous claims to change the Canadian constitutional framework focuses on articulating the Canadian state's obligation, grounded in constitutional law, to negotiate new political relationships

[3] See Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: Toronto University Press, 2004).

with Indigenous nations. Whether Indigenous status of nationhood[4] or citizenship[5] should be the guiding principle that informs interpretations of fundamental justice and political obligations with non-Indigenous peoples are the main points of tension that separate the demands of certain Indigenous groups and the Canadian state. These perspectives are highly crucial in determining the positions and constitutional demands of both the Indigenous peoples and the Canadian state.

The scholarship that evaluates Indigenous constitutional visions has expanded to include multidisciplinary approaches. Legal scholars analyze whether parts of Canadian constitutional law has the capacity to accommodate or address Indigenous constitutional demands. Their work on assessing the continuing relevancy of laws enshrined in the *Royal Proclamation, 1763*, the historic treaties, the *Charter of Rights and Freedoms*, and s. 35 of the *Constitution Act, 1982* reveals that Canada's constitutional order recognizes a unique space for Indigenous peoples to pursue their own visions of justice and political order.[6] According to these perspectives, Canada already has the constitutional tools and mechanisms that can address Indigenous peoples' constitutional vision. If the principles that are currently enshrined in the constitutional order are consistently recognized

[4] See Jacob Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000); James Tully, "Introduction," in *Multinational Democracies*, Alain-G Gagnon and James Tully, eds. (Cambridge: Cambridge University Press, 2001): 1-34; Joyce Green, *Self-determination, citizenship, and federalism: Indigenous and Canadian Palimpsest* (Regina: Saskatchewan Institute of Public Policy, 2003); Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough, Ontario: Broadview Press, 2005); James Youngblood Henderson, *Treaty Rights in the Constitution of Canada,* (Toronto: Thomson Carswell, 2007); Kiera Ladner, "*Aysaka'paykinit*: Contesting the Rope Around the Nations' Neck," in *Group Politics and Social Movements in Canada*, Miriam Smith, ed. (Peterborough, Ontario: Broadview Press, 2008): 227-249.

[5] See Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) and Tom Flanagan, "First Nations? Second Thoughts," (Montreal: McGill-Queen's University Press, 2000).

[6] See Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title.* (Saskatoon: University of Saskatchewan, Native Law Centre, 1983); William Pentney, "The rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: The Interpretive Prism of Section 25 Part I," *University of British Columbia Law Review* 22, no. 1, (1998): 21-59; Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms," *Osgoode Hall Law Journal* 34, no. 1 (1996): 61-99; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination," *McGill Law Journal* 46, no. 2 (2001): 382-456; Michael Asch, "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution," *Canadian Journal of Law and Society* 17 (2002): 23-40; Ardith Walkem and Halie Bruce, eds. *Box of Treasures or Empty Box? Twenty Years of Section 35* (British Columbia: Theytus Books Ltd, 2003); James Youngblood Henderson, *Treaty Rights in the Constitution of Canada,* (Toronto: Thomson Carswell, 2007); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

and affirmed by state institutions, Indigenous rights can be realized and exercised in meaningful ways. Other perspectives that build on this legal approach assert that constitutionalism can be a method of political interaction that promotes equal coexistence between different political communities.[7] Constitutionalism reflects a political culture that respects both differences between peoples as well as providing the necessary environment to negotiate partnerships for governance. This interpretation of constitutionalism acknowledges the position that Indigenous peoples have separate constitutional aspirations than the Canadian constitutional status quo; once a sense of separateness is established, constitutional parties can engage in equal partnerships and collaboration with the dominant Canadian society.

Conversely, political scientists assess Indigenous visions of justice and political order through the lens of government policy and actions. These scholars investigate the effects of interactions between Indigenous peoples and state institutions or initiatives. Some Indigenous peoples' continued resistance and agitation against government policies reveal how Indigenous groups have interpreted and exercised their agency to address unfavourable state action. Political scientists understand the legitimacy of Indigenous claims by analyzing certain key events and policy initiatives that trigger Indigenous mobilization, and then make inferences on what these events and interactions say about the demands each party puts forward.[8] This perspective examines

[7] James Tully, "Diversity's Gambit Declined," in *Constitutional Predicament. Canada after the Referendum of 1992*, Curtis Cook, ed. (Montreal and Kingston: McGill-Queen's University Press, 1994): 164; See also James Tully, "Introduction," in *Multinational Democracies*, Alain-G Gagnon and James Tully, eds. (Cambridge: Cambridge University Press, 2001): 1-34; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); and Jeremy Webber and Colin Macleod, eds. *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010).

[8] See Mary Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences," *Canadian Human Rights Yearbook* 3 (1989): 3-45; Jacob Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000); Joyce Green, *Self-determination, citizenship, and federalism: Indigenous and Canadian Palimpsest* (Regina: Saskatchewan Institute of Public Policy, 2003); Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough, Ontario: Broadview Press, 2005); Kiera Ladner, "*Aysaka'paykinit*: Contesting the Rope Around the Nations' Neck," in *Group Politics and Social Movements in Canada*, Miriam Smith, ed. (Peterborough, Ontario: Broadview Press, 2008): 227-249.

the ways in which Indigenous peoples' interests conflict with government objectives. As such, these scholars also determine how Indigenous peoples can best advance their demands given constraints created by colonialism. There exists contestation within the political science literature regarding whether Indigenous peoples can uphold their indigeneity alongside existing state institutions and processes. For some, Indigenous ways of being can be respected alongside Canada's institutional order; consequently, all that which is Canadian would be treated as also reflecting indigeniety.[9] For others, Indigenous peoples should distance themselves from Canadian institutions and processes to avoid the risk of further assimilation.[10]

Furthermore, Indigenous narratives and testimony present a unique insight into Indigenous belief systems and community values that inform their obligations and relationships with non-Indigenous peoples.[11] Indigenous peoples' experiences with the Canadian government's disrespect for their constitutional vision vividly demonstrate the justifications for demanding the Canadian government to negotiate a new relationship. These writers and scholars use individual experiences to illustrate a collective phenomenon. Although the stories may recount personal portrayals or struggles, the systematic ill-treatment of Indigenous peoples as a whole by the Canadian government is made clearly and explicitly.

The literature that focuses on the Indigenous constitutional perspective examines which framework should guide relationships with the Canadian state while maximizing Indigenous autonomy. The bulk of this literature seeks to explain why the Canadian government has an

[9] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto 2002): 148.
[10] Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 2009): 11.
[11] See Patricia Monture-Angus and Patricia Mcguire, eds *First Voices: An Aboriginal Women's Reader* (Inanna Publications, Toronto, 2009) and Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (Minneapolis: University of Minnesota Press, 2013).

unfulfilled obligation to collaborate on a new constitutional framework that would fundamentally alter the political and legal relationship between Indigenous and non-Indigenous peoples. The status of nationhood is largely grounded on legal evidence and scholarship that portrays a nation-to-nation relationship between Indigenous and non-Indigenous peoples. This relationship is formally enshrined in the constitution, such as through historic treaties, but has not been honoured by the Canadian state. In the perspective of these scholars, a nation-to-nation relationship is the only path for decolonization that is just for Indigenous peoples.

The literature that rejects a nation-to-nation relationship between Indigenous peoples and non-Indigenous peoples claim Canadian institutions and processes offer mechanisms that can adequately address Indigenous demands. Scholars have theorized that a nation-to-nation relationship is inconceivable because the assertion that Indigenous peoples are sovereign is "contrary to the history, jurisprudence, and national interests of Canada."[12] Consequently, historic treaties and agreements have no legal force. Moreover, this perspective suggests that Indigenous peoples should not be treated as partners alongside Canada's federal structure because Indigenous cultures during first contact exposed a "civilization gap" with European societies.[13] This argument maintains that full participation in the Canadian state is the best means to fulfill Indigenous peoples' political aspirations. The position that Indigenous peoples should accept Crown sovereignty and relinquish demands for distinct legal and political status reflects a pro-assimilationist perspective. Scholars have also directed their criticisms against Indigenous nationhood toward the problem of feasibly accomplishing the degree of recognition and autonomy Indigenous peoples demand. These scholars identify the practical limitations that inhibit

[12] Tom Flanagan, "First Nations? Second Thoughts," (Montreal: McGill-Queen's University Press, 2000): 66.
[13] Ibid., 38.

Indigenous peoples from realizing a nation status, such as the unavailability of resources to develop territorial-based self-governance structures.[14] As such, Indigenous peoples should compromise the terms of their national identity to integrate to some extent as Canadian citizens in order to access necessary political resources.[15] Unlike the assimilationist model, accepting Canadian citizenship still maintains the possibility of recognizing distinct rights to reflect Indigenous peoples' unique position in Canada.[16] A status of Canadian citizenship that makes particular concessions to Indigenous peoples is argued by some scholars as consistent with a liberal democratic order.[17] This perspective suggests that the existing understanding of liberal democracy can accommodate certain aspects of Indigenous demands for recognition. Consequently, the Canadian state is not required to fundamentally change its institutions or national narrative in order to meet Indigenous interests.

Scholars that address the relationship between Indigenous rights and Canadian constitutional politics evaluate the merits of whether Indigenous constitutional demands should be adopted into Canada's constitutional order, and how these different constitutional visions can coexist. There is little attention given to how these struggles to express Indigenous rights within the Canadian constitutional order interacts with broader processes and tensions concerning institutional change and activism generated by collective mobilization. The debate regarding the value of Indigenous rights is affected by the constant actions of groups and institutions asserting their influence to determine how the polity understands its constitutional obligations. Indeed, the current literature only touches on how constitutional struggles are placed within the broader context of citizen mobilization and subsequent institutional change.

[14] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000): 185.
[15] Ibid., 207.
[16] Ibid., 11-12.
[17] See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

For instance, Kiera Ladner argues that the objectives of decolonization and nationhood are not depicted in social movement theories; at best, these theories can offer only incomplete accounts of why Indigenous peoples choose certain mobilization strategies and organizational structures.[18] Similarly, Taiaiake Alfred asserts that Indigenous peoples need to rediscover political and legal empowerment separate from the Canadian constitutional order because Canadian institutions and processes cannot adequately address Indigenous demands.[19] These two arguments represent a tendency to view Indigenous peoples' constitutional visions as wholly independent from broader processes that characterize citizen-state relationships. Although Ladner and Alfred's work respects and defends the unique positions of Indigenous peoples, the interaction with non-Indigenous peoples and state processes cannot be clearly separated from Indigenous visions of a just relationship. Indigenous peoples have unique perspectives that deserve respect. However, Indigenous and non-Indigenous cultures interact and influence one another through processes such as social movements and institutional mechanisms. Some scholarship recognizes that Indigenous perspectives and cultures are in a state of interaction with non-Indigenous forms of knowledge,[20] but this recognition is made in the context of specific exchanges in either political, legal, or cultural contexts. As such, social movement theory and theories of institutional behaviour can provide further insight to the ways in which Indigenous peoples choose to articulate and pursue their demands. Understanding the interaction between the political, legal, and social landscape in which

[18] Kiera Ladner, "*Aysaka'paykinit*: Contesting the Rope Around the Nations' Neck," in *Group Politics and Social Movements in Canada*, Miriam Smith, ed. (Peterborough, Ontario: Broadview Press, 2008): 244-5.
[19] Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough, Ontario: Broadview Press, 2005): 21.
[20] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) and John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto 2002): 148.

Indigenous peoples understand their constitutional visions will clarify the sources of tension within Indigenous-settler relationships.

The constitutional relationship between Indigenous peoples and non-Indigenous peoples cannot be adequately addressed without considering the existing and imperfect ways in which citizens and institutions interact with one another to exert influence to determine a new constitutional status quo. Consequently, there is a necessity for a more comprehensive approach to evaluating and addressing Indigenous constitutional relationships with non-Indigenous peoples. Understanding the opportunities and constraints citizens face when contesting for institutional change is an important backdrop to Indigenous-settler constitutional relationships. This backdrop further influences how different constitutional visions interact, including how those visions are valued and interpreted among groups.

CHAPTER 2

The Canadian Constitution

Canada's constitutional order provides practices that direct citizen contestation and interaction and protects those practices from unilateral extinguishment. For instance, the Canadian constitution presents certain mechanisms, such as s. 35 of the *Constitution Act, 1982* that Indigenous peoples can use to assert their constitutional demands. However, the development of those mechanisms is also a product of citizen contestation. In effect, Canada's constitution provides particular procedures for citizens to contest constitutional obligations by allowing the constitutional order itself to be the subject of contestation. The development of the current mechanisms for challenging Indigenous-Crown obligations and how those mechanisms were attained will provide the background context to explain the character of the current state of Indigenous-settler relationships.

The weariness of Canadians to address constitutional reform is incongruous with the nature of the document itself. The Canadian Constitution inherited the ambiguity surrounding British

constitutionalism, making it harder to locate and understand what visions of justice and political duties the Canadian Constitution represents.[21] The written components of the Constitution emphasize only portions of the practical powers of governance, while its unwritten aspects inform the spirit of the constitutional order. Constitutional conventions that are understood between citizens through continual practice are the foundations of Canadian political life. Consequently, the citizens that are bound to the constitution will have to continually reassess its principles and functionality in changing social and political contexts. In effect, constitutional politics strongly influences and permeates political interactions and exchanges. For example, certain groups of citizens mobilize through legal and political channels to confront the elements of Canada's constitutional order they perceive as unjust. This confrontation may occur between other citizens, associations of citizens, or institutions. During political interactions, constitutional duties and identities are often identified and made the subject of possible adjustments. Conflicting interpretations of constitutional responsibilities between citizens and institutions are brought to bear on the existing constitutional order. As a result, the Constitution and its vision of fundamental justice and political duties evolve to recognize and respect new claims from different groups of citizens; indeed, this evolution is made possible through peoples' political wisdom and experiences of addressing constitutional conflicts.[22]

Within a constitutional framework that expects transformations and alterations, it is necessary that citizens can contest and renegotiate the terms of their relationship with the state. The role of peoples' political experiences and knowledge are brought forward to most effectively pursue constitutional change. Since the constitutional order is being renegotiated and reinterpreted

[21] James Mallory, "The Pattern of the Constitution," in *Essential Readings in Canadian Constitutional Politics*, Christian Leuprecht and Peter Russell, eds. (Toronto: University of Toronto Press, 2011): 7.
[22] Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: Toronto University Press, 2004): 265.

through various citizen interactions,[23] the relationship between citizens and the state is also in a state of contestation and ambiguity. Indeed, when citizens mobilize themselves and their knowledge to effectively pursue constitutional change, they often appeal to the institutions that have the strongest stake in interpreting and protecting parts of the constitution that is under dispute. There is a multiplicity of individual citizens and citizen groups with their own distinct set of knowledge and understanding of the constitutional order. The same complexity and multiplicity exists among institutions that are responsible for interpreting Canada's constitution. The constellation of institutions responsible for interpreting and upholding the constitution reflects the different approaches required for a holistic understanding of constitutional relationships. For instance, both a political and legal approach to interpreting the constitution upholds and respects the transformative nature of the constitution. The "living tree" doctrine outlines a model of constitutional interpretation in which the legal principles apparent in Canada's Constitution should be treated in ways that accommodate for necessary adjustments according to contemporary political realities.[24] As such, both legal and political considerations must reach a degree of congruence to make modifications to the constitutional order in a manner that reflects the constitution's growing and evolutionary nature.

The tradition for incremental constitutional adaption and evolution is arguably the only mechanism for constitutional change given the seemingly insurmountable barriers to formal constitutional amendment found in the *Constitution Act, 1982*. According to the amending formula, most constitutional amendments require securing a majority of votes in the two houses of the federal Parliament, as well as a majority of votes in seven out of ten provincial parliaments

[23] James Tully, "Introduction," in *Multinational Democracies*, Alain-G. Gagnon and James Tully, eds. (Cambridge: Cambridge University Press, 2001): 21.

[24] *Edwards v. Canada (Attorney General)* [1930] A.C. 124 at page 136.

representing at least fifty percent of the population.[25] In some instances of formal amendments, such as changing the offices of the Queen, Governor General, and the formula itself, a unanimous vote is required by both houses of the federal Parliament as well as all of the provincial parliaments.[26] Additionally, amendments to the constitutional provisions relating to Aboriginal peoples, such as Class 24 of section 91 of the *Constitution Act, 1867*, s. 25, and s. 35, requires a constitutional conference involving negotiations between the Prime Minister, the first ministers of the provinces, and Aboriginal leaders.[27]

Attempts at formal constitutional change, such as the Meech Lake Accord and the Charlottetown Accord, have failed under these stringent criteria. Although the amending formula should exhibit some rigidity to balance the processes of constitutional evolution,[28] the experiences of Meech Lake and Charlottetown demonstrate the difficulty of constructively assessing the constitutional claims of different peoples in formal institutional processes. The intergovernmental approach used in Meech Lake was rejected by Canadians because it appeared that executive processes were unilaterally changing citizens' constitutional rights.[29] The referendum used to determine the ratification of the Charlottetown Accord also did not yield constitutional reform because citizens felt their diverse constitutional interests were endangered by other citizens' constitutional demands.[30] After the fatigue of failing to implement constitutional reform, an incremental approach to constitutional change has been the status quo in Canadian constitutional politics.

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[25] *Constitution Act, 1982*, Part V, sec. 38, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[26] *Constitution Act, 1982*, Part V, sec. 41, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[27] *Constitution Act, 1982*, Part V, sec. 35.1, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[28] Nathalie Behnke and Arthur Benz, "The Politics of Constitutional Change between Reform and Evolution," *Publius* 39, no. 2 (2009): 219.
[29] Dominique Leydet, "Compromise and Public Debate in Processes of Constitutional Reform: The Canadian Case," *Social Science Information* 43, no. 2 (June 2004): 235.
[30] Simone Chambers, "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis," *Politics and Society* 26, no.1 (March 1998): 159-60.

Indigenous-settler constitutional relationships are a distinct relationship that is contested among citizens as well as between citizens and institutions. Like the entire Canadian constitutional order, Indigenous-settler relationships are also expressed through several different constitutional documents. However, the origin of Indigenous-settler constitutional relationships preceded the assertion of Crown sovereignty over Canada. Indigenous-settler constitutional relationships arguably came into fruition from economic compacts. These pacts were between Indigenous nations and fur traders from European trading companies. Companies like the Hudson's Bay created company Charters that outlined rights to access the lands and its resources in Canada. However, despite the existence of these Charters, European fur traders had to respect Indigenous trading protocols for the fur trade to be a commercial success.[31] European fur traders became adept at participating in Indigenous trade and diplomacy. Although a close relationship emerged on the basis of promoting beneficial economic transactions, the two parties had a different understanding of the significance of the trading relationship. For Europeans, accommodating and participating in Indigenous trade protocols was a necessary step to achieving commercial success. Conversely, Indigenous nations treated the participation of the European fur traders as representing a willingness to establish a familial relationship; a familial tie was assumed because trade only occurred between Indigenous nations when peace and complementary interests could be guaranteed.[32] For Indigenous nations, a relationship between families expressed through trading set the context for future expectations regarding appropriate dealing with European fur traders, and subsequently European settlers. At least for the Indigenous nations, the first economic compacts influence standards of a just Indigenous-settler constitutional relationship.

[31] J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009): 12-3.
[32] Ibid., 7-8.

When New France became British territory under the Treaty of Paris, King George III issued the Royal Proclamation on October 7, 1763. The Proclamation explicitly established a new constitutional framework for the relationship between Indigenous peoples and settlers. The British administration was weary of potential conflict between Indigenous communities and settlers who were fraudulently taking Indigenous lands. *The Royal Proclamation, 1763*, states that Indigenous lands "should not be molested or disturbed" if they were not explicitly ceded to the British Crown.[33] As such, lands that were not purchased by the Crown "are reserved to [Indigenous peoples]".[34] Furthermore, only the British Crown could purchase land from Indigenous peoples, thus protecting Indigenous communities from predatory land purchases from third parties. However, this constitutional framework assumed that the British Crown held sovereignty over the lands, even if the Proclamation acknowledges the existence of Aboriginal title.[35] Indeed, the British Crown respected Indigenous peoples' use and occupation of the land, even if that land was broadly treated as Britain's "dominion".[36] Despite the contestation regarding which party held sovereignty over the land, both the British and Indigenous nations understood a direct constitutional relationship would be the context for future dealings and interactions. Accordingly, the Proclamation provided the framework for the historic treaties between specific Indigenous nations and the Crown because an explicit constitutional relationship was articulated and affirmed. For Indigenous nations who did not sign historic treaties with the Crown, they argue that the Proclamation stands as evidence that those nations and their lands should remain unmolested by

[33] *The Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1 [Royal Proclamation]: 5.
[34] Ibid.
[35] Thomas Isaac, *Aboriginal Law: Commentary and Analysis* (Saskatoon: Purich Publishing Limited, 2012): 68.
[36] *The Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1 [Royal Proclamation]: 5.

the Canadian government. *The Royal Proclamation* is also currently recognized as part of Canada's constitutional heritage.[37]

As more settlers took residence in the Canadian colonies, different practices and interpretations of treaty making with Indigenous peoples emerged.[38] The different procedures and interpretations of treaty making that did not always respect the solemn constitutional relationship outlined in the Proclamation add to the complexity of Indigenous-settler relationships that was apparent since the economic compacts with European fur traders. Like the fur traders who acted out of necessity for their trading interests, the treaties were hastily arranged according to the economic interests of European settlers.[39] The treaty commissioners would often make oral promises to Indigenous nations that differed greatly from the written treaties. This difference occurred because treaty commissioners were pressured to secure agreements; as such, they made promises to protect Indigenous ways of living, while presenting documents to sign that interfered with Indigenous peoples' livelihoods.[40] In other instances, the Crown did not negotiate treaties in good faith, and consequently failed to meet the terms outlined in treaties. Although Canada does not recognize the historic treaties as representing a relationship with separate sovereign nations similar to international contexts,[41] Indigenous nations maintain that they have a distinct nation-to-nation relationship characterized by non-interference, or want to be treated as equal partners in the preservation of Canada.[42]

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[37] Thomas Isaac, *Aboriginal Law: Commentary and Analysis*, 68.
[38] Peter Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005): 44-5.
[39] J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*, 221.
[40] Ibid.
[41] *R. v. Sioui* [1990] 1 S.C.R. 1025 at pg. 19.
[42] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010): 27.

The historic treaties perpetuate the tensions within Indigenous-settler relationships. The treaties are recognized as part of Canada's constitutional inheritance, but those very constitutional obligations could be extinguished and infringed by the Crown through federal legislation until 1982.[43] Historic treaties are protected by more stringent constitutional mechanisms after 1982 because Indigenous nations contested and agitated for this constitutional recognition during the federal government's initiative to patriate the Constitution. The dilemma is that Indigenous mobilization for constitutional recognition of their rights is driven by the understanding that they should have always been treated as equal partners. However, the judiciary does not retroactively apply constitutional protections provided by s. 35 on Aboriginal rights that were extinguished prior to 1982; the judiciary states that the *Constitution Act, 1982* does not revive extinguished Aboriginal rights.[44] The judiciary's decision to deny the application of current constitutional protections to previous decisions promotes legal consistency, but at the cost of disregarding the continuing different interpretations of Indigenous-settler relationships. The transformative potential of the constitutional protections in 1982 is severely limited if those new protections do not address how Indigenous perspectives contested the dominant understanding of a just constitutional relationship long before 1982. Canadian institutions may not be adequately addressing Indigenous constitutional expectations if they do not consider how past Crown actions were also contrary to Indigenous visions of a just constitutional order. Instead, determining whether historic treaties are constitutionally valid is a matter of discerning if the terms of extinguishment or infringement is achieved before or after 1982. However, this seemingly straightforward process obscures how the historic treaties themselves are sites of constitutional contention. As such, following different

[43] Thomas Isaac, *Aboriginal Law: Commentary and Analysis,* 124.
[44] *R. v. Sparrow* [1990] 1 S.C.R. 1075 at page 1091.

criteria of extinguishment according to a timeline of different constitutional processes may inadequately address different interpretations of how to respect historic treaties.

The *Constitution Act, 1982* represents a constitutional turning point for Indigenous nations, as well as other citizen groups in Canada. In s. 35 of the *Constitution Act, 1982,* Aboriginal rights were recognized and affirmed, which included the rights of Indian, Inuit, and Métis peoples.[45] This recognition did not articulate or create the characteristics of Aboriginal rights, indicating that institutions and citizens would be responsible for negotiating the nature and scope of those rights. Instead, s. 35 constitutionalized the recognition that Aboriginal rights exist under the common law. Section 35 also entrenched historic treaties and the *Royal Proclamation, 1763* into Canada's constitutional order. Indeed, s. 35 explicitly entrenches many aspects of Indigenous-Crown relations that were previously expressed in statutes. Furthermore, s. 35 is interpreted as a constitutional mechanism that underpins an obligation between the Crown and Indigenous nations to reconcile their interests.[46] Past Indigenous-settler constitutional relationships are explicitly entrenched and recognized, as well as an obligation to negotiate and pursue new constitutional relationships grounded in reconciliation and fairness. These dimensions of Indigenous-Crown relations also inform broader Indigenous-settler constitutional relationships because the rights and expectations outlined in the Constitution guide and inform Indigenous-settler interactions.

The constitutional recognition and affirmation of Aboriginal rights in 1982 was a product of political mobilization and activism. The judiciary interprets the constitutional obligations protected by s. 35. In the 1997 landmark case *Delgamuukw*, the Supreme Court of Canada (SCC) stated that the purpose of s. 35 is to promote reconciliation between the fact that Indigenous

[45] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[46] *Delgamuukw v. Attorney-General of British Columbia* [1997] 3 S.C.R. 1010 at para. 186.

peoples existed and lived on the same land that the Crown asserts its sovereignty.[47] Consequently, Indigenous peoples must prove that they used and occupied the land before the assertion of Crown sovereignty in order to claim Aboriginal title; this land use must have also been exclusive and show continuity.[48] Moreover, if Indigenous peoples want to protect particular site-specific practices or customs as Aboriginal rights, they must prove that those traditions are integral to their distinctive culture.[49] Aboriginal title is considered by the judiciary as a specific kind of Aboriginal right, even though securing title does not require proving that the Indigenous nation used the land for culturally distinctive purposes.[50] Section 35 provides the framework by which Indigenous peoples can make claims for Aboriginal title and rights. However, the judiciary's interpretation of s. 35 also indicates that the need to reconcile Indigenous occupation of the land prior to Crown sovereignty with the existence of the Canadian state guides the spirit of Indigenous-settler constitutional relationships. Indeed, the ways in which s. 35 influences the processes that engage both Indigenous peoples and the Crown will determine how Indigenous-settler constitutional relationships will evolve.

A particularly pertinent aspect of Indigenous-Crown relations that is affecting Indigenous-settler relationships is the Crown's duty to consult. Canada's economic interests in resource extraction and development are powerful motivations for the government to directly confront the nature and scope of the Crown's duty to consult. The duty is an extension of the Crown's fiduciary obligation towards Indigenous peoples, in which the Crown must act in the interests of Indigenous peoples.[51] The SCC stated that this obligation represents a relationship of trust rather than between

[47] *Delgamuukw v. Attorney-General of British Columbia* [1997] 3 S.C.R. 1010 at 1016.
[48] Ibid., at para. 143.
[49] Ibid., 1016.
[50] Ibid., at para. 111.
[51] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People," *Alberta Law Review* 41, no. 1 (2003-2004): 52-3.

adversaries.[52] Consequently, the parties in a relationship grounded in trust govern their behaviour on standards of honour and fair dealing.[53] The duty is triggered when Crown actions may adversely affect Aboriginal rights or title, even if those rights are undergoing processes of negotiation.[54] Depending on the nature of the Crown's infringement of Aboriginal rights, the Crown may also be obligated to accommodate Indigenous interests through acts such as compensation.[55] The SCC also ruled that the degree to which the Crown honours its duty to consult is contingent on the strength of the Aboriginal rights or rights claim, and the extent of the proposed Crown infringement on those rights or rights claims.[56] As such, each situation may entail different requirements for fulfilling the duty.

The duty to consult is a significant feature of Aboriginal rights because it acts as a mechanism to reconcile Indigenous and non-Indigenous interests. The duty has the potential to protect Aboriginal rights in changing social contexts because consultation must occur when the Crown's actions may adversely affect those rights. Indigenous peoples do not hold a veto to prevent the advancement of Crown proposals or decisions. Nevertheless, consultation can prompt the Crown and Indigenous nations to negotiate a new constitutional relationship, which involves providing the opportunity to articulate the different constitutional expectations between Indigenous and non-Indigenous peoples. As one dimension of respecting s. 35, the duty can be the mechanism to address past constitutional misunderstandings; addressing past injustices would strengthen and create a relationship of trust between Indigenous and non-Indigenous peoples; such a relationship of trust allows each party to set the terms and protocols for how Indigenous interests

[52] *R. v. Sparrow* [1990] 1 S.C.R. 1075 at page 1108.
[53] *Delgamuukw v. Attorney-General of British Columbia* [1997] 3 S.C.R. 1010 at page 1019.
[54] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 37.
[55] Ibid., at para. 49.
[56] Ibid., at para. 39.

are treated alongside Canadian interests. As such, the duty could necessitate processes so that each party can come forward with suggestions on how to best respect rights for all peoples. Because s. 35 does not explicitly articulate the nature and scope of Aboriginal rights, the duty to consult becomes the process by which Indigenous and non-Indigenous parties can begin a conversation regarding when and how Aboriginal rights are implicated in government decision-making. Consequently, the duty to consult requires thorough examination to understand how the Canadian government understands its obligations towards Indigenous nations.

CHAPTER 3

The Canadian Institutional System

The nature of Canada's constitutional order produces different interpretations of the constitution between Indigenous and non-Indigenous peoples. The institutions responsible for interpreting the constitution must adjust accordingly to address those different interpretations. Indigenous-settler relationships undergo this adjustment by the ways in which institutions react to changing social expectations. Section 35 demonstrates the need for both judicial and political institutions to honour Crown obligations to Indigenous peoples. The judiciary has interpreted s. 35 as providing a legal framework for Indigenous peoples to make rights claims. Conversely, the government has a duty to negotiate with Indigenous peoples in order to reach a mutually acceptable constitutional partnership. These two responsibilities of upholding a clear legal framework to guide Indigenous rights claims and the government's obligation to maintain meaningful interactions with Indigenous peoples is meant to achieve the reconciliation and rights protection outlined in s. 35. As such, it is necessary for the judiciary and the government to treat Indigenous constitutional

demands with consistency and clarity within their respective spheres of influence. Otherwise, major disagreements between institutions on basic expectations regarding the nature of appropriate Indigenous-Crown relations will cause all parties to act in a state of political and legal uncertainty. A lack of consistency may produce unpredictable responses from both Indigenous peoples and institutions that are detrimental to the protection of constitutional rights. Institutions attempt to express s. 35 rights, such as the duty to consult, through policy-making and the formulation of legal norms. Indeed, the Crown's duty to consult provides a useful approach to evaluating how institutions work together, albeit in volatile ways, to interpret Indigenous-settler constitutional obligations.

Theories of Institutional Change

A historical institutional approach to understanding how institutions change in reaction to societal pressures is useful for demonstrating how the unfolding of particular events[57] shape institutions' decisions and interests. The model operates on the assumption that certain historical events present institutions with a set of decisions; once a decision is taken, the institution's trajectory of existence is dependent on the path it chose in that initial decision.[58] Thus, institutions are a product of the historical events that triggered certain actions to be taken. Besides the path dependency nature of historical institutionalism, the theory also includes the role of critical junctures. Critical junctures are moments in which drastic or fundamental institutional change is possible, because the available decisions have never been presented before this event occurred;

[57] Paul Pierson and Theda Skocpol, "Historical Institutionalism in Contemporary Political Science," in *Political Science: The State of the Discipline*, eds. Ira Katznelson and Helen V. Milner (New York: W.W. Norton & Company Inc., 2002): 702.
[58] Ibid.

when a decision is taken, the previously available alternatives are closed.[59] In effect, critical junctures have the ability to completely change the trajectory of an institution. These moments are relatively rare because apart from those instances of momentous change, institutions otherwise operate in a stable equilibrium.[60] As such, critical junctures punctuate institutional equilibrium to instigate institutional change. Once the juncture is closed, the equilibrium is restored and the institution is considered stable. The historical institutional model explains how specific historical events act as catalysts that perpetuate the current contestation between actors and institutions regarding the nature of Indigenous-settler constitutional relationships. Past sequences of events also influence which avenues are available for triggering institutional change. The nature and scope of institutional constraints that act as barriers to renegotiating a new relationship are influenced by historical precedents. Indeed, historical institutionalism offers a comprehensive understanding to how Indigenous-settler relationships are often mired by conflicting interpretations, in both the past and present.

Historical institutionalism's model of path dependency is a useful way to analyze the evolution of Indigenous-settler relationships, and to attempt to predict how it will continue to evolve. Although institutions are often treated as stable, self-perpetuating entities, they are actually in a constant state of change. The institutions must decide on several factors that make up their existence, such as how to redistribute goods and power, what their appropriate roles are, and what guidelines or interpretations they should use to perform their tasks; indeed, all of these functions are connected and are the subject of ongoing contestation and reinterpretation.[61] Institutions appear

[59] Giovanni Capoccia and Daniel Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism," *World Politics* 59, no. 3 (April 2007): 342.
[60] Ibid., 345.
[61] James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, eds. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010): 10-11.

stable because they are able to garner a consistent coalition that supports their actions and decisions.[62] This coalition is always shifting, so it is important that institutions make decisions that can sustain support to keep the institution meaningful. That is not to say that all institutions exist solely to satisfy the interests of enough individuals for support; rather, institutions attempt to act as faithfully within their respective roles as society's expectations allow. As long as institutions' roles and decisions are regarded as meaningful and legitimate, institutions will continue to exist. However, making legitimate decisions requires institutions to be open to the possibility of adjusting their behaviour. These adjustments can resemble different aspects of institutional change that allow for the coalition of supporters to recognize the institution.

The punctuated equilibrium model does not portray or evaluate the ways in which institutions react to shifting narratives of Indigenous-settler relationships in all instances. The punctuated equilibrium theory emphasizes moments in history in which institutions recognized Indigenous rights that was contrary to the previous equilibrium when those rights were not articulated or recognized. An example of institutional equilibrium could be when Aboriginal title was not yet recognized. The Judicial Committee of the Privy Council dismissed the idea that Indigenous peoples held title to land. Instead, the JCPC stated that Indigenous peoples occupied land based on a usufructuary right.[63] Thus, the Crown was perceived as owning all lands, while allowing Indigenous people to occupy land. This decision supported the Canadian government's assimilationist policies under the *Indian Act* because Indigenous peoples had no legal recourse to assert their autonomy. Furthermore, the White Paper was introduced in 1969, which was an assimilationist policy that would effectively eliminate Indigenous peoples' legal distinction from

[62] Ibid., 8-9.
[63] *St. Catherines Milling v. The Queen* [1888] UKPC 70, 14 App Cas 46 at para. 5b.

Canadians. A possible critical juncture that disrupted the equilibrium between the judiciary and government's treatment of Indigenous peoples was the recognition of Aboriginal title. The SCC decided in the *Calder* case that Aboriginal title existed prior to Crown sovereignty.[64] After this critical juncture occurred, a new equilibrium was established in which Indigenous peoples gained more legal protection for their occupation and use of the land. Then the equilibrium model would assume that each subsequent decision in which state institutions recognize Indigenous perspectives of a just constitutional relationship would lead to a new equilibrium that is more accommodating to Indigenous constitutional demands.

Despite the punctuated equilibrium model's ability to provide some narratives of institutional change, this model does not account for several institutional decisions that shape current Indigenous-settler interactions. There is an assumption that when a critical juncture is present, an institution will undergo fundamental institutional change that will radically change its previous trajectory of actions and behaviours. The Indigenous-settler case demonstrates otherwise. The institutions responsible for interpreting the constitution have not always acted on chances to radically change status quo understandings of constitutional obligations. The most noteworthy example is the failure of the government to enact reforms in accordance with provisions in the 1996 Report of the Royal Commission on Aboriginal Peoples. This Royal Commission was initiated in 1991 to address the tensions and dissatisfaction of Indigenous peoples. Indeed, the Royal Commission began its mandate after incidences of violence between Indigenous and non-Indigenous communities took place, such as the Oka Crisis. The final report had recommendations that, if implemented, would have made sweeping changes to the ways in which government treated Indigenous peoples. Instead, despite Indigenous peoples' support for the report, the government

[64] *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313 at page 316.

did not implement the broad reforms and instead opted to address the status of Indigenous rights through a piecemeal approach. The judiciary's landmark decision in *Delgamuukw* was another critical juncture that created the impetus for the government to engage with Indigenous peoples to form a new constitutional relationship. Nevertheless, the legal obligation outlined by the judiciary was still met with governmental inertia on formulating a grand constitutional framework for future relations. The government's unwillingness to implement broad reforms in favour of addressing Indigenous demands on a policy-by-policy basis indicates that critical junctures are not the mechanism of institutional change that affects Indigenous-settler relationships.

Instead, the theory that institutions are always in a state of adjustment and incremental change provides an additional explanation for the institutional tension resulting from contestation between Indigenous and non-Indigenous peoples. According to this theory, institutions are always adjusting themselves to maintain legitimacy, and they do undergo drastic changes when those incremental adjustments accumulate to a critical level. Indeed, the incremental changes may appear insignificant until they attain a critical mass in which transformative processes occur.[65] Consequently, the events that lead to the moments in which drastic institutional change is possible is more significant than the timing of the event that tipped the balance to cause the change.[66] In the case of Indigenous-settler relationships, a model of gradual institutional change that culminates in more fundamental institutional shifts is an additional interpretation of past events and subsequent decision-making. In the case of the Royal Commission in 1996, punctuated equilibrium theory would assume that the report itself constitutes the critical juncture because the recommendations present many options for institutional change that was previously inconceivable.

[65] Paul Pierson and Theda Skocpol, "Historical Institutionalism in Contemporary Political Science," 703.
[66] Ibid.

However, the government maintained the constitutional status quo, regardless of the level of dissatisfaction among Indigenous nations. Indeed, the decision to not implement the report's recommendations led to further instability between Indigenous and non-Indigenous peoples, which has repercussions for the institutions responsible for addressing that relationship. As such, those institutions most likely experienced instability reflective of mounting Indigenous-settler tension rather than a state of institutional equilibrium.

Conversely, the gradual institutional change model would place attention on the Oka Crisis as representative of Indigenous-settler tensions regarding constitutional obligations. The Oka Crisis occurred when the Quebec government wanted to expand a golf course onto Mohawk burial grounds. The land in which the government was encroaching was the site of disputed land grants dating back before Confederation. Moreover, Indigenous peoples already felt slighted by the absence of their participation during the drafting of the Meech Lake Accord, an Accord which included a series of constitutional amendments that also disregarded Indigenous concerns. Although the situation of disputed land was not a new phenomenon, it was another instance of a similar story in which the government fails to uphold past agreements, and no progress is made to reopen past land disputes.[67] The disagreement in Oka was the tipping point in which the dispute became a genuine crisis. The accumulation of similar grievances from Indigenous communities and the repercussions of those grievances were made apparent in the Oka Crisis. Indeed, the level of crisis in the relationship between Indigenous and non-Indigenous peoples was the underlying reason for initiating the Royal Commission in 1991.[68] According to the gradual institutional change model, a state of equilibrium was not present before a rare moment of institutional change

[67] Peter Russell, "Oka to Ipperwash: The Necessity of Flashpoint Events," in *This is an Honour Song: Twenty Years since the Blockades*, Leanne Simpson and Kiera L. Ladner, eds. (Winnipeg: Arbeiter Ring Publishing, 2010): 29.
[68] Ibid., 39.

was made available. A model of gradual change interprets crisis situations as the product of a series of gradual tensions that accumulate over time. As such, previous conflicts influence the alternative paths for institutional decision-making that are made available in crisis situations. In the case of the Oka Crisis, the government chose to re-evaluate its treatment of Indigenous peoples through a Royal Commission, rather than recognize the sovereignty of the Mohawk peoples. The aftermath of the crisis demonstrates how several options became open after the crisis, some of which would have ushered more fundamental institutional changes than others. Nevertheless, the decision to create a Royal Commission on the status of Indigenous peoples was a distinct departure from the status quo.

The punctuated equilibrium theory emphasizes the institutional decisions made during the critical juncture because that decision may dramatically alter the trajectory of the institution's status quo, or equilibrium. The gradual institutional change model directs attention to the ways in which incremental changes to external pressures may lead to moments of fundamental change. As a result, these two approaches to institutional change can point to different, but equally significant, factors of institutional change. However, the gradual institutional change model more explicitly considers the ways in which systems of institutions can themselves be sites of tension as institutions address the pressure of adapting to societal expectations. The perspective of understanding institutions as sites of tension helps detect nuanced interactions between institutions and external pressures. The individual perspectives of each institution responsible for interpreting the constitution may not complement other institutions' positions. Since institutions are products of a series of adjustments and compromises made over time to secure coalitional support, those

past decisions form "layers" built into the institution.[69] Institutions are rarely able to completely eliminate past roles and behaviours, so those past layers exist alongside an institution's new functions and actions. These layers, although they are part of an institution's self-understanding, often persist in dysfunctional ways because they are products of past events and situations that may not be relevant to contemporary contexts.[70] The internal contradictions within institutions elevate the need for incremental change, as those adjustments help institutions operate consistently and predictably. However, it is inevitable that some vestiges of past behaviours remain, because incremental change involves only adjusting actions that are overtly incompatible with societal expectations. For instance, the judiciary and the government recognize the duty of the Crown to establish a new constitutional relationship with Indigenous peoples. There is some consensus regarding the inadequacy of Indigenous peoples' current status quo position in Canadian society. For the judiciary, this perspective is layered overtop the perception that Crown sovereignty cannot be contested, which appears to severely limit the possibility of a new constitutional relationship. Conversely, the government's privileging of majority perspectives also limits the possibility of accommodating a new constitutional relationship that is contrary to electoral, and thus majority, interests. As a result, the institutional system must make decisions that reconcile their own internal interests with the demands from external forces.

Each institution responsible for interpreting constitutional relationships, the judiciary and the government, must confront their own internal contradictions while addressing contested relationships between citizens. How these institutions address Indigenous-settler relations reveals the types of barriers institutions themselves erect that exacerbate the difficulty of recognizing

[69] Robert Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96, no. 4 (2002): 702.
[70] Ibid.

different approaches to a just constitutional relationship. For example, Canada's judiciary, most notably the SCC, acknowledges that when s. 35 is invoked, Aboriginal rights and title must be interpreted in a liberal manner.[71] A broad and expansive interpretation of s. 35 allows Indigenous peoples to exercise their communal rights as a foundation for rebuilding their capacity to function as contemporary societies. In cases that have broader implications for Indigenous-settler relations, the judiciary recommends negotiations outside of litigation as the best process to secure meaningful outcomes. The judiciary's decisions are meant to reinforce the obligation to recognize Indigenous peoples' pre-existence prior to Crown sovereignty.[72] However, judicial decisions do not articulate standards of proper protocols when addressing Indigenous constitutional demands in instances of government policy-making outside the parameters of a specific dispute. This refusal prevents the judiciary from meaningfully enforcing the constitution, which is the role of the judiciary.

The Canadian government also does not clarify the parameters of just dealings with Indigenous peoples because of its own institutional constraints. The government prioritizes policies that will generate electoral success. Similar to the context of the historic treaties, the government engages with Indigenous peoples' political demands when the interests of non-Indigenous peoples are also at stake.[73] However, selectively addressing Indigenous peoples' constitutional demands based on non-Indigenous interests fails to uphold the Crown's fiduciary relationship with Indigenous peoples. A relationship of trust cannot emerge when political support and resources are mobilized to benefit Indigenous peoples as a peripheral consequence from privileging non-Indigenous interests. The government's agenda is also affected by the governing

[71] *R. v. Sparrow* [1990] 1 S.C.R. 1075 at page 1077.
[72] *Delgamuukw v. Attorney-General of British Columbia* [1997] 3 S.C.R. 1010 at para. 186.
[73] J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada*, 221.

party in power, as each party has different visions of a just constitutional relationship. Although an underlying obligation to uphold the honour of the Crown when dealing with Indigenous peoples always exists, each government may have a different approach to honouring that obligation. It may be difficult to engage in long-term constitutional negotiations or policy planning if successive governments can undo those initiatives. For example, former Liberal Prime Minister Paul Martin negotiated the Kelowna Accord, a set of policy initiatives designed to improve the lives of Indigenous peoples by pledging to commit almost 5.1 billion dollars of government spending over the course of five years.[74] The Accord was a partnership between the government, Premiers, and Indigenous leaders. However, the Accord was completely abandoned by Martin's successor, Stephen Harper.[75] The failure of the Kelowna Accord demonstrates that it may be difficult for the government to uphold its obligations to Indigenous peoples in a consistent manner, despite having the government's constitutional honour at stake.

The government may be acting consistently under the incentive structures of an elected position, but Indigenous peoples' interests will not be adequately considered under a majoritarian model of decision-making. Many other minority groups face the same discrimination under a majoritarian model, but some constitutionally-protected identity groups receive decision-making influence outside the realm of elected offices. For instance, the Senate is meant to represent regional interests, and French-Canadian legal interests receive guaranteed representation in the SCC. These offices that accommodate minority interests exist because of the acceptance that those interests must be constitutionally protected. Indigenous interests and rights are also constitutionally protected, but they are not mandated to take part in Canadian institutions outside

[74] Lisa Patterson, *Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005*, [Canada], Political and Social Affairs Division (4 May 2006): 8.
[75] Chris Hall, "Stephen Harper, First Nations and an opportunity lost," *CBC News*, January 11, 2013.

of elected offices. It is the responsibility of government to uphold constitutional obligations alongside pursing electoral success. If the government cannot properly uphold constitutional obligations through policy-making alone due to electoral constraints, the government can alter existing institutional systems to recognize new interests. However, the process of formal institutional change follows the requirements of the amending formula. As such, a majority vote in Parliament and seven out of ten provinces representing at least fifty percent of the population are required, which is advantageous to the dominant perspectives in decision-making. Even the compositions of institutions that can protect minority interests are determined by the will of the majority. Although it is not wholly the government's decision to produce an amending formula that privileges majorities, its effects create an impasse regarding how the government can uphold its responsibilities to different peoples. The government now operates with dysfunction because there is little incentive to address the constitutional obligations of minorities. Similar to the judiciary, the government inadequately balances the interests of the majority with a constitutionally-protected minority, resulting in the perception among Indigenous peoples that government is an obstacle to reaching their constitutional demands, rather than a partner.

In an institutional system, such as the constellation of institutions responsible for interpreting and protecting the constitutional order, each individual institution acts, to a degree, contradictorily. The judiciary decides how s. 35 is respected, but does not articulate standards of fair dealing between Indigenous peoples and the Crown outside the parameters of a specific legal challenge. The federal government eschews its responsibility to protect minority constitutional demands despite previously experiencing how other processes of constitutional reform, such as formal constitutional amendment, present insurmountable barriers to achieving reform. Consequently, different institutions contending with their own contradictory behaviour will not

likely act coherently with other institutions struggling with the same internal disorder.[76] In effect, the constellation of different institutions that attempt to operate concurrently may also present tensions between each institution within the constellation. In instances in which different institutions must act cohesively to produce a stable outcome, it is reasonable to understand how institutional decisions can lead to more contradictions and instability than equilibrium. Furthermore, institutions make decisions that are bound by path dependency, in which alternative decisions are contingent on the sequence of past events.[77] As a result, contradictory or incompatible actions will limit the possibility that future actions can bridge institutional misconfiguration within an institutional system.

Tensions are apparent between Canadian legal and political institutions that are responsible for constitutional interpretation and protection. The potential for tension is somewhat inevitable, as each institution understands Indigenous peoples' contestation of their constitutional status according to their specific boundaries and responsibilities. The judiciary avoids articulating robust criteria to properly address Indigenous rights claims, and instead asserts that political negotiations alone will produce more meaningful results. Without providing standards or protocols to determine proper dealing with Indigenous peoples, the judiciary has no oversight mechanism to force political negotiations to occur. Without oversight mechanisms, the government is free to pursue their own policy mandates with the exception of instances in which the judiciary directly reverses or rejects government behaviour. Nevertheless, even without robust criteria of constraints, judicial decisions place significant conditions upon government objectives. The government typically does not want to engage in litigation because it obstructs the government from wholly implementing its

[76] Robert Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," 702.
[77] Andrew Bennett and Colin Elman, "Complex Causal Relations and Case Study Methods: The Example of Path Dependence," *Political Analysis* 14, no. 3 (2006): 252.

policy preferences. During litigation, the government does not defend its position by stating that violating their Crown obligations is a part of their mandate; rather, the government often asserts that their initiatives sufficiently honour Indigenous interests. As a result, tension exists between the judiciary and the government's interpretation of how the government must meet its obligations when dealing with Indigenous peoples.

Case Study Examination of Institutional Change

Since gradual institutional change best exemplifies how institutions address Indigenous-settler relations, institutional tension must also be an observable characteristic of those institutions' interaction with one another. A prominent source of tension occurs when one institution's adjustment to address contestation towards Indigenous-settler relations does not properly address another institution's expectations or behaviour. The evolution of the duty to consult demonstrates how the judiciary and government both assert their interpretations of the duty, while attempting to maintain consistency across institutions to uphold the Crown's honour. The different interpretations emerge incrementally as the duty to consult simultaneously evolves into an independent sphere of Aboriginal law. Analyzing case law pertaining to the duty to consult and the government's consultation policy framework will demonstrate if inter-institutional tension is the outcome of institutions' imperfect reactions to contestation regarding Indigenous-settler constitutional relationships.

Only case law at the SCC level will be analyzed because those decisions, since they cannot be appealed, directly inform the government's legal obligations towards Indigenous peoples. As such, SCC decisions set the final legal parameters for just dealings with Indigenous peoples. Cases selected for analysis are those that set the major criteria and boundaries regarding how the duty to

consult can be fulfilled. Other companion cases may be briefly referenced, but they will not be the focus of the discussion because they do not act as the central guidelines that indicate how the judiciary understands the duty to consult.

Analyzing the government's consultation policy framework will discern the government's approach to the duty to consult. The policy will reveal how the government decides to uphold its legal obligations, and if the government has chosen to emphasize or de-emphasize elements of the SCC rulings to promote a separate vision of honouring the duty to consult. Only the federal consultation policy will be analyzed, although each province has established its own framework. For the scope of this research, the federal government's approach to consultation is a good standard to determine the general consensus regarding how governing institutions uphold the duty to consult.

Case Law

When the duty to consult was articulated in *Delgamuukw*, the decision stated that upholding the duty was contingent on the context of the situation; as such, the duty to protect Indigenous interests fell on a spectrum depending on the severity of the Crown's infringement and the Indigenous right.[78] The SCC outlined some parameters to the spectrum of consultation, from stating the Crown's obligation to involve Indigenous perspectives in decision-making, to requiring "full consent" from Indigenous peoples.[79] The spectrum outlined in *Delgamuukw* reveals that since full consent may be required from Indigenous peoples, Indigenous peoples may, in effect, hold a

[78] *Delgamuukw v. Attorney-General of British Columbia* [1997] 3 S.C.R. 1010 at para. 168.
[79] Ibid.

veto over Crown decisions. However, the SCC was mostly concerned with consultation in the context of infringing on proven Aboriginal title.[80]

In the 2004 case *Haida Nation,* the next SCC level case to explicitly deal with questions of the duty to consult, the justices interpreted the consultation spectrum in a manner that could be perceived as closing the possibility of a veto for Indigenous peoples. In *Haida Nation*, the case dealt with the question of whether Indigenous rights claims, rather than proven rights, could trigger the duty to consult. The SCC ruled that the duty was maintained because exploiting resources or land the Indigenous claimant is seeking protection for violates the honour of the Crown; indeed, benefiting from disputed resources prevents the Indigenous claimant from using those resources if their rights are recognized.[81] In effect, the SCC rejected the government's actions, and outlined another context in which government must respect constitutional obligations to Indigenous peoples.

The SCC detailed some suggestions of appropriate consultation by using a spectrum model. The higher end of the consultative spectrum included "the opportunity [for Aboriginal peoples] to make submissions for consideration, [Aboriginal peoples'] formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[82] A high level of consultation is triggered when the Indigenous rights claim is strong, the potential infringement of those rights by the Crown is significant to Indigenous peoples, and the risk of non-compensable damage is also high.[83] The SCC's spectrum of adequate consultation was also used to resolve the dispute in *Taku River*, in which the SCC employed their criteria set out in *Haida Nation* to assert that the Tlingit

[80] Thomas Isaac, *Aboriginal Law: Commentary and Analysis,* 327.
[81] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 27.
[82] Ibid., at para. 44.
[83] Ibid.

peoples were indeed adequately consulted.[84] This interpretation of the duty to consult was also extended in 2005 to apply to established treaty rights, since lands and rights that have been settled through treaties must also be consulted to the same degree as prospective title and rights to disputed land.[85] After these landmark decisions, the SCC effectively created a new dimension to existing Aboriginal law,[86] that has since developed further with more specifics regarding the consultative spectrum and when the duty is triggered.

The next major case dealing with the duty to consult did not emerge until 2010. The *Rio Tinto* case addressed the question of whether administrative bodies were capable of fulfilling the Crown's duty to consult, and if historic injustices triggered the duty. The SCC ruled that tribunals cannot enter into consultation with Indigenous communities without an explicit legislative mandate and the necessary resources to provide remedial concessions.[87] As such, the government must provide a mandate with appropriate funding and resources in order for the duty to be fulfilled. However, the SCC admitted that the government could eschew its consultative obligations by establishing tribunals with no mandate to deal with legal questions concerning Indigenous interests.[88] The only remedy the SCC suggested was for the Indigenous community to seek legal protection through litigation.[89] In this case, the SCC is admitting that the government can avoid the duty to consult by limiting the powers of tribunals or administrative bodies, and that only litigation can protect Indigenous interests from this situation.

[84] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 at para. 47.
[85] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 para 35.
[86] Dwight Newman, *Revisting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Limited, 2014): 19.
[87] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650 at para. 60.
[88] Ibid., at para. 62.
[89] Ibid., at para. 63.

This framework does not promote reconciliation, which is one of the purposes of the duty to consult. Instead, this framework demonstrates that the duty to consult does not bind government actions to act honourably before legal challenges are taken. If litigation is the only option Indigenous peoples can ensure the government acts honourably, then Indigenous-Crown relations will be characterized by tension and distrust. *Rio Tinto* establishes the duty to consult as a constitutional principle that undermines the conditions for reconciliation that it seeks to establish.[90] Consequently, the SCC's decision builds into the duty to consult a mechanism that may increase tensions within Indigenous-settler relationships. Furthermore, the SCC's interpretation encourages inter-institutional tension. The SCC states that it is legal for the government to deny consultative capabilities to tribunals; however, should the government choose this legally acceptable alternative, a legal challenge can provoke the judiciary to force the government to act otherwise. Instead, the SCC would be promoting institutional harmony by explicitly stating the government has a legal obligation to provide tribunals with legislative mandates with resources when dealing with Indigenous interests. This requirement would demonstrate that both institutions are committed to honouring the duty to consult, since the duty is upheld by a legal standard at early stages in government decision-making.

Rio Tinto also addresses the question of when the duty is triggered. The Carrier Sekani Tribal Council (CSTC) asserted that they have the right to be consulted on all matters concerning the development of a dam in British Columbia, despite not having been consulted in the initial creation of the dam.[91] The SCC ruled otherwise, stating that only the Crown action under scrutiny is the specific Crown proposal relevant in the case; as such, broader projects that may adversely

[90] Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult," *The Canadian Bar Review* 79 (Feb 2000): 254.
[91] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650 at para. 54.

affect Indigenous interests and rights are not considered as triggering the duty to consult.[92] This ruling closes the possibility of using past injustices to allow Indigenous peoples to prompt consultation for current infringements and violations of their interests. Although this decision could distinguish between honouring the duty to consult and using the duty to replace Aboriginal and treaty rights jurisprudence,[93] the goal of constitutional reconciliation is severely curtailed under the SCC's approach. Denying the use of past injustices to begin a dialogue regarding different expectations between Indigenous nations and settlers limits the possibility for reconciliation. Indeed, reconciliation could have been the constitutional mechanism that promotes institutional harmony between the judiciary and the government when dealing with Indigenous-settler tensions. Under a more robust interpretation of the duty to consult, the judiciary and the government would treat reconciliation as requiring a holistic understanding of injustice. A holistic approach to reconciliation includes addressing the origins of current Indigenous-settler tensions from past constitutional conflicts, such as the treaty relationship that underpins Aboriginal rights. Conversely, the SCC's framework of the duty to consult allows the government to selectively address injustices, which may increase contestation between Indigenous-settler relationships because past actions are not part of discussing reconciliation. The SCC recommends reconciliation outside of litigation, while closing the possibility of using legal obligations to guide alternative visions and processes of reconciliation in the political realm, such as reconciling past actions. This situation demonstrates how institutional decisions may not produce consistent outcomes when those decisions overlap with other institutions' behaviours and actions.

[92] Ibid., at para. 53.
[93] Dwight Newman, *Revisting the Duty to Consult Aboriginal Peoples*, 21.

The 2010 *Little Salmon* case clarified that the duty to consult existed as a constitutional obligation, regardless if modern treaties do not specify the duty's existence.[94] With this ruling, the duty to consult is reiterated as existing alongside the existing general legal framework, such as administrative law.[95] The SCC asserted that although the Crown did indeed meet its consultation obligations,[96] it was the government's mistake to consider the consultation that took place a mere "courtesy" to the Little Salmon Carmacks First Nation (LSCFN).[97] The dispute occurred because the Yukon government approved a land grant that may adversely affect the LSCFN without notifying the Indigenous community of the final decision.[98] Nevertheless, the SCC discerned that the government consulted the LSCFN prior to the decision-making in an adequate manner, but also stated the LSCFN's frustrations and concerns were made in the context of accumulated problems with the Yukon government.[99] The SCC rightly stated that the individual filing the land grant application should not have their application denied because of the distrust between the Yukon government and the LSCFN.[100] Yet, the SCC's cautious approach is not consistent with its robust commitment to promoting reconciliation outside of litigation. The judiciary would not have overstepped its institutional boundary by further stating the government should take the spirit of consultation more seriously in future dealings with the LSCFN. The SCC stated that the duty to consult permeates existing legal principles to guide other specific constitutional expectations between Indigenous and non-Indigenous peoples;[101] based on this premise, it is not inconsistent for the SCC to reiterate the Yukon government's responsibility to maintain good communication

[94] *Beckman v. Little Salmon Carmacks* [2010] 3 S.C.R. 103 at para. 69.
[95] Ibid., at para. 45.
[96] Ibid., at para. 79.
[97] Ibid., at para. 39.
[98] Ibid., 27.
[99] Ibid., 80.
[100] Ibid.
[101] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 41.

and respect for the LSCFN as a part of upholding constitutional responsibilities. Such a statement would confirm that government's duty to consult informs interactions with Indigenous peoples at all stages of political exchanges and decision-making.

The 2013 *Behn v. Moulton Contracting* is the most recent case pertaining to the duty to consult. The case involved individual Indigenous peoples asserting that consultation was not met when the Crown issued logging licenses to a logging company, while the broader Indigenous community complied with the Crown's decision. Consequently, the individual Indigenous peoples erected a blockade that prevented the company from accessing the timber.[102] The SCC left open the possibility that individual Indigenous peoples could claim a duty to consult independent of the larger Indigenous community,[103] but the justices did not explicitly engage with this question. The SCC only clarified that individuals can assert the duty to consult as representatives of the Indigenous community,[104] which was not the situation in the *Behn* case. Moreover, the SCC asserted that the Indigenous individuals were given opportunities to express their concerns regarding the decision to grant logging licenses, but chose to stay silent.[105] Since the Indigenous individuals did not state their positions when they were consulted, creating blockades demonstrated an abuse of process.[106] This decision demonstrates that Indigenous peoples and the Crown are mutually obligated to make good faith efforts to promote meaningful consultation and exchanges.[107]

However, the SCC did not address how the Indigenous individuals engaging in the blockade may have had a larger stake in protecting the lands licensed to the logging company than

[102] *Behn v. Moulton Company* [2013] 2 S.C.R. 227 at para. 10.
[103] Ibid., at para. 33.
[104] Ibid., at para. 30-1.
[105] Ibid., at para. 37.
[106] Ibid., at para. 42.
[107] Ibid.

the broader Indigenous community.[108] The SCC ignored this important aspect of the case because it had to address the question of whether an abuse of process occurred; but besides the SCC, there is no other institution that could consider possible reasons as to why the Indigenous individuals did not state their disagreement with the licenses, such as the possibility of internal constraints within the Indigenous community. If the SCC must adhere to the parameters of the specific case, then an institutional gap exists in which no other institution can explore the complex motivations and possible constraints of Indigenous actors. The SCC reveals gaps in the government's handling of their obligation to consult, but there is no equivalent institution that thoroughly investigates how Indigenous communities can strengthen their capacity to uphold consultation obligations. Consequently, if Indigenous individuals faced obstacles to participating in consultation due to internal restraints, no institution would enforce an obligation for the Indigenous community to reform. This lack of mutual institutional oversight for Indigenous communities may contribute to the inability of the duty to consult to protect individuals with different rights claims.

These cases, which demonstrate the gradual evolution of the duty to consult as a dimension of Aboriginal law, outline several principles and criteria to evaluate how government and Indigenous peoples can uphold their mutual constitutional obligations. The spectrum criterion, which attempts to standardize the context-specific nature of appropriate consultation, has also evolved. The SCC has reinterpreted the spectrum more narrowly since *Haida Nation* because they have closed the possibility of granting Indigenous peoples a veto during consultation processes. *Haida Nation* only implicitly revealed that a veto is not a component of fair consultation, since it was not mentioned when the SCC detailed the characteristics of "deep" consultation. Since then, it has been made explicit that consultation does not grant Indigenous peoples a veto over proposed

[108] Ibid., at para. 36.

Crown action.[109] Indeed, this is a departure from the ruling in *Delgamuukw*, which stated that certain situations will require consent from Indigenous peoples.[110] The SCC found no principle in existing constitutional law or treaty laws that allow Indigenous peoples to exercise a veto,[111] but the denial of such a mechanism undermines how the duty to consult supports efforts at reconciliation.

It may appear counterintuitive to claim that providing one party in negotiations with a veto promotes reconciliation because the party with the veto can undermine good faith efforts to reach a mutually acceptable outcome. However, in the current state of the duty to consult, the government only needs to demonstrate that it considered Indigenous interests and how proposals could accommodate those interests. This framework reveals that the government has no legal obligation to dramatically reverse a Crown proposal, such as the complete discontinuation of the proposal. Instead, in cases where the proposal cannot be altered, Indigenous interests are considered through measures of accommodation.[112] In effect, no matter the level of consultation, the Crown proposal will be carried forward. Framing the duty to consult in a manner that assumes the Crown proposal will be advanced undermines the degree to which Indigenous perspectives are balanced with Crown interests. The imbalance created by prioritizing Crown interests also jeopardizes efforts to find conciliatory outcomes that respect both Indigenous rights and Crown proposals. The current legal interpretation of the duty to consult begins with the premise that Indigenous interests must be reconciled with Crown actions, rather than treating both parties as mutually responsible for finding compromises. A veto might not promote reconciliation in and of

[109] *Beckman v. Little Salmon Carmacks* [2010] 3 S.C.R. 103 at para. 14.
[110] Ibid.
[111] Ibid.
[112] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 49.

itself, but if the veto was reimagined as a mechanism to signal the need for more negotiation, the government may more seriously consider Indigenous perspectives.

The evolution of the duty to consult demonstrates how the judiciary can only articulate standards that express the existing legal order. For instance, the judiciary states that no existing law provides Indigenous peoples with a veto during consultation, without considering how a veto power could treat both Indigenous interests and Crown interests with equal merit. Indeed, a veto power is one way to signify a commitment to treating Indigenous peoples as constitutional partners whose interests are integral to the future of Canada. Instead, the different interpretations of a just constitutional relationship between Indigenous and non-Indigenous peoples are ignored by the judiciary when contemplating possible remedies to respect Indigenous interests. The judiciary assumes that reconciling Indigenous rights and Crown interests must occur in the context of upholding Crown sovereignty over the land. In effect, the SCC fails to consider Indigenous constitutional perspectives when formulating standards for future constitutional relations. In fact, the SCC has the ability to limit Crown sovereignty when the rule of law is threatened,[113] but the SCC has continued to deny constitutional space for Indigenous legal perspectives. As a result, the Crown's legal obligations to Indigenous peoples fall short of achieving reconciliation because Indigenous legal philosophy is not given adequate consideration,[114] such as during the creation of standards regarding appropriate consultation.

Government Policy

[113] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto 2002): 120.
[114] Ibid., 112.

The government could counteract the judiciary's shortcomings by formulating a consultative framework that addressed questions of how to reconcile fundamentally different interpretations of Indigenous-settler relationships. Unlike the judiciary, the government does not have to justify new initiatives solely based on legal precedent. As long as the government abides by the legal norms set out by the judiciary, the government can expand its consultative policies to robustly include Indigenous perspectives. Given that the judiciary encourages the government to find non-legal remedies for Indigenous-settler conflicts, the government faces no restraints to developing new consultation protocols that incorporate Indigenous perspectives in a more robust manner. Nevertheless, the goal of consultative policies should be to advance good faith efforts of reconciliation between Indigenous and non-Indigenous interests rather than simply avoiding litigation. If the government treated the judiciary's articulation of the duty to consult as the minimal threshold to avoid legal challenges, then the capacity for the duty to consult to engage with unresolved constitutional tensions is lost.[115] The SCC has stated that governments can avoid the charge of failing to consult Indigenous peoples by seeking Indigenous consent before or after Aboriginal title is declared.[116] This statement enforces the position that robust forms of consultation, rather than adopting a minimalist approach, can help the government avoid future legal challenges. The SCC appears to be attempting to enforce a more flexible approach to consultation that fulfills good faith Indigenous-Crown interactions. However, Indigenous consent is only legally required when Aboriginal title is secured. Infringing other forms of Indigenous rights, such as Aboriginal rights to specific practices and customs, does not require Indigenous consent.

[115] Dwight Newman, *Revisting the Duty to Consult Aboriginal Peoples*, 114.
[116] *Tsilhqot'in Nation v. British Columbia* [2014] SCC 44 at para. 97.

The government's current consultative policy is updated to reflect the development of case law up to 2010. In many instances, the policy emphasizes that the legal parameters of the duty to consult, as outlined by the courts, must be followed by federal agencies and officials; however, the policy also acknowledges that providing additional consultative measures may help build stronger relationships with Indigenous communities. As such, the government's policy strictly adheres to legal norms, while allowing officials to exercise discretion when determining whether or not to advance more robust forms of consultation. For instance, the policy reiterates the judiciary's decision that Indigenous peoples cannot exercise a veto over the Crown's proposed project.[117] However, the policy also states that, during consultation, officials should show a willingness to reject a proposal or decision.[118] The idea of not advancing a Crown proposal was also brought up when considering proper accommodation for Indigenous peoples.[119] Although the Indigenous party may not exercise an explicit veto, the federal government's policy framework suggests that stopping a proposal in its entirety can, in some instances, uphold the Crown's honour.

Another example of the government's discretionary approach lies in the section regarding how federal officials should properly document accommodation procedures and measures for both federal record keeping and to demonstrate good faith efforts. The SCC's decision in *Little Salmon* suggests that miscommunication does not breach the duty to consult if the government's actions produce meaningful consultation.[120] As such, the government's policy guidelines state that officials may disclose the rationale behind why certain measures of accommodation were not

[117] Canada, Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, [Ottawa], March 2011: 18.
[118] Ibid., 44.
[119] Ibid., 53.
[120] *Beckman v. Little Salmon Carmacks* [2010] 3 S.C.R. 103 at para. 39.

granted to the Indigenous community.[121] The language in this section reveals that supplying Indigenous peoples with justification for Crown actions is not binding on federal officials. Similar language is used to state that federal officials must abide by the federal consultative principles, regardless of the protocols made by other Indigenous nations; however, the policy then states that it may be conducive to achieving meaningful consultation if federal officials used Indigenous standards of consultation as starting points for negotiation.[122]

The federal government's attempt to promote more robust forms of consultation is non-committal at best. Although the government acknowledges that further initiatives to promote meaningful exchanges and participation strengthen Indigenous-Crown relations, there is no binding obligation to pursue those initiatives. As such, the federal government's consultative guidelines seek to achieve the minimum threshold outlined by legal norms. Indeed, the consultation guidelines' adherence to minimal legal standards reflects inter-institutional tension. The government's policy preferences and proposals have been seriously curtailed by the SCC's expansion of the duty to consult as a general constitutional framework that guides Indigenous-Crown constitutional relations. The government may wish to maintain its ability to pursue policy preferences by only abiding by minimal legal standards, while preserving broad discretionary powers to pursue different consultative processes. However, the government's resistance against judicial constraints may alter the pursuit of meaningful consultation with Indigenous peoples as a matter of government discretion rather than a constitutional obligation. Government should maintain complete control over policy-making, but the advancement of Indigenous-Crown relations should be animated by more than just government preferences. Thus, the government's

[121] Canada, Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 55.
[122] Ibid., 48.

consultation policy is another instance in which inter-institutional conflict can become the source of increased Indigenous-settler tension.

Each institution, the judiciary and the government, have their own interpretations of a just relationship between Indigenous and non-Indigenous peoples. The different institutional roles and expectations provide insightful approaches to how the Crown can uphold its obligation to Indigenous peoples. The evolution of the duty to consult demonstrates that the ways in which institutions confront constitutional disputes informs how Indigenous-Crown relations develop. However, these institutions are also reacting to external influences alongside behaviours and actions within institutional systems. The ways in which Indigenous peoples mobilize to trigger institutional change affect the institutional system's future actions.

CHAPTER 4

Indigenous Forms of Social Movements

Other actors that must respond to different interpretations of Canada's constitution are groups engaging in collective mobilization. Actors that want to initiate social movements articulate current disputes between Indigenous and non-Indigenous peoples in a manner that advances their interests. Similar to institutions, these groups must also frame their actions to appear legitimate to other actors and to gain external support. Groups engaging in collective mobilization follow their own pattern of behaviours that influence the behaviours of other actors. Indigenous groups attempting to initiate a social movement are aspiring to transform major institutional practices. In addition to the actions of Canada's institutional system, the behaviour of Indigenous groups participating in social movements is another major source of interactions that inform dialogical processes within Indigenous-settler relationships.

Canadian institutions must interact with, and respond to, contestation between citizens in order for their roles and behaviours to match societal expectations. The interaction between

institutions and citizens are fairly routine processes that are often initiated by institutions. For instance, the government's consultation framework was constructed to reflect developing case law, but it also attempted to integrate the input of Indigenous peoples' perspectives on proper consultation protocols. However, the institution ultimately decides the extent to which citizen input will be incorporated in the final policy. For instance, Indigenous peoples stated that the government should move beyond the minimal legal requirements for consultation in order for the process to be considered meaningful and legitimate.[123] As such, Indigenous peoples suggested consultation protocols that went well beyond existing case law, such as using consultation processes to address past injustices, treating potential Crown infringements as one part of accumulated effects on Indigenous ways of living rather than as an isolated proposal, and devising consultation procedures without first attempting to evaluate Indigenous rights claims' potential strength.[124] In response to these suggestions, the federal government's guidelines reflect the standards outlined in case law, but also consider the input made by Indigenous peoples as recommended actions to take in certain situations.

The government's consultation guidelines demonstrate how an institution chooses to react to societal contestation in order to continue operating with legitimacy. In this case, the government chose to closely follow the legal norms established by the judiciary rather than the opinions of Indigenous peoples, who are, ironically, the actors intended to participate in consultation protocols. As such, the government secured legitimacy from its actions by closely following the judiciary's standards. The judiciary is thus a part of the coalition of actors that legitimate government actions. Since some institutions can legitimate the existence of other institutions within a system, external

[123] Canada, Department of Aboriginal and Northern Affairs Canada, *Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation*, [Ottawa], 2005-2006: https://www.aadnc-aandc.gc.ca/eng/1308577845455/1308578030248.
[124] Ibid.

actors may have little capacity to initiate institutional change. This situation explains the frustration experienced by supporters of Indigenous self-determination towards state institutions; each institutional decision appears to reinforce other institutional visions of a just relationship, which discredits the value of Indigenous perspectives and disempowers Indigenous peoples' ability to speak about their own visions on their own terms.[125]

Institutions discriminate against external perspectives, such as Indigenous worldviews, due to the ways in which institutions have maintained biases against certain groups.[126] These biases exist as vestiges of historical processes and values that create flaws and inconsistencies within an institution. Institutional biases that systematically discredit the perspectives of certain peoples are a fundamental obstacle against the ability for institutions to assess identity claims. Individuals who make identity claims are not seeking to pass judgement on different cultural values; rather, they are seeking to engage in public deliberation regarding how their cultural values can be respected in society.[127] Indeed, the act of making claims before institutions reveals a commitment to open their claims for debate and further contestation in order for the claim to gain legitimacy among society.[128] Consequently, when institutions operate with biases that prevent a fair assessment of identity claims, rights claimants feel detached and frustrated at the institutional system. For instance, Indigenous peoples distrust the institutions responsible for upholding constitutional obligations because decision-making outcomes do not adequately consider Indigenous

[125] James Tully, "Diversity's Gambit Declined," *Constitutional Predicament. Canada after the Referendum of 1992*, ed. Curtis Cook (Montreal and Kingston: McGill-Queen's University Press, 1994): 159-60.
[126] Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford: Oxford University Press, 2009): 3.
[127] Phil Ryan, *Multiculiphobia* (Toronto: University of Toronto Press, 2010): 140.
[128] Avigail Eisenberg, "Identity and Liberal Politics: The Problem of Minorities Within Minorities," in *Minorities within Minorities: Equality, Rights and Diversity*, eds. Avigail Eisenberg and Jeff Spinner-Halev (Cambridge: Cambridge University Press, 2005): 263.

perspectives. Indigenous peoples' hostile reactions to institutions' actions jeopardizes future attempts at building a meaningful relationship between Indigenous and non-Indigenous peoples.

The premise that institutions are non-neutral entities is a product of how institutions undergo constant change. Consequently, institutions' incremental adjustments to sustain legitimacy according to societal standards contribute to an inability to fairly consider diverse visions of how institutions should operate. Institutions can rectify this inability to fairly assess identity claims by acknowledging that their positions are often informed by dominant perspectives and attitudes.[129] Institutions must be prepared to detect previous mistakes in decision-making and question underlying assumptions regarding the rights claims of different peoples.[130] However, it is difficult for institutions to willingly undermine their own actions because institutional legitimacy is ultimately determined by dominant perspectives and values. As a result, rights claims can initiate the process by which institutions re-evaluate their behaviour and detect injustice towards minority values.[131] By their nature, institutions do not have internal mechanisms that fundamentally challenge institutional behaviours and assumptions. Institutions must take cues to undergo radical change from external sources, such as citizens asserting different rights claims.

Institutions present constraints against citizens mobilizing to assert rights claims because those claims often represent demands that undermine the political and social status quo upon which institutions rely for legitimacy. Conversely, institutions also present opportunities for citizens to mobilize because processes of gradual institutional change can reveal tensions or contradictions within and between institutions that are open to contestation from citizens. More opportunities for

[129] Dhiru Patel, "Public Policy and Racism: Myths, Realities, and Challenges," in *Race and Racism in 21st Century Canada: Continuity, Complexity, and Change,* eds. Sean Hier and B. Singh Bolaria (Peterborough, Ontario: Broadview Press, 2007): 263.
[130] Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims*, 41.
[131] Ibid.

institutional change emerge when tensions between institutions in a system are overt.[132] Citizens asserting rights claims strategically interact with institutional opportunities and constraints.

Social Movement Theories

The political process model is a social movement theory that states citizens engaging in collective mobilization use specific patterns of contentious collective action in the face of changing opportunity structures.[133] This social movement theory stresses the cycle of interactions between institutional opportunities and constraints, and citizens' attempts to agitate for change. As such, the ways in which citizens organize or react to institutional constraints and opportunities both initiate, and react to, institutions' actions. The initial actions that began from either citizens or institutions are acted upon by future decisions from both parties; as a result, outcomes are contingent on the interactions made between citizens and institutions rather than the saliency of the normative ideals animating each actor.[134] In effect, the exchanges between citizens and institutions are path dependent because future actions are shaped by previous decisions. It is difficult to precisely distinguish a moment in time in which one actor initiates the exchange. It is even difficult to accurately decipher the status quo institutional constraints and opportunities, since institutions gradually change and are shaped by the decisions and expectations of citizens. Although institutions reflect the attitudes of the dominant society, the shifting coalition of actors that sustains institutional legitimacy leaves open the possibility for non-dominant perspectives to permeate institutional processes. However, once a group of citizens mobilizes to challenge a

[132] Robert Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96, no. 4 (2002): 702-3.
[133] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Cambridge: Cambridge University Press, 1998): 10.
[134] Ibid., 7.

dimension of the institutional status quo, the subsequent institutional environment gives rise to a different set of conditions than the initial actions of the mobilization.[135]

Instead of deciphering the origin of collective mobilization, the political process model detects the ways in which citizens develop mobilization strategies in response to institutional adjustments. The collective history of a group's mobilization tactics make up their repertoires of contention, which those groups use as resources to agitate for institutional change.[136] Indeed, various groups can draw on one another's repertoires in an attempt to pursue their interests. The political process model identifies a range of possible contentious actions, such as violence, disruption, and convention.[137] The ways in which groups use these tactics and the contexts in which these actions are taken determine the group's collective repertoires. For instance, Indigenous peoples use all of these strategies to varying degrees of success in certain situations. Indigenous peoples use existing political and legal channels to demand institutional change, such as instigating legal challenges and participating in forums for policy-making. Alongside these conventional methods of demanding for change, Indigenous peoples also use disruptive tactics to gain attention towards their demands. Disruption transforms the initial demands to become more urgent, providing a valuable opportunity for change to occur. Tactics such as blockading access to key destinations and flash-mob protests are forms of disruption employed by Indigenous peoples. Violence is used to raise the seriousness of the situation, but it also easily puts at risk the legitimacy of the entire movement. The escalation of the Oka Crisis demonstrates that the Mohawks' armed

[135] Doug McAdam, John D. McCarthy, and Mayer N. Zald, "Introduction," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, eds. Doug McAdam, John D. McCarthy, and Mayer N. Zald (Cambridge: Cambridge University Press, 1996): 13.
[136] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 104.
[137] Ibid.

resistance was treated by Canadian forces as disrespecting law and order.[138] All previously used practises of contention form the existing repertoire that Indigenous peoples can employ to demand further institutional change.

The contentious activity in and of itself does not meaningfully advance demands for institutional change. The ways in which a group strategically frames its contentious actions determines the types of opportunities for change that are made available. Indeed, both citizens and institutions are locked in a framing contest, as each side attempts to provide a rationale for their actions that increases opportunities for their own desired outcome.[139] Framing a movement or collection of contentious actions involves the usage of existing values and beliefs to make sense of a perceived injustice and how that injustice can be rectified; as such, the framing of a movement should resonate between the members of the group seeking change, the institutions that are sought after to initiate change, and other bystanders that could become allies or which are already allies.[140] Although a movement's framing will depend on the political context, frames also overemphasize the ability to enact successful change in order to maximize existing opportunity structures.[141] Optimism regarding the ability to take action resonates across many different actors, but other values and attitudes that resonate are often difficult to use as frames because actors have unequal access to the discourse and ideas of different values.[142] In this way, framing contentious actions

[138] "Canadian Army Intervenes at Oka," *CBC News*, http://www.cbc.ca/archives/categories/politics/civil-unrest/the-oka-crisis-1/dramatic-showdown.html.
[139] John D. McCarthy, "Constraints and Opportunities in Adopting, Adapting, and Inventing," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, eds. Doug McAdam, John D. McCarthy, and Mayer N. Zald (Cambridge: Cambridge University Press, 1996): 149.
[140] Robert D. Benford and David A. Snow, "Framing Processes and Social Movements: An Overview and Assessment," *Annual Review of Sociology* 26 (2000): 624.
[141] William A. Gramson and David S. Meyer, "Framing Political Opportunities," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, eds. Doug McAdam, John D. McCarthy, and Mayer N. Zald (Cambridge: Cambridge University Press, 1996): 289-90.
[142] Mayer N. Zald, "Culture, Ideology, and Strategic Framing," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, eds. Doug McAdam, John D. McCarthy, and Mayer N. Zald (Cambridge: Cambridge University Press, 1996): 267.

becomes a technique; marginalized peoples must be able to choose powerful frames that both persuade the attitudes of external actors and resonate with internal members that have their own visions of justice that are contrary to the understandings and perspectives of dominant institutional processes.

Citizens also must consider the constantly evolving political opportunities and constraints when determining the framing of their contentious actions. The frame enables actors to make sense of how their actions are connected to the type of institutional change that is made possible through an opportunity structure. The political process model identifies new access to power, changing alignments of power, new allies, and cleavages among elites as four main dimensions of opportunity structures.[143] In the context of Indigenous-settler relations, these types of opportunity structures alter depending on the current political discourse and issues. The evolution of the duty to consult reveals that the judiciary's legal norms are changing the parameters of considering when the duty is triggered and the actions that constitute proper consultation. As a result, the government's consultation policy framework does not provide an incentive for federal officials to pursue consultation strategies that are beyond minimum legal standards. The institutional constraints reside in how new case law may limit the scope of the duty to consult, which then act as standards to construct federal policy. Access to power appears to be closed because the duty to consult has evolved to close several possibilities for empowering Indigenous peoples. Although the government's policy preferences are hindered by judicial decisions, each institution remains relatively stable because both are committed to upholding a vision of consultation that is not independent from the assertion of Crown sovereignty. As such, power alignments are sustained

[143] Sidney Tarrow, "States and Opportunities: The Political Structuring of Social Movements," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, eds. Doug McAdam, John D. McCarthy, and Mayer N. Zald (Cambridge: Cambridge University Press, 1996): 54.

and elites are not entirely divided because consultation is understood as a right flowing from the Canadian constitutional order, rather than a right from a separate sovereign entity.[144] Furthermore, it is difficult to gain additional allies because the duty to consult is a right only applied to the government's classification of Aboriginal peoples.

Nevertheless, the judiciary's and the government's decision to leave the terms and definition of appropriate consultation to context-specific situations[145] presents an opportunity for Indigenous peoples to form their own conditions for meaningful consultation. The political opportunity emerges because of the existence of the duty to consult as a uniquely Aboriginal right. The existence of rights opens some access to power because the nature and scope of a right is subject to contestation. Although institutions have provided their understanding of the scope and nature of the duty to consult, the rights-holders are empowered to contest the justice of those interpretations. Indigenous peoples can use the ambiguous definition and expectations regarding the duty to consult as a framework to advance broader Indigenous demands such as the right to have their perspectives treated with respect. Indigenous peoples can transform the institutional system's understanding of the duty to consult to capture Indigenous peoples' perspectives, thereby revealing the current injustice of the status quo arrangement. Indeed, the inclusion of Indigenous visions may expose how the institutional system's behaviour prevents Indigenous peoples from participating and interacting with institutions in a fair manner.[146] Thus, Indigenous peoples must frame their contentious action to incorporate both the discourse of institutional interpretations of

[144] James Tully, "The Struggles of Indigenous Peoples for and of Freedom," in *Box of Treasures or Empty Box? Twenty Years of Section 35*, eds Ardith Walkem and Halie Bruce (Penticton, B.C.: Theytus Books, 2003): 278-9.
[145] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 at para. 22 and Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 8.
[146] Robert Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96, no. 4 (2002): 703.

the duty to consult with Indigenous perspectives. As a result, the contentious action will meaningfully represent a persuasive frame between both institutions and Indigenous participants.

Case Study Examination of Social Movements

A case study analysis of two salient protest movements will reveal how Indigenous peoples mobilize against undesirable institutional actions, and the institutional system's reactions to those external shocks. These movements were chosen because they involve Indigenous peoples agitating against the status quo understanding of the duty to consult. Furthermore, these movements have occurred within the timeframe of the case law developments regarding the duty to consult. The timing of the protests is significant because the resistance against the terms and conditions of the duty to consult must reflect the institutional system's evolving interpretations. Moreover, choosing politically salient movements indicates that the political situation in which the protests occurred was urgent. In critical situations, the decisions of actors, both resistors and institutions, are made seriously, and thus faithfully represents the true behaviour or each actor. Each of the protests are not in and of themselves a social movement. However, the political process model can still be applied because each case represents the broader movement of advancing Indigenous rights. The case study analysis will extensively examine each protest movement within the specific boundaries of the political context from which the protests emerge, as well as place the specific protest within the broader Indigenous rights social movement. The emergence of Idle No More and the Rexton Shale Gas protests will be analyzed.

Case Study 1: Idle No More

The Idle No More movement initially began as a response to the government's budget, called Bill C-45, which was first tabled in October 18, 2012. The budget was an omnibus bill,

which outlined the government's fiscal policy as well as proposing changes to existing statutes. The changes that concerned Indigenous peoples were the proposal to amend the *Navigable Waters Protection Act* and the *Indian Act*. The proposed changes to the *Navigable Waters Protection Act* would limit the necessity of federal approval for businesses to construct infrastructure "in, on, over, under, through or across any minor water."[147] The proposal also affects the assessment of pipelines and interprovincial power lines, because environmental assessment hearings would not consider how those utilities would affect any water in Canada.[148] However, the proposal was formulated without prior consultation with Indigenous communities that rely on Canada's water systems for both navigation and cultural purposes.[149] Furthermore, the proposed changes to the *Indian Act* would allow First Nations to expedite the process to surrender a band's territory by only requiring a majority of votes from those in attendance of a band meeting or referendum rather than a majority of eligible voters.[150] The changes are meant to facilitate Indigenous peoples to "create economic opportunity and prosperity for their communities,"[151] but the proposal did not consult different Indigenous communities that may benefit from different land designating procedures.[152] The government was directly criticized for failing to honour their duty to consult Indigenous peoples regarding the proposed amendments in the two Acts on one occasion during the second reading of the Bill.[153]

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[147] *Jobs and Growth Act, 2012*, S.C. 2012, c. 31.
[148] Laura Payton, "Budget bill's pension changes to save $2.6B over 5 years," *CBC News* Oct. 18, 2012, http://www.cbc.ca/news/politics/budget-bill-s-pension-changes-to-save-2-6b-over-5-years-1.1160560.
[149] Canada, *House of Commons Debates*, 30 Oct 2012 (Ms. Peggy Nash, NDP), 41st Parliament, 1st Session, Second Reading.
[150] Laura Payton, "Budget bill's pension changes to save $2.6B over 5 years," *CBC News* Oct. 18, 2012, http://www.cbc.ca/news/politics/budget-bill-s-pension-changes-to-save-2-6b-over-5-years-1.1160560.
[151] Canada, *House of Commons Debates*, 30 Oct 2012 (Mr. Chris Warkentin, CPC), 41st Parliament, 1st Session, Second Reading; see also 30 Oct 2012 (Mr. Rick Norlock, CPC), 41st Parliament, 1st Session, Second Reading.
[152] Canada, *House of Commons Debates*, 26 Oct 2012 (Mr. Hoang Mai, NDP), 41st Parliament, 1st Session, Second Reading and 30 Oct 2012 (Mr. Massimo Pacetti, Liberal), 41st Parliament, 1st Session, Second Reading.
[153] Canada, *House of Commons Debates*, 26 Oct 2012 (Hon. Scott Brison, Liberal), 41st Parliament, 1st Session, Second Reading.

Four women in Saskatchewan, Jessica Gordon, Sheelah McLean, Sylvia McAdam and Nina Wilson, organized an event in Saskatoon to debate the Bill's capacity to erode Indigenous rights; they called their meeting "Idle No More."[154] Soon, the meeting in Saskatoon spread, culminating in the movement's organization of a National Day of Action in various locations one month after the initial meeting on November 10, 2012.[155] The movement protested against the proposals in Bill C-45, and pledged to agitate against future proposals that "erode treaty and Indigenous rights and the rights of all Canadians."[156] The movement promotes a constitutional vision in which honouring Indigenous sovereignty will protect the lands and waters for all peoples of Canada.[157] The Idle No More movement supports the notion that Indigenous sovereignty is respected by implementing a nation-to-nation treaty relationship, in which honouring the spirit of past treaty agreements forms the basis of Indigenous rights over land and resources.[158]

However, the content of the proposals in Bill C-45 was not the only factor in the movement's call for a new constitutional relationship. The movement states that a lack of consultation with Indigenous peoples is an additional source of anger against the government, as it appears to demonstrate the government's flagrant disregard for Indigenous perspectives.[159] This argument follows that if the government appropriately consulted Indigenous peoples regarding the proposed changes in Bill C-45, those proposals would never be tabled in Parliament. Thus, breaching Indigenous people's standards of the duty to consult prompted a sense of urgency to begin a new conversation regarding the nature of Indigenous-settler relations. For instance, the

[154] "9 Questions About Idle No More," *CBC News*, Jan. 5, 2013, http://www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843.
[155] "Timeline: Idle No More's rise," *CBC News*, http://www.cbc.ca/news2/interactives/timeline-idle-no-more/
[156] "9 Questions About Idle No More," *CBC News*, Jan. 5, 2013, http://www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843.
[157] http://www.idlenomore.ca/vision
[158] http://www.idlenomore.ca/manifesto
[159] "9 Questions About Idle No More," *CBC News*, Jan. 5, 2013, http://www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843.

chief of Attawapiskat, Theresa Spence, announced her decision to start a hunger strike on the National Day of Action event in Ottawa to pressure a meeting with the Prime Minister and Governor General.[160] Spence already gained national attention for demanding the government to address the housing crisis in Attawapiskat a year before, and the Idle No More protests were an additional platform to demand changes in her community. Spence's actions and the broader Idle No More Movement reveal how Indigenous peoples use the duty to consult as an attempt to begin a conversation regarding a new constitutional relationship. This strategy complies with the understanding that consultation, as a dimension of s. 35 constitutional protection, can serve as a platform for meaningful Indigenous-Crown exchanges. But rather than launching a legal challenge to determine whether the duty to consult can affect Crown actions, the participants of Idle No More chose to use the terminology of consultation while instilling their own understanding of proper consultation protocols, such as direct meetings with the Prime Minister and Governor General. The movement is attempting to reclaim a space for Indigenous perceptions of proper consultation, while showing the injustice of the current institutional understanding.

Bill C-45 was passed to the committee stage and received more criticisms for the lack of consultation with Indigenous peoples regarding legislation directly affecting their livelihoods.[161] Some members of Parliament explicitly called on the government to uphold its constitutional obligation to consult Indigenous peoples, as mandated by the judiciary.[162] These demands reveal that some actors in government accept an understanding of the duty to consult that surpasses the minimalist approach employed by the government. Indeed, these demands are consistent with the

[160] "Attawapiskat chief 'willing to die' to force Harper meeting," *CBC News*, Dec. 11, 2012, http://www.cbc.ca/news/canada/sudbury/attawapiskat-chief-willing-to-die-to-force-harper-meeting-1.1165049.
[161] Canada, *House of Commons Debates*, 26 Nov 2012 (Ms. Jean Crowder, NDP; Ms. Niki Ashton, NDP; Mr. Jasbir Sandhu, NDP) 41st Parliament, 1st Session, Committee.
[162] Canada, *House of Commons Debates*, 26 Nov 2012 (Ms. Linda Duncan, NDP; Ms. Niki Ashton, NDP; Mr. Malcolm Allen, NDP) 41st Parliament, 1st Session, Committee.

federal government's consultation framework, which states that in certain contexts, fulfilling other consultative protocols will help build stronger relationships with Indigenous communities.[163] Similar to the Indigenous protesters, members of Parliament have different understandings and interpretations for the same discourse regarding the duty to consult. For instance, Minister of Aboriginal Affairs and Northern Development John Duncan responded to Spence's actions by stating that he is open to the possibility of meeting with her because the government respects direct negotiations with First Nations leaders; a spokesperson for his ministry also stated that the government respects the duty to consult, and consults Aboriginal people 5000 times every year.[164] Despite the opposition to the proposals and the Idle No More protests, the Conservative majority government passed Bill C-45 on December 14, 2012.

The Idle No More protesters did not lessen their resolve to protect their rights, which are claimed to be violated by Bill C-45.[165] The forms of protest also evolved, including acts of petitioning specific members of Parliament, holding peaceful rallies and marches, flash-mob style protests in public spaces, and blockades in city centres and railways.[166] The perceived lack of consultation on the part of the government deepened the resolve among Indigenous peoples that respecting the original treaty relationships is the necessary step to ensuring Indigenous interests and rights are protected.[167] In effect, the demand for proper consultation is used synonymously by Indigenous peoples as honouring sacred treaty agreements. For Indigenous peoples, the issue of adequate consultation is one dimension of the broader goal of respecting Indigenous peoples'

[163] Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 48.
[164] "Attawapiskat chief 'willing to die' to force Harper meeting," *CBC News*, Dec. 11, 2012, http://www.cbc.ca/news/canada/sudbury/attawapiskat-chief-willing-to-die-to-force-harper-meeting-1.1165049.
[165] The Canadian Press, "National chief urges Canadians to 'stand with us,'" *CBC News*, Dec. 21, 2012, http://www.cbc.ca/news/politics/national-chief-urges-canadians-to-stand-with-us-1.1136373.
[166] The Canadian Press, "Idle No More spreading beyond Canada's borders," *CBC News*, Jan 1, 2013, http://www.cbc.ca/news/canada/idle-no-more-spreading-beyond-canada-s-borders-1.1331096.
[167] Ibid.

autonomy. Conversely, the government maintains its position that consultation has been respected.[168] Although acts of civil disobedience were escalating, the government did not change its position on the parameters of adequate consultation beyond the existing legal norms.

When the government agreed to meet First Nations leaders, neither party could agree on the terms of how the working meeting would proceed. Many Indigenous leaders expressed their commitment to withdraw from the meeting if the Governor General was not present, and were concerned about the location of the meeting.[169] The government was criticized as being "very dictatorial and unrelenting" because of the insistence that the meeting should be held in the Prime Minister's office without the Governor General.[170] Some leaders in the Assembly of First Nations were willing to engage with the Prime Minister under the government's terms of the meeting, but division existed between Indigenous leaders whether the meeting should proceed. The situation reveals that the institutions' understanding of the duty to consult does not bind government behaviour to properly anticipate negative responses from Indigenous peoples.[171]

The government only reacts to specific challenges to status quo constitutional arrangements. In this case, the government even attempted to maintain discretionary power to control the meeting's agenda, such as the participants and the location of the meeting, despite the admission that a meeting to re-examine Indigenous concerns was necessary. The government incurs a negative reaction from Indigenous peoples when the government misjudges the timing to introduce and implement proactive consultation measures. Indeed, the entire Idle No More movement can be interpreted as a product of the government's miscalculation regarding when

[168] Ibid.
[169] "First Nations meeting with PM thrown into disarray," *CBC News*, Jan 10, 2013, http://www.cbc.ca/news/politics/first-nations-meeting-with-pm-thrown-into-disarray-1.1381808.
[170] Ibid.
[171] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People," *Alberta Law Review,* 41, no.1 (2003-2004): 76.

robust forms of consultation should take place. The Idle No More protesters continued their acts of civil disobedience after the working meeting took place between some AFN Chiefs and the Prime Minister.[172] The protesters were in a unique position because they were able to maintain pressure against the government and First Nations chiefs to re-engage on issues of respecting treaty rights.[173] The working meeting resulted with the government making some commitments to expedite the advancement of Indigenous interests. For instance, the government articulated a clear mandate to outline processes for treaty implementation.[174] Nevertheless, the working meeting did not fully respect Indigenous terms of proper engagement and consultation. Consequently, Indigenous leaders drafted their own declaration that outlined their demands, such as meeting with the Prime Minister, Governor General, and provincial leaders to discuss a new Indigenous-Crown relationship.[175] The declaration also states that the government must seek Indigenous peoples' consent when their "inherent or treaty rights," may be affected.[176]

The demand for the government to seek Indigenous consent was completely at odds with the legal norms that guide the procedural and substantive elements of meeting the requirements of consultation at that time. The declaration reveals a vast difference between Indigenous and non-Indigenous perspectives regarding proper consultation protocols. Although the Idle No More movement was not successful in reversing Bill C-45,[177] it exposed the necessity for Indigenous-Crown relations to be re-evaluated. Each party holds extremely different expectations regarding

[172] "Idle No More protests go on after PM meets AFN leaders," *CBC News*, Jan 12, 2013, http://www.cbc.ca/news/canada/idle-no-more-protests-go-on-after-pm-meets-afn-leaders-1.1325096.
[173] Chris Hall, "Stephen Harper, First Nations and an opportunity lost," *CBC News*, January 11, 2013.
[174] "Idle No More protests go on after PM meets AFN leaders," *CBC News*, Jan 12, 2013, http://www.cbc.ca/news/canada/idle-no-more-protests-go-on-after-pm-meets-afn-leaders-1.1325096.
[175] "Chief Theresa Spence to end hunger strike today," *CBC News*, Jan 23, 2013, http://www.cbc.ca/news/politics/chief-theresa-spence-to-end-hunger-strike-today-1.1341571.
[176] Ibid.
[177] "Idle No More protesters stall railway lines, highways," CBC News, Jan 16, 2013, http://www.cbc.ca/news/canada/idle-no-more-protesters-stall-railway-lines-highways-1.1303452.

core dimensions of the Indigenous-Crown constitutional relationship, such as how consultation should proceed in a fair manner. However, a meeting was not convened after the declaration was made public, although Idle No More protesters continued to rally across the country. It is unclear whether a meeting could be convened at all, considering the tension created between Indigenous leaders and the government when the location and participants of the previous working meeting were contested. It may be difficult to arrange a meaningful meeting between the government and Indigenous leaders in the future because the terms of proper consultation are heavily disputed. Indeed, the debate regarding the standards of proper consultation in policy-making has uncovered a profound absence of clear standards on how to make Indigenous-Crown interactions meaningful and fair. The SCC has stated that seeking Indigenous consent may be the most certain strategy for the government to avoid legal challenges regarding the duty to consult;[178] nevertheless, this statement is consistent with the government's use of their discretion to conduct Indigenous-Crown relations. As the experience of Idle No More suggests, relying solely on discretion to judge the course of Indigenous-Crown interactions can lead to the deterioration of Indigenous-Crown relations that are difficult to ameliorate.

The protests also gained some non-Indigenous support since the claim that Bill C-45 lacked proper consultation appealed to the public's democratic sensibilities.[179] The way in which Indigenous peoples framed their mobilization as a response to a lack of consultation also helped gain non-Indigenous allies who were also concerned about the government's omnibus bills. Non-Indigenous peoples can understand why circumventing consultation is an affront to democratic ideals and reflects poor policy-making, because consultation is a dimension of existing

[178] *Tsilhqot'in Nation v. British Columbia* [2014] SCC 44 at para. 97.
[179] Jennifer Clibbon, "Paul Martin says Ottawa has 'no understanding' of native issues," *CBC News*, Jan 17, 2013, http://www.cbc.ca/news/canada/paul-martin-says-ottawa-has-no-understanding-of-native-issues-1.1405653.

administrative laws governing procedural fairness.[180] It is less certain if non-Indigenous participants in Idle No More support a nation-to-nation relationship guided by treaty rights. An online Nanos Research Poll conducted over two days revealed that a majority of Canadians participating in the survey did not view the Idle No More protests favourably, with 45.5% stating they had a "negative or somewhat negative impression."[181] This poll suggests that Indigenous peoples have not yet gained allies that wholly support Indigenous visions of a just constitutional relationship. Non-Indigenous peoples appear concerned when government acts unreasonably towards Indigenous interests when it signals that interests from other citizens may be unfairly ignored. Other than the administrative fairness dimension of the duty to consult, the demands of Idle No More participants regarding Indigenous rights do not appear to resonate with other peoples.

Idle No More continues its efforts to advance a new relationship guided by the original treaties by applying strategies for long-term institutional change. The participants of the movement organize workshops that educate Indigenous and non-Indigenous peoples about treaty rights and contemporary Indigenous concerns. The workshops are called "teach-ins," and the education of citizens is a strategy to influence a new generation of political actors that will affect the political coalitions that supply legitimacy to institutions. The movement demonstrates flexibility to pursue multiple paths for institutional change, despite the government's unwillingness to change past legislation such as Bill C-45.[182] Although the movement was unsuccessful at reversing Bill C-45, it was highly successful in raising awareness of Indigenous constitutional demands in relation to respecting Indigenous rights to fair consultation.

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[180] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People," *Alberta Law Review,* 41, no.1 (2003-2004): 51.
[181] "Awareness of Idle No More is widespread, poll suggests," CBC News, Jan 24, 2013, http://www.cbc.ca/news/politics/awareness-of-idle-no-more-is-widespread-poll-suggests-1.1335699.
[182] "Idle No More protesters stall railway lines, highways," *CBC News*, Jan 16, 2013, http://www.cbc.ca/news/canada/idle-no-more-protesters-stall-railway-lines-highways-1.1303452.

Case Study 2: The Rexton Shale Gas protests

The Rexton Shale Gas protests were a series of confrontations between Indigenous and non-Indigenous protesters, the New Brunswick government, and SWN Resources. The New Brunswick government's agenda to explore the possibility of shale gas production is contested by the citizens who are concerned that shale gas production could irrevocably harm the environment and their ways of life. On November 29, 2011, some residents of New Brunswick appealed to their government to completely stop plans for shale gas development. For instance, a petition with almost 16,000 signatures asking for the government to end shale gas development was tabled in the legislature by Kirk MacDonald, a Progressive Conservative MLA.[183] However, MacDonald later voted in support of a non-binding resolution to advance shale gas exploration in the province despite the presence of the petition.[184] The process by which the government is advancing its agenda is a critical factor in the demands for withdrawing plans for shale gas exploration. The petition states that the government has expedited processes to explore the possibility of shale gas production without formal public inquiries.[185] This statement reveals that the lack of public consultation is perceived as rendering illegitimate the entire mandate for a shale gas sector.

Almost two years later, on September 30, 2013, Indigenous and non-Indigenous protesters decided to directly obstruct the advancement of shale gas exploration. They erected a blockade that prevented SWN Resources, who were given licenses by the New Brunswick government to explore the potential for gas and oil,[186] from accessing key highways and equipment. The

[183] "Anti-shale gas petition tabled at legislature," *CBC News*, Nov 29, 2011, http://www.cbc.ca/news/canada/new-brunswick/anti-shale-gas-petition-tabled-at-legislature-1.1046848.
[184] "PC MLA supports shale gas motion," *CBC News*, Dec 7, 2011, http://www.cbc.ca/news/canada/new-brunswick/pc-mla-supports-shale-gas-motion-1.1064201.
[185] "Anti-shale gas petition tabled at legislature," *CBC News*, Nov 29, 2011, http://www.cbc.ca/news/canada/new-brunswick/anti-shale-gas-petition-tabled-at-legislature-1.1046848.
[186] SWN Resources Canada, Inc., https://www.swnnb.ca/about.html#about-us.

protesters claimed that the blockade was a last resort to stop their government from pursuing a mandate that does not reflect the demands of New Brunswick citizens.[187] The Elsipogtog First Nation community perceived the government's seemingly unilateral actions to advance the shale gas industry as "the last straw" that needed to be resisted.[188] The Elsipogtog First Nation Chief delivered an eviction notice to SWN Resources, and stated that the band council will pass a resolution to reclaim unoccupied reserve lands to prevent fracking companies and the government from continuing exploration.[189] Besides the complete removal of SWN Resources from the land and the discontinuation of shale gas exploration, the protesters also demanded a meeting with the provincial government.[190] The non-Indigenous participants supported the Elsipogtog First Nation Chief's demands insofar that it would prevent SWN Resources from continuing their work, and stop the government from pursuing shale gas production without proper public consultation.[191] By focusing on the goals of maintaining transparency in policy-making and protecting the environment, the Elsipogtog peoples were successful in framing their objectives to gain non-Indigenous allies.

SWN Resources responded by successfully applying for a court injunction to remove the protesters from barring access to their equipment.[192] The Court decided that the protesters had a

[187] "Rexton road blocked by shale gas protesters," *CBC News*, Sept 30, 2013, http://www.cbc.ca/news/canada/new-brunswick/rexton-road-blocked-by-shale-gas-protesters-1.1873350.
[188] Jane Taber, "N.B. Premier defends police actions at First Nations anti-fracking protest," *The Globe and Mail*, Oct 18, 2013.
[189] "First Nations chief issues eviction notice to SWN Resources," *CBC News*, Oct 1, 2013, http://www.cbc.ca/news/canada/new-brunswick/first-nations-chief-issues-eviction-notice-to-swn-resources-1.1874870.
[190] "Shale gas protesters defy order to remove Rexton barriers," *CBC News*, Oct 4, 2013, http://www.cbc.ca/news/canada/new-brunswick/shale-gas-protesters-defy-order-to-remove-rexton-barriers-1.1912218.
[191] "First Nations chief issues eviction notice to SWN Resources," *CBC News*, Oct 1, 2013, http://www.cbc.ca/news/canada/new-brunswick/first-nations-chief-issues-eviction-notice-to-swn-resources-1.1874870.
[192] *SWN Resources Canada Inc v. Claire* [2013], NBQB 328 at para. 20.

right to express their opinions as long as they did not affect SWN Resources from conducting their work.[193] The protesters did not remove the barricades, with some stating that the assertion of treaty rights and Aboriginal rights supersedes the Court's injunction.[194] Premier David Alward responded to the protests by stating he will continue to welcome meetings with First Nations, but that no meeting will be convened as long as protesters are "breaking the law."[195] Nevertheless, talks did occur between the government and the Elsipogtog Chief Aaron Sock, which resulted in a commitment to establish a working group to fully address the concerns of the Elsipogtog peoples.[196] The meeting between Premier Alward and the Elsipogtog Chief was important to maintaining communication, but it also demonstrated how consultation alone does not guarantee negotiations. Indeed, the meeting established the wide divide between the government's insistence that their mandate will be pursued, and the Elsipogtog people's commitment to prevent that mandate from advancing.[197] Consequently, the protests continued to escalate because the government was not reconsidering its decision to allow SWN Resources to perform seismic testing. For instance, the New Brunswick ombudsman, who attempted to mediate between the interests of government and protesters, did not have the authority to overturn the government's policy mandate.[198] The protests continued because consultation without the possibility of overturning the decision to pursue shale gas exploration appeared to ignore the seriousness of the protesters' interests. Similar to the Idle No More movement, the original demands for consultation

[193] Ibid.
[194] "Shale gas protesters defy order to remove Rexton barriers," *CBC News*, Oct 4, 2013, http://www.cbc.ca/news/canada/new-brunswick/shale-gas-protesters-defy-order-to-remove-rexton-barriers-1.1912218.
[195] Ibid.
[196] "Talks to end anti-shale gas roadblocks spark working group," *CBC News*, Oct 1, 2013, http://www.cbc.ca/news/canada/new-brunswick/talks-to-end-anti-shale-gas-roadblocks-spark-working-group-1.1927990.
[197] Ibid.
[198] "Shale gas complaints to ombudsman unprecedented," *CBC News*, Oct 9, 2013, http://www.cbc.ca/news/canada/new-brunswick/shale-gas-complaints-to-ombudsman-unprecedented-1.1931188.

transformed into demands for long-term commitments to address broader Indigenous-Crown relationships.[199]

SWN Resources successfully gained an extension to their original injunction,[200] which was then enforced by the RCMP. The exchange between the RCMP and protesters ended in violence, with five police vehicles burned and forty people, including the Elsipogtog Chief, arrested.[201] The RCMP claimed that weapons were hidden at the protest site, making it necessary to act against the non-peaceful protesters.[202] Indigenous leaders reiterated their demands by stating the government's duty to consult Indigenous peoples is backed up by SCC decisions.[203] Indeed, the Elsipogtog peoples demand proper consultation to define future Indigenous-Crown relations to address other concerns facing the Elsipogtog community; the community has expressed their opposition to the current consultation procedure because they need more resources to understand how the industry will affect their rights.[204] The federal consultation policy states that funding Indigenous communities may be necessary to facilitate meaningful consultation.[205] The available funding is used to support a number of tasks that make consultation meaningful, including research and development, which is the concern of the Elsipogtog peoples.[206] However, the federal policy makes funding available for the Indigenous community after it has constructed consultation protocols based on the strength of Indigenous rights claims. This process is contrary to the demands

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[199] "Shale gas clash: Explosives, firearms seized in Rexton," *CBC News*, Oct 18, 2013, http://www.cbc.ca/news/canada/new-brunswick/shale-gas-clash-explosives-firearms-seized-in-rexton-1.2125134.
[200] *SWN Resources Canada Inc v. Claire* [2013], NBQB 342 at para. 10.
[201] "RCMP, protesters withdraw after shale gas clash in Rexton," *CBC News*, Oct 17, 2013, http://www.cbc.ca/news/canada/new-brunswick/rcmp-protesters-withdraw-after-shale-gas-clash-in-rexton-1.2100703.
[202] "Shale gas clash: Explosives, firearms seized in Rexton," *CBC News*, Oct 18, 2013, http://www.cbc.ca/news/canada/new-brunswick/shale-gas-clash-explosives-firearms-seized-in-rexton-1.2125134.
[203] Ibid.
[204] Ibid.
[205] Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 49.
[206] Ibid.

of the Elsipogtog peoples, because they perceive the exclusion of Indigenous input at the earliest stages of consultation as undermining good faith efforts at consultation.

Despite the escalation in violence between the protesters and RCMP, the government and Elsipogtog Chief agreed that shale gas exploration would be suspended during a "cooling off period," in which consultation can take place between Indigenous and non-Indigenous leaders.[207] However, in the aftermath of the protests, the Elsipogtog peoples turned away from negotiations with government in order to pursue land claims. The Elsipogtog Chief stated that owning the land is the surest route to protecting their rights.[208] Additionally, the government expressed its commitment to advance a shale gas sector in New Brunswick, with the Premier stating that the "personal agendas of the minority" will not be a "roadblock to developing [New Brunswick's] bright future."[209]

This outcome demonstrates that a failure to meaningfully pursue consultation with Indigenous peoples at the early stage of decision-making may lead to more confrontations in the future that become harder to settle through negotiations. Moreover, the land claims process to determine Indigenous ownership of land is slow, while the government has already given licenses for companies to drill wells.[210] As such, there is a high probability that future confrontations will occur between Indigenous peoples attempting to assert their rights and the government advancing their agenda. Indigenous peoples can legally demand consultation if they pursue land claims because it obliges the government to take seriously their *prima facie* rights claims. Government

[207] "Shale gas company loses bid for injunction to halt N.B. protests," *CBC News*, Oct 21, 2013, http://www.cbc.ca/news/canada/new-brunswick/shale-gas-company-loses-bid-for-injunction-to-halt-n-b-protests-1.2128622?cmp=rss.
[208] "N.B. First Nation says it will take land claims to court," *CBC News*, Oct 24, 2013.
[209] Kevin Bissett, "N.B. premier vows to press ahead with shale gas despite protests," *The Canadian Press*, Jan 31, 2014.
[210] Ibid.

must consult Indigenous peoples when they have knowledge of Indigenous rights claims.[211] Thus, future confrontations between the New Brunswick government and the Elsipogtog peoples may be observed in court rather than through civil disobedience. Engaging in legal challenges to determine the parameters of appropriate consultation may be the only recourse to settling Indigenous-Crown disputes.[212] The experience of the Rexton Shale Gas protests demonstrates that the duty to consult as a guiding principle for Indigenous-Crown relations does not motivate government to act beyond minimum legal requirements. As such, the Elsipogtog peoples have decided to engage in land claims to enhance the Crown's legal obligations to the Indigenous community.

The Rexton Shale Gas protesters were also reacting to a third party in addition to the government's actions. SWN Resources were legitimately given licenses to explore the possibility for shale gas production, regardless of whether the government adequately addressed public concerns. As such, SWN Resources were successful in their application for an injunction. However, the protesters claimed that preventing SWN Resources from performing their jobs was the only recourse they had to demand a meeting with the government.[213] Although the judiciary had to respect the loss of SWN Resources, forcing the protesters to remove their barricades did not entail a legal obligation for the government to address the demands of the protesters. Indeed, if the protesters had not applied adequate pressure by sustaining the blockades, the government may not have been willing to engage with their concerns. Third parties can play an important role in consultation because they have information regarding a proposed project that is valuable to

[211] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 27.
[212] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People," *Alberta Law Review*, 41, no.1 (2003-2004): 68.
[213] "Rexton road blocked by shale gas protesters," *CBC News*, Sept 30, 2013, http://www.cbc.ca/news/canada/new-brunswick/rexton-road-blocked-by-shale-gas-protesters-1.1873350.

determining possible measures of accommodation.[214] The experience of the Rexton Shale Gas protests reveals that the mere presence of third parties can undermine the perception of good faith negotiations because it appears as though the Crown proposal cannot be reversed. Clear communication, which is a key factor in consultation processes, would have clarified the role of SWN Resources in relation to fulfilling the duty to consult.

Third parties like SWN Resources can fulfill the Crown's duty to consult if they are given the proper mandate and resources,[215] but this mandate was not given because the exploration project was not considered by the government as necessitating Indigenous participation in decision-making; the government claimed it followed the legal norms of treating consultation as a "sliding scale," in which exploration of possible resources only involved giving adequate notice to Indigenous peoples that testing was occurring.[216] The government stated that the scope of consultation would change if shale gas development proceeds in the future.[217] Although the government's actions are legally defensible, their decision to treat obligations to consult as minimum legal requirements blinded the government to consider how exploration was viewed as illegitimate by Indigenous and non-Indigenous peoples. Indeed, the government's restrictive approach to consultation is viewed by Indigenous peoples as contrary to their perceptions of just dealings.[218] If the government conducted more robust forms of consultation, they may have been able to better balance dividing interests regarding shale gas development. Showing a stronger

[214] Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 19.
[215] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650 at para. 60.
[216] "Alward government defends record on shale consultation," *CBC News*, Oct 23, 2013, http://www.cbc.ca/news/canada/new-brunswick/alward-government-defends-record-on-shale-consultation-1.2186465.
[217] Ibid.
[218] "RCMP, protesters withdraw after shale gas clash in Rexton," *CBC News*, Oct 17, 2013, http://www.cbc.ca/news/canada/new-brunswick/rcmp-protesters-withdraw-after-shale-gas-clash-in-rexton-1.2100703.

effort to respect the interests of citizens who opposed shale gas exploration may have also prevented the protests from occurring.

The emergence of Idle No More and the Rexton Shale Gas protests illustrate how Indigenous peoples react to decisions made by existing institutional systems regarding appropriate levels of consultation. In both instances, the government advanced its policy mandates without consulting Indigenous peoples beyond the requirements outlined in existing case law. In particular, the New Brunswick government asserted that more substantive forms of consultation would occur if their project was advanced. Indigenous communities perceived a lack of consultation at the earliest stages of decision-making as undermining good faith efforts to respect Indigenous interests. In the context of Idle No More, the proposed amendments affecting Indigenous peoples were already drafted without Indigenous consultation.[219] As such, the institutional system does not promote a vision of consultation in which consultation is the first step to including Indigenous perspectives in decision-making. Rather, appropriate levels of consultation are determined after the Crown proposal is fully articulated.[220] However, the Crown proposal itself may be the subject of Indigenous contestation. Consequently, Indigenous peoples react strongly against government actions that appear to disrespect the spirit of consultation. By protesting, Indigenous peoples are reasserting their right to participate on their own terms by asserting their interests outside of institutional channels.

No clear resolutions were presented after either protest movement were concluded. The Idle No More movement continues to organize rallies and education sessions in an effort to maintain the collective organizational capacity to pursue future protests. The Indigenous peoples

[219] Canada, *Senate Debates*, 13 Dec 2012 (Hon. Lillian Eva Dyck) 41st Parliament, 1st Session, Volume 148, Issue 131.
[220] Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 20.

who participated in the Rexton Shale Gas protests have chosen to pursue land claims to definitively settle their authority to determine future land use. These outcomes demonstrate that disrespecting the terms of consultation for one party will further strain Indigenous-Crown relations, and jeopardizes the goal of reconciliation. Indigenous peoples' acts of contentious collective action were made in response to institutions' initial decision to exclude Indigenous perspectives in the early stages of decision-making. Those contentious acts present a new context that determines the character of future Indigenous-Crown interactions. Consequently, new opportunities and constraints present sites for future contestation between Indigenous peoples and institutional systems. Based on the citizen-institution interaction in the two case studies, disruptive protests and litigation appear to be the mechanisms in which Indigenous peoples will challenge future institutional decisions.

CHAPTER 5

The Indigenous-settler Feedback Loop

Indigenous-Crown constitutional relationships are affected by processes of institutional change and social movements (see Figure 1). These two processes are themselves in a dialogical relationship with each other. Social movements use Indigenous-settler contestation to frame the necessity for institutional change. Institutional systems react to external pressures that are triggered by both the systemic Indigenous-settler contestation that is characteristic of Canada's constitutional order and new forces of confrontation organized by mobilizing groups. The outcomes of the interaction between institutional change and social movements influence the development of Indigenous-settler relationships in a feedback loop. The actions of groups and institutional systems address current Indigenous-settler contestation. The outcomes of those interactions then create a new context in which the perception of Indigenous-settler contestation is altered. This new understanding of Indigenous-settler contestation informs the character of groups' and institutions' future activities. Actors operating within groups or institutional systems must

make decisions that consider previous interactions and anticipate possible reactions from external forces. This feedback loop develops both Indigenous-settler relationships and the relationship between mobilization and institutional change. As such, the transformations between Indigenous-settler relationships resemble a system of interconnected relationships and exchanges that are recognized within the Canadian constitutional order. Indeed, Canada's tradition of gradual constitutional change sets the expectation that Indigenous-settler relationships are also open to contestation through the relationships and exchanges between actors. Thus, the unique character of Indigenous-settler constitutional relationships is established by the particular interactions made within the system of groups and institutions.

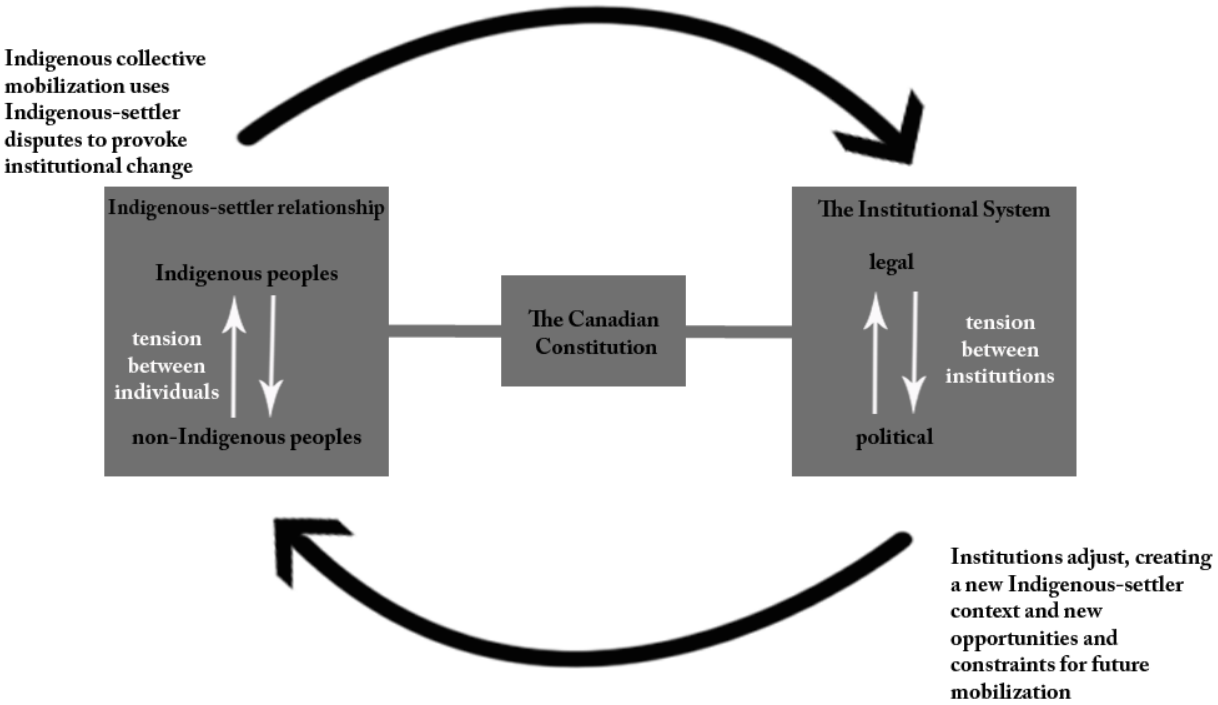

Figure 1: The Indigenous-settler feedback loop

The interactions between different forces and actors within the overall system of Indigenous-settler relationships possess different characteristics because they achieve different results. Together, these interactions influence each other to produce outcomes that alter the entire system in a manner resembling a feedback loop. The actions of actors at the macro level, such as mobilizing groups and institutions, must affect the perceptions of individual actors at the micro level; when individual perceptions are altered, those individuals' behaviours accumulate to effect change at the macro level.[221] For example, the outcomes of Indigenous-Crown interactions may shift Indigenous and non-Indigenous individuals' perceptions of a just constitutional relationship. When a new context of a just Indigenous-settler relationship emerges, individual actors will behave within their macro level roles, such as within groups or institutions, in a different manner. For instance, individuals' different behaviour may modify the coalition of actors that legitimate institutions, or interpret the necessity of a social movement in a different perspective. However, interactions between actors may not dramatically change existing behaviours. Without altering micro level actors' actions, the character of Indigenous-settler relationships will appear static. As such, a feedback loop process does not guarantee that interactions will produce gradual macro level changes. Indeed, through the feedback loop, actors who avoid participating in interactions with other actors may entrench obstacles to building meaningful relationships in the future. Attaining changes within systems of relationships, such as Indigenous-settler relationships, require all actors to robustly participate in meaningful exchanges.

The aim of Idle No More and the Rexton Shale Gas protests was to change how consultation was practiced with Indigenous peoples to respect constitutional standards of fairness. Changing the practice of consultation involves influencing the individual perceptions of that

[221] Peter Hedstrom and Richard Swedberg, "Social Mechanisms," *Acta Sociologica* 39 (1996): 296.

practice. The movements sought to contest the status quo understanding of appropriate consultation by revealing the ways in which the current system promoted injustices. As such, both movements framed their demands for altering the practices of consultation as consistent with protecting the democratic principles that underpin the importance of consultation, such a procedural fairness. If individual actors accept the new understanding of the disputed practice, then they will adjust their behaviour to reflect the new protocols. However, changing individual perceptions often resembles gradual change. The extent to which Idle No More and the Rexton Shale Gas protests have influenced individual attitudes remains unclear. Indeed, the goal to transform individual attitudes remains as new sites of contestation and protest emerge. Consequently, the process between macro-micro-macro level changes is not clearly separated into different phases that operate linearly. Rather, the transition between macro and micro level interactions operates alongside one another. In many situations, macro level actors behave differently before the perceptions of micro level actors are completely transformed. The experiences of Idle No More and the Rexton Shale Gas protests most significantly changed how Indigenous peoples will respond to institutional decisions that disrespect the duty to consult. This change at the micro level will have repercussions for future group mobilization, and it occurred despite how other micro level perspectives, such as non-Indigenous peoples, may not have been transformed.[222]

The two protest movements' interaction with the institutional system also influence future Indigenous-Crown exchanges. The interactions made by both groups and institutions shape the character of future exchanges, thereby also narrowing the availability of alternative outcomes. As

[222] "Awareness of Idle No More is widespread, poll suggests," CBC News, Jan 24, 2013, http://www.cbc.ca/news/politics/awareness-of-idle-no-more-is-widespread-poll-suggests-1.1335699.

such, Indigenous-Crown relationships evolve according to the path dependent character of previous interactions. Indigenous peoples are currently resisting the Enbridge's Northern Gateway oil tanker and pipeline project. This pipeline project represents a major confrontation in which the Crown's duty to consult will be evaluated by Indigenous and non-Indigenous actors. The strategies and experiences of Idle No More and the Rexton Shale Gas protests will affect how Indigenous peoples and institutions assess Enbridge's proposed pipeline project. The Northern Gateway pipeline is in its early planning phases, but already faces intense opposition from First Nations communities. Similar to the outcome of the Rexton Shale Gas protests, Indigenous peoples are mobilizing resources to launch a legal challenge against the Crown[223] in addition to organizing collective acts of resistance.[224]

For instance, the Joint Review Panel evaluated Enbridge's proposal and stated that Enbridge's process of consultation was adequate, [225] despite how many Indigenous peoples did not participate because they disagreed with the proposal and the consultation protocols.[226] As a result, the Gitga'at First Nation legally challenged the Joint Review Panel for insufficiently considering the evidence that evaluated the loss of the Indigenous peoples' ways of life beyond the adverse effects to specific ecosystems or resources.[227] This situation reinforces the notion that when Indigenous peoples do not agree with the terms of consultation processes, their only recourse is to seek judicial remedies.[228] Indeed, the institutional system does not offer another viable alternative

[223] Dene Moore, "Northern Gateway pipeline heading toward showdown over First Nations rights," *The Canadian Press*, Dec 13, 2013.
[224] "Enbridge Concert: First Nations and Famous Friends Say "No" to Northern Gateway Oil Tanker and Pipeline Project," *Market Wire News*, Feb 1, 2012.
[225] Canada, The National Energy Board, *Considerations Report of the Joint Review Panel for the Enbridge Northern Gateway Project Volume 2*, [Ottawa], 2013: 49.
[226] Ibid., 41.
[227] "First Nation Launches Court Challenge to Enbridge Northern Gateway Environmental Assessment; Says Review Was Unlawful," *Market Wire News*, Jan 22, 2014.
[228] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People," *Alberta Law Review*, 41, no.1 (2003-2004): 53.

for Indigenous peoples to challenge the established parameters of consultation. However, the government interprets challenges to resource projects as resembling special interest groups unduly delaying public hearing processes and then resorting to litigation to subvert the proposals of a representative democracy.[229] The tension within the institutional system to condemn the use of legal challenges while not presenting alternative channels for articulating disagreements places the prospects for reconciling Indigenous and Crown interests at risk.

Similar to the outcome of the Rexton Shale Gas protests, Indigenous nations in British Columbia may undergo land claims to expand the parameters of appropriate consultation by requiring the government to seek explicit consent from the affected Indigenous nation. Once Indigenous peoples secure Aboriginal title, the government must seek consent from the Indigenous nation, or justify their proposal in a manner that is consistent with the principles of s. 35.[230] Before the SCC explicitly stated the requirement of consent when Aboriginal Title is concerned, the government has relied on the absence of an Indigenous veto to legitimate its mandate.[231] The SCC decision has further reinforced Indigenous peoples' use of litigation to demand more decision-making powers. Although the adversarial nature of the judicial system may exacerbate Indigenous-Crown tensions because clear "winners" and "losers" are identifiable, pursuing legal challenges is consistent with Indigenous peoples' existing repertoires of contentious action. Indigenous peoples seek to change the protocols and expectations that are practiced by the current institutional system. Securing this change may then usher a transformation in attitude, in which Indigenous peoples are treated as equal partners because their interests are protected and legitimated by the institutional system.

[229] The Hon. Joe Oliver, Minister of Natural Resources, *The Media Room*, Jan 9, 2012.
[230] *Tsilhqot'in Nation v. British Columbia* [2014] SCC 44 at para. 76.
[231] Shawn McCarthy and Jeffrey Jones, "Ottawa defiant as UN deals blow to Gateway pipeline," *The Globe and Mail*, May 12, 2014.

Since Idle No More, Indigenous peoples have also learned new, effective practices of collective action. The grassroots collective action represented by Idle No More peacefully demonstrated Indigenous people's perception of the illegitimacy of institutions' behaviours, and maintained pressure against institutional systems to provoke change. Due to the support for Idle No More amongst different Indigenous communities across the country, the experiences and capacity to effectively organize and execute contentious actions remain a powerful memory within the collective consciousness of many First Nations peoples. Indigenous people have always attempted to resist injustices by state institutions. Nevertheless, Idle No More significantly transformed the role of grassroots participation as a central element to a legitimate movement that represents the positions of Indigenous peoples. These characteristics are apparent in collective acts organized by Indigenous peoples in response to the Enbridge Northern Gateway project. So far, Indigenous peoples have participated in events that address the dangers of the pipeline project,[232] communicate the interests of British Columbian First Nations nation-wide,[233] and protest against the pipeline project through public rallies.[234] Moreover, Indigenous peoples are also using their legal traditions to ban tankers and pipelines from the tar sands from entering their territories.[235] Indigenous peoples are exhibiting a new resolve that is deeply rooted within their communities to assert their rights. This determination at the grassroots level will affect future Indigenous-Crown interactions.

Implications of the Indigenous-settler Feedback Loop

[232] "Enbridge Concert: First Nations and Famous Friends Say "No" to Northern Gateway Oil Tanker and Pipeline Project," *Market Wire News*, Feb 1, 2012.
[233] "Historic 'Freedom Train' Sets Out to Defend First Nations Self-Government Rights and Freedom From Oil Spills," *Market Watch*, April 24, 2012.
[234] "'No Enbridge' Vancouver Rally Draws Thousands," *The Huffington Post B.C.*, Nov 16, 2013.
[235] Save the Fraser Declaration, http://savethefraser.ca/fraser_declaration.pdf.

Indigenous-Crown relations are tense as the future of the Enbridge Northern Gateway project remains uncertain. The institutional system, in particular the government, will struggle to understand and properly react to Indigenous peoples' demands and actions if it does not consider the ways in which Indigenous resistance is in dialogue with institutional change. The experiences of Idle No More and the Rexton Shale Gas protests illustrate the exchanges between the actions of groups and institutions. The result of those exchanges alters the character of Indigenous-Crown relations. As such, the institutional system must address new confrontations with Indigenous peoples in a manner that considers preceding developments and experiences. The government cannot treat Indigenous demands in isolation of broader issues within Indigenous-Crown relations. When Indigenous peoples are contesting the terms of consultation, the government too quickly dismisses these criticisms as showing bad faith towards the consultative process or as a strategy to undermine Crown proposals. In effect, the government is treating Indigenous peoples' criticisms in a manner that ignores the Crown's unique relationship with Indigenous peoples and the development of that relationship over time. These actions represent a failure of certain actors, such as those that make up the Crown, to meaningfully engage with other actors in the system of Indigenous-settler relationships. Ignoring how Indigenous actors frame their current demands in relation to previous experiences directs the feedback loop process to resist changing the character of Indigenous-settler relationships.

In addition to overlooking the path dependent nature of Indigenous-Crown relations, the institutional system does not provide clear institutionalized arenas to contest distinct visions of consultation. Consequently, the parties will rely on crisis situations to meaningfully engage with alternative interpretations of proper consultation. If the government waits for crisis situations before acting upon Indigenous peoples demands, it is strategic for Indigenous peoples to organize

contentious actions to elicit government action. However, both parties' overreliance on crises to initiate meaningful Indigenous-Crown exchanges will make it more difficult to reach compromises. The government insufficiently addresses the underlying values or practices attached to Indigenous peoples' perceptions of fair consultation because they are preoccupied with pursing their resource extraction mandate. Similarly, Indigenous peoples are not in a position to compromise because they want to maximize the opportunity to make as many gains as possible, including exercising some control over resource extraction on their lands. Rather than emphasizing how both parties have a common goal in honouring the duty to consult, each side reiterates the justness of their interpretations of proper consultation. As a result, crisis situations raise the stakes for both parties, making the exchanges between Indigenous peoples and the government difficult to identify points of compromise. Relationships that are characterized by the emergence of crises also changes the development of interactions between actors. Over time, crises may widen and entrench differences between actors, differences that are further reinforced through the feedback loop. Dialogical relationships become meaningless if there are no points in which different perspectives can reach common understandings.

Relying on crisis situations to initiate dialogue regarding conflicting Indigenous and Crown interests impairs the building of trust that is essential to institutional systems' goal of reconciling Indigenous rights with Crown sovereignty. Trust is heavily dependent on the distribution of power in society; Indigenous peoples distrust the institutional system because it is perceived as an instrument of oppression.[236] Indigenous peoples attempt to correct power asymmetries through collective acts of contention. This display of power also threatens the institutional system, causing

[236] Patti Tamara Lenard, *Trust, Democracy, and Multicultural Challenges* (Pennsylvania: The Pennsylvania State University Press, 2012): 65.

the state to suspend its current actions to address the confrontation made by external pressures. The outcome of the exchange is determined by the degree to which Indigenous peoples frame their mobilization to appear legitimate and the institutions ability to make adjustments to remain legitimate. But regardless of how power is redistributed, the trust between parties is damaged. Even when each party's actions may be perceived as legitimate, both parties may distrust the other party's goodwill to act within the newly established protocols. Trust is repaired over time, as each side experiences and observes each other's compliance to the new practices or guidelines. However, there is also the possibility that the distrust created from the initial act of contention creates an incentive for a party to reassert their power in another area of interaction to compensate for their previous loss of power. Once again, the resulting confrontation may change power distributions, but it may weaken the overall trust between the parties.

Trust is a significant part of Indigenous-Crown relations because it makes possible the idea that overarching Crown sovereignty can respect Indigenous ways of being. However, the narrative of Indigenous collective contention alongside the institutional system's attempt to remain legitimate resembles exchanges made between distrustful parties. The crisis situation caused by confrontations between collective action and institutional change presents opportunities to alter the parameters and interpretations of Indigenous-Crown constitutional obligations. Idle No More and the Rexton Shale Gas protests illustrate that Indigenous peoples radically opposed the government's practice of consultation, and wished to replace that interpretation with an Indigenous vision of appropriate consultation. If Indigenous peoples contest aspects of their constitutional relationship with the Crown because they can only trust their own laws and traditions to protect their interests, then the vision that Crown sovereignty can be trusted to respect Indigenous rights is undermined. The assertion of Crown sovereignty is a firmly established fact within the

institutional system. Indigenous peoples' challenges against this fact through high stakes confrontation may seriously imperil the institutional system's capacity to justly interpret the constitution.

The distrust experienced between Indigenous peoples and the Crown is communicated within the dialogical interaction between collective action and institutional change. Hostility affects actors' practices and behaviours, which influences the recreation of Indigenous-settle relations. As actors engage different perspectives with distrust, the resulting Indigenous-settler context closes opportunities for actors to approach different constitutional demands through alternative practices, such as negotiation and compromise. The feedback loop has the potential to encourage parties to constructively contest constitutional obligations, but the path dependent nature of dialogical interactions can also create conditions in which changing Indigenous-settler relations becomes more difficult. In effect, the reliance on crises restrains actors from adopting new practices to contest constitutional obligations. This effect only intensifies the dependence on crises situations to resolve constitutional disputes, while also decreasing alternative practices to address contestation. As such, the character of Indigenous-settler relations will not be significantly transformed, while the feasibility of implementing alternative practices to pursing change will decrease.

The institutional systems' overreliance on piecemeal adjustments to constitutional interpretations rather than comprehensive amendments exacerbates the institutional pressure to interpret the constitution fairly. Ironically, a constitutional crisis may occur as a result of eschewing questions of fundamental constitutional reform. Crisis situations present some new opportunities for critical institutional change. However, without the proper institutional mechanisms to manage the possible alternative reforms, a crisis situation may simply destroy the

possibility for meaningful reform. The experiences of the Meech Lake and Charlottetown Accords demonstrate that improper institutional mechanisms, such as executive federalism and referenda, may undermine the entire reform project. Similarly, providing no institutional mechanism besides piecemeal approaches guided by the eruption of crises may also put at risk proposals for necessary constitutional reform.

Possible Reforms

The duty to consult is a constitutional obligation that is meant to reconcile possible conflicting rights interests. As such, the duty to consult is a mechanism that can mitigate conflicts before crisis situations occur by addressing Indigenous-Crown interests in light of past injustices and future initiatives to strengthen communities. The duty to consult serves as an interesting perspective to evaluate Indigenous-Crown conflict over constitutional obligations, and it may be the best constitutional mechanism to resolve future conflicts. A robust implementation of the duty to consult can address the dilemma between the need for institutional protocols to guide contention and accepting groups' contestation towards the status quo constitutional order.

The duty to consult already entails some institutional protocols, such as the spectrum criteria that delineates the boundaries of proper consultation. However, more institutional practices can enhance the ways in which governments upholds the duty to consult. For instance, the current consultative framework is not clear regarding when the duty to consult is triggered. The government must consult Indigenous peoples when they have knowledge of Indigenous rights or rights claims.[237] This practice does not clearly state the degree to which the government must secure proper knowledge of Indigenous rights claims. Putting in place an institutional body that

[237] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 35.

assesses conflicting rights claims can ensure that both parties have equal access to contesting the terms of appropriate consultation within the parameters set by the specific situation. This additional consultative process may be better equipped to fairly organize conflicting rights claims than the current process of expecting all government departments to spend resources on researching Indigenous peoples' rights claims.[238]

The composition of the institution should include both Indigenous and Crown representatives who have knowledge regarding the assessment of diverse values and worldviews. For example, Indigenous and non-Indigenous mediators can identify the disputed core practices that underpin rights claims in order to detect instances in which negotiation is possible. In effect, these mediators would provide dispute resolution when conflicting interests emerge, which is a practice some Indigenous peoples expressed as highly relevant to making consultative processes meaningful.[239] The non-Indigenous representatives should be appointed by the government, while the Indigenous positions should be representatives chosen by the five national aboriginal organizations: the Assembly of First Nations, the Congress of Aboriginal People, the Métis National Council, the Inuit Tapiriit Kanatami, and the Native Women's Association of Canada. The risk that the government may appoint individuals with similar policy preferences, or that the national aboriginal organizations lack legitimacy because they do not reflect the attitudes of Indigenous peoples at the community level may never be fully omitted. Nevertheless, the politics surrounding appointments can be partly remedied by implementing strict qualifications for the positions. The role of the institution itself and the expertise required for the position can

[238] Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult,* 17.
[239] Department of Aboriginal and Northern Affairs Canada, *Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation*, https://www.aadnc-aandc.gc.ca/eng/1308577845455/1308578030248.

significantly curtail the preferences of the individuals. Furthermore, the duration of the positions should not have a quick turnover rate. Longer-term appointments would strengthen decision-making in future disputes because members can recall experiences from previous disputes and the members are familiar with one another's mediation style.

Consequently, creating a separate institutional body allows Indigenous peoples to put forward their rights claims with evidence and rationales that support Indigenous perspectives of the strength of the claim. Providing a formal institution that acknowledges rights claims made on their own terms respects Indigenous peoples' perspective regarding the strength of the claim. Such a reform addresses the concern that rights claims assessments made outside of Indigenous worldviews obscure understanding of how Indigenous ways of life are threatened.[240] This development would significantly transform the government's consultative duties as an active exercise to constantly engage with Indigenous interests. Respecting Indigenous judgements regarding the validity of their claim signifies the Crown is taking seriously their task to deal with Indigenous peoples honourably.[241]

An institutional arrangement that delegates the assessment of rights claims in one specialized body also ensures that knowledge of conflicting claims and interests are assessed to find possible solutions in anticipation of Crown proposals. Before the government articulates its policy mandate, it can consult this institution to determine the reaction of Indigenous peoples. Implementing a practice in which the government uses expertise regarding Indigenous rights claims before proposing their policy preferences can avoid severe backlash towards their mandate. The reactions to the federal government's Bill C-45 and the New Brunswick government's

[240] Ibid.
[241] Ibid.

decision to allow SWN Resources to conduct seismic testing could have been mitigated if government took seriously Indigenous interests. A formal institutional body can make Indigenous interests easily accessible for government officials, making it difficult for the government to ignore Indigenous perspectives. As such, this organization would only have consultative powers that are equally accessible between Indigenous and non-Indigenous peoples. The new institutional mechanism should not replace decision-making that emerges as a result of interactions between Indigenous and non-Indigenous actors from different macro level groups. The capacity to compromise and negotiate are integral to relationship building between actors with diverse interests. Consequently, a new institutional mechanism should facilitate meaningful consultation rather than become the site to fulfill the duty to consult. Moreover, if the government chose to overlook the information made available in this new institutional body, the judiciary could more easily assess whether the government failed to uphold consultative duties; the judiciary would discern whether the knowledge made available through the interactions made between the institution and the specific Indigenous nation were adequate to constitute knowledge of a potential Aboriginal right or title.[242]

A separate institutional body can also help the judiciary to fairly evaluate both Indigenous and Crown obligations to proceed with good faith during consultation. If Indigenous claims and interests are treated fairly by this institutional body, then Indigenous peoples' participation and cooperation with this body can indicate whether Indigenous peoples are cooperating with good faith. The perception that this institution is fair towards Indigenous interests comes from the composition of the institution as well as its practices. The inclusion of Indigenous peoples with expertise regarding the evaluation of diverse interests is necessary to build trust between the

[242] *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511 at para. 35.

institution and Indigenous peoples. The Indigenous individuals within the specialized body must be able to understand Indigenous worldviews and values and translate those perceptions so that non-Indigenous peoples can recognize and evaluate those claims. In order to uphold this standard, some Indigenous members of the institution should be appointed based on their mediation qualifications and some members should be chosen by the Indigenous community that is involved in the specific dispute. The members that represent a specific Indigenous nation will hold temporary offices that expire after an agreement on the terms of consultation are established. An Indigenous nation can appoint the same or different temporary members if mediation is required in later stages of decision making within the same dispute between the Crown and an Indigenous nation. This arrangement would balance the necessity to have members that are experienced in mediating different systems of values and individuals who understand the worldviews of a particular Indigenous nation. However, the institution must be flexible enough to adjust according to external contestation. Indigenous and non-Indigenous peoples should retain their capacity to contest the ways in which the institution evaluates diversity claims. Indeed, fair consultation must involve the parties' capacity to contest the terms of consultation, including the treatment of claims. In this specific context, the judiciary can effectively intervene to use legal principles to distinguish between reasonable attempts to address all competing interests.

The character of Indigenous-settler constitutional relationships evolves over time through interactions between macro and micro level actors. When a new understanding of Indigenous-settler relationships emerges, further transformations through macro and micro level interaction between actors occur. The exchanges between institutions' understandings of constitutional obligations and the subsequent mobilization against those institutions' decisions reveal the current character of Indigenous-settler relationships. Currently, this evolving relationship is characterized

by creating new opportunities for macro and micro level changes by encouraging actors to pursue that change in an antagonistic fashion. Antagonism between actors is exposed through crisis situations. Relying on crises to provoke interactions between actors increases the likelihood that opportunities for transforming Indigenous-settler relationships will be completely undermined. This risk can be mitigated by implementing robust mechanisms of consultation. A new institutionalized process of consultation can permit actors to contest existing relationships in a positive and constructive manner.

Conclusion

Indigenous-settler disputes consist of the interplay between different actors' interactions as they reinterpret the nature and scope of constitutional obligations between Indigenous peoples and the Crown. For instance, the Crown's duty to consult Indigenous peoples is a disputed constitutional obligation. Its purpose is to maintain meaningful Indigenous-Crown relationships and guide the development of future Indigenous-Crown interactions. Indigenous-settler relationships are contested due to the Canadian Constitution's ambiguous recognition of Indigenous rights in historic treaties, *The Royal Proclamation, 1763* and s. 35 of the *Constitution Act, 1982*. Canada's constitutional order relies on an arrangement in which citizens re-evaluate their constitutional status through processes of policy change informed by ongoing SCC decisions. Since the failed experiences of formal constitutional amendment, constitutional changes are traditionally developed incrementally over time in Canada.

The institutional system responsible for justly interpreting the constitution must respond to external sources of contestation. However, the separate institutions within the system, such as the government and the judiciary, may experience their own disputes when determining the appropriate nature and scope of Indigenous-Crown constitutional obligations. In the context of Indigenous-settler relationships, the historical institutional model that emphasizes forces of incremental change reflects institutions' past adjustments to external pressures. This model also helps explain future developments within institutional systems because of how path dependency shapes decision-making. Each institution follows its own path dependent decision-making that is affected by other institutions in the system as well as non-institutionalized actors. Disputes emerge when individual institutions make decisions that prevent the institutional system from operating consistently to secure positive outcomes.

For instance, the judiciary and the government assert different understandings of appropriate consultation with Indigenous peoples. Each institution attempts to enforce their own interpretation, resulting in tensions and instability within the institutional system. The legal norms established by the judiciary that guide appropriate consultation inadequately compel the government to pursue robust forms of consultation with Indigenous peoples. The case law pertaining to the duty to consult so far has closed certain possibilities for Indigenous peoples to pursue their vision of reconciliation. In the *Rio Tinto* case, the SCC stated that only the specific Crown action in the case can trigger the duty to consult.[243] This ruling prevents the duty to consult from addressing and correcting past unjust decision-making. Additionally, the *Little Salmon* case revealed the judiciary's hesitation to outright denounce the Yukon government's insufficient understanding of Indigenous rights and demands as a barrier to fulfilling Indigenous perspectives

[243] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650 at para. 53.

of fair dealing. This decision reveals that governments can fulfill the legal requirements of adequate consultation without considering the perspectives of Indigenous peoples. Consequently, the government excludes Indigenous participation in articulating the terms for just consultation to pursue its policy preferences.

When the institutional system fails to accommodate the demands of external pressures, Indigenous peoples can collectively provoke different change within the institutional system, which would consequently transform Indigenous-settler relationships. According to the political process model, these contentious acts are made in reaction to the decisions of other actors, such as institutions, and thus have path dependent qualities. Once a contentious action is made to exploit a political opportunity following an institutional decision, the event unfolds and presents new opportunities and constraints for future interactions between actors. The Idle No More movement and the Rexton Shale Gas protests illustrate how contentious actions exploit political opportunities in situations where institutional decisions appear to overlook individuals' interests. The ways in which Indigenous protesters framed their positions in these protest movements also demonstrate how their interests are determined by previous developments within Indigenous-settler constitutional relationships. For instance, both of these movements demanded the government to honour the duty to consult in a manner that considered Indigenous perspectives of fair dealing. This demand contests the legal requirements regarding the duty to consult, in which the government is not obliged to seek Indigenous participation when setting the terms of appropriate consultation.

The interplay between actors fulfilling different roles produces a new outcome within the system of Indigenous-settler relationships. Actors within macro roles, such as in institutional systems and within social movements, attempt to change the system of relationships by altering

the behaviours of actors at the individual level. When micro level actors' have different attitudes, they will behave differently within their macro level roles; the different behaviours create systematic change. In order for the system of Indigenous-settler relationships to evolve in a manner that promotes constructive interactions between actors, all actors must make decisions that facilitate the participation of other actors to meaningfully participate. Decisions that make negotiation impossible between different parties, or relying on a context of decision-making that reduces the likelihood of mutual understanding inhibits the development of Indigenous-settler relationships. When considering the duty to consult, the government is impeding on improving Indigenous-settler relationships by not implementing necessary measures to ensure that all parties equally participate in meaningful exchanges. The feedback loop integrates distrust between Indigenous and non-Indigenous actors into the status quo context of Indigenous-settler relationships, which further entrenches the unlikelihood of reconciliation between competing interests.

A new institutional body that can facilitate meaningful consultation between Indigenous peoples and the Crown may address the current shortcomings in current consultative practices. This new institution can serve to mediate conflicting Indigenous-Crown interests and clarify the expectations of each actor to participate honourably. Mediators can sort through different demands in a manner that equally respects the perspectives of each actor. Under this arrangement, Indigenous attitudes regarding adequate consultation will be evaluated equally alongside existing procedures. Moreover, assigning one specialized institution the task of finding points of commonality between different interests can also help delineate the degree to which each party is participating with good faith. By making the interests of each party accessible to other actors, there is less justification for decision-making that excludes certain perspectives.

The interplay of interactions between different actors guides the development of Indigenous-settler relationships. Contestation regarding the character of Indigenous-settler relationships can be constructive if actors use existing differences as an opportunity to renegotiate unjust practices. Improving actors' capacity to meaningfully interact with one another also improves the capacity of the entire system to adjust according to the needs of each actor. The duty to consult is a dimension of Indigenous-Crown relations, but it is also a principle that can improve the political relationship between Indigenous and non-Indigenous peoples. Indeed, the opportunity to improve consultation procedures may reveal new alternatives to reimagine a just Indigenous-settler relationship that were previously inconceivable.

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