Final Report: Knowledge Synthesis Grant

Indigenous, Industry and Government Perspectives on Consultation in Resource Development[*]

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Brief Summary and Key Messages

This knowledge synthesis report explores current understandings and interpretations of engagement and the duty to consult with Indigenous Peoples in the context of resource development in Canada. We hope the research presented here will inform academics, Indigenous groups, governments and industry, and contribute to reconciliation with Indigenous Peoples. We reviewed the academic and policy literatures on the duty to consult, and performed a detailed review of publicly available policy and guideline documents related to consultation and engagement produced by governments, industry members and Indigenous communities and organizations. The detailed analysis involved thematic and content analyses of the documents. Our findings reveal several key themes:

Theme 1: Differing Understandings, Definitions and Expectations

The first barrier to effective and meaningful consultation can be found in the different understandings, interpretations or definitions of consultation by the actors involved, what they see as its purpose and how it is related to reconciliation between Indigenous Peoples and the rest of Canada. Government documents reveal that meeting legal requirements is a primary consideration and guiding factor, focusing on how the requirements relate to procedural aspects and the delegation of authority. Documents from Indigenous groups emphasize the assertion of rights and increasing autonomy, as well as increasing the role for Indigenous Peoples in decision-making. Finally, industry documents reflect a priority of reducing uncertainty in operations and investment.

Theme 2: Authority and Power

Consultation often involves an uneven power relationship between the consulters, who have formal authority for final decisions, and the consulted, who can only attempt to influence those decisions. One of the most contentious issues related to consultation has been how much authority or power is granted to Indigenous communities over development on their traditional and treaty lands. This relates to the ongoing discussion over whether the principle of consent means Indigenous Peoples have a veto. A potential resolution is following the tradition of many Indigenous groups of consensus-based decision making, where deliberation continues until all parties agree on a decision. While Indigenous groups may not desire to completely stop a project on their own, the notion that it would move forward without their agreement demonstrates a lack of respect for their concerns and rights.

Theme 3: Procedure, Timing and Substance

Documents from Indigenous groups indicate that there is too much focus on procedures and whether the duty to consult is conducted fairly, compared to the time spent on the outcomes and the substance of accommodation, which includes both economic and cultural components. An important concern expressed in these documents is that consultation processes are often rushed, and that insufficient time is dedicated to establishing trusting relationships and allowing for respectful and meaningful consultation. A related issue is the Crown's ability to delegate its obligations to other actors. This can be seen by some Indigenous groups as the Crown shirking its responsibility and not promoting positive relations; just because delegation is legally permissible does not mean it is appropriate, acceptable, desirable or meaningful. Industry's primary concern is having clarity on what they are responsible for and a smooth transition to government consultation when issues are outside their authority.

Executive Summary

Indigenous Peoples' involvement in resource and economic development has become a prominent public policy and legal issue in Canada, and one that is constantly evolving. In particular, projects on or near the traditional and treaty territories of Indigenous Peoples impact the rights of Indigenous Peoples and trigger the Crown's fiduciary duty to consult. Historically, Indigenous communities and nations were excluded from decisions about resource development, but this is changing rapidly. Speers and Coates (2016) argue that resource development remains the best prospect since Confederation for addressing the lack of opportunity Indigenous Peoples experience in Canada. Importantly, this opportunity is not necessarily limited to economic benefits, and can include improvements in health, social, cultural conditions in Indigenous communities across the country and facilitate the reconciliation of relations between Indigenous Peoples and the Canadian state.

Creating more equitable and mutually-beneficial relationships among Indigenous communities, resource development companies and government begins with developing a better understanding of these groups' unique perspectives on consultation and supporting engagement activities, and the differences or similarities between them. We contribute to this better understanding through this knowledge synthesis report.

Our objective in this research is to synthesize the academic and grey literatures and policy documents surrounding the duty to consult, and the broader literature around the engagement of Indigenous Peoples in resource development in Canada. We did this firstly through a rapid review of the research literature focusing on the duty to consult. Second, we performed a detailed review of publicly available policy and guideline documents related to consultation and engagement produced by governments, industry members and Indigenous communities and organizations. The documents used in the detailed analysis are policy statements or guidelines, designed to inform and guide individuals and organizations in implementing the duty to consult. The detailed analysis involved two types of document analysis: thematic and content. Thematic coding is an open-ended interpretive process and content analysis is the quantitative counting of the instances of a reference. Having two streams of inquiry improves the validity of the findings, as the results of the thematic and content analyses are used to corroborate each other.

Our findings contribute to a shared understanding of consultation among Indigenous groups, government and industry. This can facilitate improvements in the consultation process while increasing the incidence of mutually agreeable outcomes in resource development decisions. Better consultation and engagement processes can improve relationships between the actors involved in resource development, and contributes to Canada's economic prosperity.

This knowledge synthesis project primarily addresses the theme of economic development and environmental sustainability and subthemes: *How do First Nations, Inuit and Métis people define their roles in the economic development of urban, rural and remote communities?* and *What are the economic, social and environmental impacts of resource development on Aboriginal*

communities, and in particular, on women and children? and *What are appropriate practices and processes for establishing and maintaining respectful social licence agreements with Aboriginal communities*? The project also addresses the theme of treaties, governance, legal traditions and equity, particularly the question of *How are Indigenous and non-Indigenous organizational structures and institutions shaping and fostering sustainable and vibrant communities?*

What We Discovered

Our review of the literature suggests several challenges or barriers to effective consultation, demonstrating the differing views that Indigenous groups, industry and governments have of how consultation should be conducted. These include different definitions of consultation; it's relationship to reconciliation; the debate over whether the duty to consult provides a veto or requires consent from Indigenous Peoples; delegation of the duty to consult; issues with accommodation, capacity building, timing, information sharing and transparency; and the inclusion of traditional knowledge.

Our main conclusion is that, not unexpectedly, each actor has a different motivator behind their participation in consultation or engagement activities. Government documents reveal that meeting legal requirements is a primary consideration and guiding factor, particularly as these requirements relate to procedural aspects and the delegation of authority. Documents from Indigenous groups focus on the assertion of rights and increasing autonomy, as well as increasing the role for Indigenous Peoples in decision-making. Finally, industry documents reflect a focus on reducing uncertainty in operations and investment.

Key Themes

Theme 1: Differing Understandings, Definitions and Expectations

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relates to the ongoing discussion over whether the principle of consent means Indigenous Peoples have a veto. A potential resolution is following the tradition of many Indigenous groups of consensus-based decision making, where deliberation continues until all parties agree on a decision. While Indigenous groups may not desire to completely stop a project on their own, the notion that it would move forward without their agreement demonstrates a lack of respect for their concerns and rights.

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Next Steps

Several areas of future research emerged from this study. First, there is an opportunity to study further how consultation and engagement are occurring on the ground, through cases studies of individual projects and communities or surveys of participants. Second, it is important to investigate ways to incorporate the governance and decision making traditions used by Indigenous communities into consultation and engagement processes. At the very least, ensuring Indigenous Peoples have a say in how they are consulted is critical. Finally, while the timeframe and methodologies can be prohibitive, more work needs to be done to establish the link between consultation processes and substantive outcomes in the community. In short, does better consultation lead to a stronger and healthier community, and how?

Introduction and Context

Indigenous[1] Peoples' involvement in resource and economic development has become a prominent public policy and legal issue in Canada. Projects are increasingly proposed in locations which are on or near the traditional territories of Indigenous Peoples, which impacts the rights of Indigenous Peoples and triggers the Crown's fiduciary duty to consult. Historically, Indigenous communities and nations were excluded from decisions about resource development. Over time, however, Canada's legal system has ruled that the Crown has a duty to consult with Indigenous communities, when approving and shaping projects which are located on their land or could infringe on their rights, and if appropriate, accommodate their concerns. Indeed, constitutional scholar Peter Hogg argues that "no area of Canadian law has been so transformed in such a short period of time as the law of aboriginal rights" (Hogg, 2009). However, the extent to which these legal precedents have empowered Indigenous communities in decision-making or allowed them to share equally in the wealth Canada's resources provide is less clear. Despite this, Speers and Coates (2016) argue that resource development remains the best prospect since Confederation for addressing the lack of opportunity Indigenous Peoples experience in Canada. Importantly, this opportunity is not necessarily limited to economic benefits. It can include improvements in health, social, cultural conditions in Indigenous communities across the country and facilitate the reconciliation of relations between Indigenous Peoples and the Canadian state.

Creating more equitable and mutually-beneficial relationships among Indigenous communities, resource development companies and government begins with developing a better understanding of these groups' unique perspectives on consultation and supporting engagement activities, and the differences or similarities between them.[2] This knowledge synthesis report has two primary purposes. First, to synthesize extant research literature related to the duty to consult to identify the major issues, barriers and challenges associated with the conduct of the duty to consult. Second, to analyze policy statements and guideline documents related to consultation and engagement produced by Indigenous groups, government and industry. The purpose is to examine these groups' perspectives on the barriers and challenges to consultation, explore how they believe consultation should be conducted and generate insights for improvement.

[1] We note that only recently has the Canadian government used the word 'Indigenous'; instead, the term 'Aboriginal' is used in the context of Canada's constitution and includes First Nations, Inuit, and Métis. We choose to use the term Indigenous as the most inclusive collective noun, as recommended by Indigenous Foundations (2017) and Joseph (2016). Our use of alternative terms reflects the use of those terms in works cited in order to maintain scholarly accuracy and the intent of the original work.

[2] Consultation, in the context of this research project, refers to the Crown's obligation to meaningfully consult with Indigenous Peoples prior to the Crown making a decision or taking a course of action that may affect their rights and privileges, in accordance with Section 35 of the *Constitution Act* and the many subsequent Supreme Court and Federal Court of Appeal rulings in this matter. Project proponents are frequently required to engage with Indigenous communities in support of the Crown fulfilling its obligations. Engagement refers to a broad range of actions taken by companies and government departments as they interact with Indigenous Peoples for the purpose of finding common ground when a project, proposed by a company, is being assessed by the relevant authorities.

The remainder of the report is organized as follows. First, we present a short section on the implications of the research, followed by an outline of the research approach and methodology. Most of the paper is a discussion of the results of our analysis. We provide a rapid review of the research literature, and a detailed review of policy documents, comparing the use and frequency of identified keywords, such as "consultation," "reconciliation," "veto" and "consent." Following our review, we identify several areas of future research and outline a plan for knowledge mobilization. Finally, we conclude with a summary of our results.

Implications

In many cases, conflict over resource development projects has led to legal challenges and civil protests from Indigenous groups and communities. Examples include pipeline projects in B.C. and Quebec, hydraulic fracturing in New Brunswick and Nova Scotia, and hydroelectric and mining projects in B.C. These conflicts often have a high public profile, which can create the perception that resource development and the protection of Indigenous lands, rights and culture are mutually exclusive outcomes. In these cases, it may seem that improvements or changes in government consultation processes and industry engagement activities will do little to resolve disputes or satisfy aggrieved parties.

However, many have argued that the dichotomy posed for Indigenous communities between economic development and the preservation of rights and traditional practices is overdrawn (Notzky, 1995; Anderson, 1999, 2002; Slowey, 2009; Angell and Parkins, 2011). Indigenous Peoples are not just passive victims of resource development, but have the ability to influence and shape decisions which affect their communities (Angell and Parkins, 2011). In addition, Indigenous Peoples' cultures and ways of life are not a remnant of the past, threatened by present day trends and activities. Like all cultures, they are constantly changing and responding to the external environment. Participating in resource development has the potential to empower Indigenous groups and give them greater capacity to navigate and manage these changes, while preserving their rights and identity (Slowey, 2009). However, given Canada's history of neglecting Indigenous Peoples' rights and excluding them from decision making,[3] an outstanding question is whether consultation processes and engagement activities contribute to that empowerment. This requires examining how the actors involved — Indigenous groups, government and industry — view and interact in the process and practice of consultation and supporting engagement activities.

Bridging the differences between frames or worldviews is an important first step in improving consultation and engagement with Indigenous groups in resource development decisions. Unless relations with industry and government improve, Indigenous groups will continue to use the legal system to be heard, given their historical success (Gallagher, 2011). The legal system is a time-consuming and financially costly avenue for dispute resolution and often impedes the development of positive relations. In addition to working through existing state and industry processes, Indigenous groups in Canada have both the capacity and a precedent of engaging in civil

[3] For a historical perspective on Indigenous Peoples' relationships with resource development see Notzke (1994).

disobedience and protest as a means of asserting their rights and interests (Maclean, Robinson and Natcher, 2015). Thus, finding common ground amongst Indigenous Peoples, governments and industry on engagement and consultation practices is imperative to the future of resource development and the Canadian economy, and ultimately to the reconciliation of the relationship between Indigenous Peoples and the rest of Canada.

Research Approach and Methodology

The goal of the research reported on here is to summarize and synthesize existing knowledge, both in the academic and policy worlds, on the implementation of consultation. Our research occurred in two stages. First, we performed a rapid review of the research literature and policy documents focusing on the duty to consult. Second, we performed a detailed review of publicly available policy and guideline documents related to consultation and engagement produced by governments, industry members and Indigenous communities and organizations.

Rapid reviews provide an overview and synthesis of a literature or documents, with the goal of providing an output in a short period of time (Ganann, Ciliska and Thomas, 2010). These reviews are frequently used to provide an evidence base for policy makers who require a quick turnaround on information to respond to emerging issues or specific timelines (Grant and Booth, 2009). While rapid reviews do not necessarily sacrifice rigor, they are typically more wide-ranging and less exhaustive compared to systematic reviews. The purpose is to cover a wide range of topics related to an issue or area of interest, while ensuring a timely response. These features make rapid reviews an ideal strategy for a knowledge synthesis project

Rapid reviews tend to rely on a narrative approach, organizing information around common themes, as opposed to systematic reviews, which organize information based on similar methodologies or results (Ganann, Ciliska and Thomas, 2010). Narrative review is an ideal strategy for a literature that is qualitative, without a body of studies that use similar methods, address the same question and can be easily aggregated using quantitative analysis. Thus, it is the most appropriate strategy for integrating the material under review in this research, which involves a range of materials, including theoretical and conceptual pieces, cases studies, reports, as well as policy analysis and policy statements. Rapid reviews often use less formalized search strategies than systematic reviews (Grant and Booth, 2009), and narrative reviews traditionally do not outline the process by which sources were identified and included in the study (Green, Johnson and Adams, 2006). Nevertheless, a brief overview of the process used in this study is warranted.

In the rapid review, we conducted a search of documents using databases such as Scopus, World of Science and Project Muse, as well as Google Scholar. The search involved using combinations of several keywords: Indigenous, duty to consult, and Canada, as well as synonyms or closely related words. Sources were eliminated manually if they were deemed to have too little relevance or if they were purely empirical studies with little connection or discussion of broader debates

around consultation and engagement.[4] A snowballing process was used whereby the bibliographies of retrieved sources were used to identify additional literature. Grey literature was collected by examining the publications of think tanks and other organizations that produce reports in the field of Indigenous policy and resource development, as well as a more general internet search.

The second step of our analysis relies on a detailed review of publicly available policy and guideline documents related to consultation and engagement produced by governments, industry members, and Indigenous communities and organizations. The documents used in the analysis are policy statements or guidelines, designed to inform and guide individuals and organizations in implementing the duty to consult or in engaging with Indigenous communities. Policies or guiding documents were gathered through an extensive online search and separated into the three categories: Indigenous groups, industry and government. The search produced 61 documents: 17 from industry, 22 from Indigenous groups and 21 from government; the list is reported in Appendix A. Documents from industry includes documents from companies and industry associations. Documents from Indigenous groups includes documents from First Nations, Indigenous political institutions, and Indigenous associations. The number of documents from each group is not the same; however, exact symmetry is difficult to achieve and not necessarily valuable because every document varies in length.

Using NVivo software, which is designed to allow the systematic coding or thematic organization of many documents, we conducted two types of analysis: thematic and content. We treat thematic coding as an open-ended interpretive process and content analysis as the quantitative counting of the instances of a reference, following Viasmoradi, Turunen and Bondas (2013). Having two streams of inquiry improves the validity of the findings, and allows researchers to determine whether the results of the thematic and content analyses corroborate each other or not.

In the thematic analysis, we created a codebook (Appendix B) after a preliminary review of the documents, which identified and defined several 'themes' or 'nodes'. Three research assistants then coded the documents according to the codebook. Regular meetings were held throughout the process to ensure consistent understanding of themes by the research assistants. After the research assistants read and coded each of the documents, summaries of each of the themes or nodes were compiled to highlight the overarching issues within each theme.

In the content analysis, we assessed and compared the frequency of occurrence of keywords in the documents in each category (Indigenous groups, government and industry). This provides an indication of the level of importance placed upon central concepts by each of the groups. Each word search included stemmed words. For example, counts of the term "sustainable" included the word "sustainability" as well, and the term "relationship" also included its plural, "relationships." To ensure that differences in word counts are not related to differences in the number and length of documents, the number of mentions are reported and analysed per every 10,000 words.

[4] An example of an empirical study that came up in searches but was manually excluded is a scientific study on the impacts of Cree-polar bear interactions and the influence of public policy decisions (Lemelin et al., 2011).

The documents are broadly representative and include Indigenous groups in different regions of the country; all provinces, the federal government, and the Government of Northwest Territories (GNWT)[5]; and a cross-section of resource industries. However, caution should be exercised when making generalizations about how each group understands consultation or how they believe it should be implemented. This is particularly true for Indigenous groups; in many Indigenous cultures, knowledge and history is shared and passed down orally rather than in written form. Thus, many of the protocols and guidelines that Indigenous groups have regarding consultation may not be captured in a review of publicly available documents. Given that there are hundreds of First Nations, Inuit and Metis communities in Canada, it is difficult to make conclusive generalizations about a common approach to consultation and engagement. We do not intend to speak for the Indigenous Peoples, groups and communities whose documents have been included in this report. The final source of information and interpretation of these documents is, of course, the communities and organizations who created them. Nevertheless, these publicly available documents provide a window into the understandings, motivations and issues that Indigenous groups, along with government and industry, have regarding consultation processes.

Results

This section of the report is divided into two sub-sections. First, we present the findings of the rapid review of research literature, identifying the critical barriers, challenges issues in consultation. Second, we outline and discuss the results of the analysis conducted on policy statements and guideline documents.

Rapid Review of the Research Literature

In the mid-2000s, a handful of Supreme Court decisions outlined the duty to consult, which dramatically changed the landscape of resource development and Indigenous groups in Canada.[6] The *Haida Nation v. British Columbia (Minister of Forests)* ([2004] SCC 73) and *Taku River Tinglit First Nation v. British Columbia (Project Assessment Director)* ([2004] 3 SCR 550) decisions established the duty to consult in cases where Indigenous groups had a claim to the land in question. The *Mikisew Cree First Nation v. Canada (Minister of Heritage)* ([2005] SCC 69) decision extended the duty to instances where treaty rights were already established, including the right to hunt and trap on traditional territories. The *Quebec (Attorney General) v. Moses* ([2010] 1 SCR 557) and *Beckman v. Little Salmon/Carmacks First Nation* ([2010] SCC 53) cases confirmed that even though modern treaties frequently contain provisions for consultation and negotiation, the duty to consult remains and serves as a constitutional protection or backstop in the relationship. The result of these cases is that to maintain the honour of the Crown in its relations with Indigenous Peoples, the governments of Canada have a duty to consult and accommodate Indigenous Peoples' concerns across a broad range of relationships and agreements.

[5] Yukon and Nunavut are excluded, as they did not have publicly accessible policy documents.
[6] Of course, these decisions were influenced by, and built on, previous court cases, in particular, *Delgamuukw v. British Columbia* [1997] 3 SCR 1010.

The string of legal victories that outlined the duty to consult have empowered Canada's Indigenous Peoples to the point where they have been referred to as "resource rulers" (Gallagher, 2011). Given the Canadian economy's strong resource base, it is not a stretch to argue that Indigenous Peoples now play an important role in the country's economic future. However, Indigenous organizations and communities often find formal consultation processes, and the approach to engagement taken by industry and government, to be lacking (Assembly of First Nations of Quebec and Labrador [AFNQL], 2005; Hupacasath, 2006; Assembly of First Nations [AFN], 2011a).[7] As the nature and substance of the duty to consult is expanded upon by the Canadian courts, there continue to be serious questions about how processes are conducted, if legal requirements are being met, and most importantly, whether consultation leads to the empowerment of Indigenous communities. This is essential, as there is evidence to suggest that communities which have control and play an important decision-making role in development decisions experience the best outcomes in terms of community and social development (Rodon and Lévesque, 2015). Thus, the first barrier to consultation can be found in the different understandings or definitions that the actors involved have of consultation, what they see as it's purpose and how it is related to reconciliation between Indigenous Peoples and the rest of Canada.

One of the most contentious issues related to consultation has been how much authority or power is granted to Indigenous communities over development on their traditional or treaty lands. The courts have repeatedly indicated that the duty to consult does not grant Indigenous Peoples a veto over resource development projects. In *Delgamuukw*, the Supreme Court stated that the duty to consult varies with the circumstances, from cases where an Aboriginal claim was weak and the infringement minor, to cases where a claim was clearly established and the activities proposed would have the potential to severely impact Aboriginal rights. The decision outlined that the duty could require giving notification and sharing information when infringement is relatively minor. In cases where infringement is significant, consultation could entail full consent and actual participation in decision making.

In 2016, the Government of Canada endorsed the United Nations Declaration on the Rights of Indigenous People which calls for free, prior and informed consent (FPIC) of Indigenous Peoples in development decisions. How these seemingly contradictory positions requiring consent but not granting veto can be reconciled in consultation processes is still unclear (Coates and Favel, 2016). Joffe (2016) argues that requiring consent is not the same thing as a veto; consent involves some limitations and involves a process of balancing interests and give and take, while veto is an absolute and unilateral right to halt a project. The relevant discussion then is about the conditions under which consent is required, rather than whether there is an absolute veto or not (Imai, 2017). Boutilier (2017) suggests that one way to implement this is to include FPIC in the language of the *Canadian Environmental Assessment Act*, first proposed by the AFN in 2011, or outlining FPIC directly in the Canadian constitution. The AFN proposal recommended engaging Indigenous

[7] A full list of acronyms and abbreviations is provided in Appendix C.

communities earlier in planning, requiring plain language summaries that respond to Indigenous Peoples and requiring the use of traditional knowledge (AFN, 2011b).

Another issue that has arisen in the fulfilment of the duty to consult is the ability of the Crown to delegate its obligation to other actors. The *Haida* decision outlined that, although the Crown is ultimately responsible for fulfilling the duty to consult, procedural aspects of consultation can be delegated to third parties, such as administrative bodies in the public sector or the project proponent. However, what these procedural aspects are and which organizations they can be delegated to is still being shaped. Consultation has often been conducted by administrative organizations that have some level of independence from government, such as the Environmental Assessment Office, the National Energy Board (NEB) and the Nuclear Safety Commission. Lambrecht (2013) argues that delegating Indigenous consultation processes to administrative bodies is sensible, as they are already undertaking analysis on and assessments of proposed projects that will inform government decision making. However, some argue that ambiguity around what government body and which officials are responsible for the duty to consult further complicates negotiations and makes the process less accessible to Indigenous groups (Promislow, 2013; Ritchie, 2013). Charowsky (2011) notes that when administrative bodies conduct consultations on major projects, they must recognize that they may not have final authority to grant approval for a project or decide whether the duty to consult has been met.

Several experts argue that the environmental assessment process has not lived up to expectations in terms of empowering Indigenous groups (Wismer, 1996; Noble and Udofia, 2015). They find there is insufficient time to assess whether projects will have a negative or positive impact on local communities, and local knowledge has not been properly balanced with other evidence. In the case of the National Energy Board, which has conducted consultation on controversial projects like the Northern Gateway and Trans Mountain pipelines, Graben and Sinclair (2015) and Popowich (2007) both suggest that the tribunal is not equipped to fulfill the duty to consult because it only evaluates whether a project is in the public interest and does not have the capacity to assess whether individual or minority rights have been protected. Indeed, some Indigenous groups have opted not to participate in these processes because they do not address the issues that are important to them (Boutilier, 2017). In *Chippewas of the Thames First Nation v. Enbridge Pipeline Inc.* [2017 SCC 41] and *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*. [2017 SCC 40], the Supreme Court ruled that the NEB can and should conduct and evaluate the duty to consult. Hodgson (2017) argues that the NEB is more likely to have the authority to carry out and assess consultation when it is the final decision maker, like it did in *Chippewas of the Thames* and *Clyde River,* than when it advises or provides a recommendation and the executive branch of government is the final decision maker.

Procedural aspects of consultation can also be delegated to the project proponent. Thus, industry's efforts to communicate, engage and partner with Indigenous communities can contribute to fulfilling the duty to consult. Adding to the complex web of actors involved in consultation, it is also possible that there are multiple Indigenous groups that need to be consulted and

accommodated. In some cases, multiple Indigenous communities are affected by a project. For example, Gardner et al. (2015) study a proposed hydroelectric dam in Ontario where an Indigenous community, Constance Lake First Nation, was also a proponent. They found that several neighbouring First Nation and Métis communities located upstream from the project were affected and were not sufficiently consulted. There is also the problem of who should be consulted in cases where more than one group or actor claims to speak for a community. This issue has arisen when individual communities have different positions than national or regional Indigenous organizations (Peach, 2016).

The most common way industry has engaged and negotiated with Indigenous groups is through impact benefit agreements (IBAs). IBAs are agreements signed between a project proponent and an Indigenous community which outline the benefits that will be provided to the community in exchange for their support of a project. Cameron and Levitan (2014) argue that IBAs in effect turn the duty to consult over to private companies and limit Indigenous communities' access to legal and political channels to voice their concerns. Similarly, O'Faircheallaigh (2010) argues that IBAs can restrict a community's ability to oppose projects through judicial and regulatory means. Dylan et al. (2013) echo this sentiment by suggesting that Indigenous communities have little power when signing IBAs, because the project could still go ahead without their involvement, leaving them with little leverage in negotiations. In addition, Dylan et al. argue that Indigenous communities often have limited tools to address poverty and poor social conditions, making them more likely to accept an agreement that does not maximize their benefits, as it is the only opportunity to improve their situation.

Another criticism of IBAs is that they provide development *in* the community but do not provide development *of* the community (Beckley et al., 2008). In short, agreements tend to focus on economic goals rather than community or social outcomes. Often benefits are tied to a specific project, making them localized, short term, and unevenly or unfairly distributed within and across communities (Fidler and Hitch, 2007; Coates and Crowley, 2013). While some point out that many IBAs do contain provisions for community development (Sosa and Keenan, 2001), others argue that to avoid a piecemeal approach, revenue sharing or agreements addressing social programs should be negotiated with government rather than industry (Shanks, 2006; Knotsh and Warda, 2009). Thus, there is still uncertainty around when accommodation is required, who should provide it and what form it should take (Mullan, 2011).

Consultation often involves an uneven power relationship between the consulters, who have formal authority for final decisions, and the consulted, who can only attempt to influence those decisions. This situation is exacerbated because many Indigenous communities do not have access to resources and expertise which would allow them to participate fully in consultation processes (Ritchie, 2013). The courts have ruled that government is required to ensure Indigenous Peoples can participate fully in the consultation process. This could include paying for travel to meetings, the time of elders and other community members, and consultants and professional services, as well as other activities that support Indigenous Peoples' involvement in decision making.

However, the provision of supports and development of capacity which would lead to full and equal participation in consultation does not always occur in practice (Ritchie, 2013). When Indigenous groups engage directly with project proponents, without the involvement of government, differences in capacity can be even more significant because companies or firms are not legally obliged to provide support.

Approaches taken in capacity-building have often been one-sided; they focus only on government and industry providing capacity and supports to Indigenous Peoples, without considering what knowledge and skills Indigenous communities can offer (Howitt et al., 2013). The knowledge and perspectives that Indigenous People have acquired throughout their long history living on the land are often referred to as traditional ecological knowledge (TEK). TEK is "a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment" (Berkes, 1993). Involving Indigenous Peoples and using TEK in shaping resource development projects and regulatory processes can contribute to the sustainability of development (Hill et al., 2012). For example, Innu and Inuit communities' knowledge was instrumental in establishing the criteria for the environmental assessment of a mining project located at Voisey's Bay in Newfoundland and Labrador (Gibson et al., 2005). O'Faircheallaigh (2007) proposes that involving Indigenous groups in the ongoing monitoring and implementation of environmental regulations can increase their involvement in project development beyond the approval stage, while improving companies' compliance with regulatory requirements and standards. However, Reed (2008) cautions that the extent to which Indigenous Peoples' involvement will strengthen the quality and durability of resource development decisions will be determined by the effectiveness of consultation processes. Reed stresses that the process must fully engage Indigenous groups in a meaningful way, to ensure resource development and management incorporates local knowledge. Not only will this increase the legitimacy of the process, it will improve the quality of environmental outcomes that are produced.

Indigenous perspectives and TEK have been particularly influential in the study of the forestry sector as they provide a different definition of sustainable forestry compared to that of industry. According to Karjala, Sherry and Dewhurst (2003), Indigenous approaches to sustainable forestry are place-based and are not connected to a human presence. In contrast, industry's approach is resource-based and focuses on the utility of forests to humans. Parsons and Prest (2003) go further to argue that Indigenous forestry is a distinct approach to resource development that combines current forestry management models with traditional cultural practices. They argue this approach is becoming more common with increasing participation of Indigenous communities in forestry. Several lessons have emerged from the study of Indigenous involvement in resource management: each project has unique features and a one-size-fits-all approach to management will not work; TEK is not just about documentation or recording of knowledge, it is about respecting the relationship between knowledge and knowledge-holders; co-management is a social learning process for managing human use of resources, not just an institution for managing the resources;

and economic development is a sustainable process towards community goals not just about jobs and business revenue (Wyatt et al., 2010).

Detailed Review of Policy Documents

The previous section suggests several issues preventing, or barriers to, effective consultation, demonstrating the differing views that Indigenous groups, industry and governments have of how consultation should be conducted. These include different definitions of consultation; it's relationship to reconciliation; the debate over whether the duty to consult provides a veto to or requires consent from Indigenous Peoples; delegation of the duty to consult; issues with accommodation, capacity building, timing, information sharing and transparency; and the inclusion of traditional knowledge. This section reviews policy statements and guideline documents related to the duty to consult that were produced by Indigenous groups, industry and governments, in order to examine which barriers or challenges are important to each group and explore their perspectives on each.

Definitions of Consultation

How do the documents of each group — Indigenous groups, governments and industry — define consultation and its purpose? As discussed above, the duty to consult is prescribed and shaped by the Canadian courts. However, notwithstanding the legal definition, the general concept of consultation is interpreted and understood differently by the actors that are involved in the process. There are several definitions of consultation from the documents we examined. For example, the Government of B.C. (2010) states that "consultation in its least technical definition is talking together for mutual understanding." On the industry side, the Association for Mining Exploration British Columbia [AME] (2015) states "consultation and engagement are about sharing information, listening to and respecting concerns raised, and looking for ways to address those concerns in a manner that is reasonable and commensurate with the nature, scope and duration of the exploration activities being carried out." AFNQL (2005) suggests that "consultations are an excellent opportunity for First Nations to exercise their jurisdiction over, and their social and economic interest in, lands and natural resources." These definitions showcase differences in how each group approaches consultation; for Indigenous groups, it is about empowerment and the expression of rights. This contrasts with the other definitions, which use language oriented to developing relationships and fair processes.

In the *Haida* decision, the Supreme Court expressed that consultation must be meaningful. However, what exactly constitutes "meaningful consultation" is not clear. Indigenous groups that addressed meaningful consultation suggested that it required being engaged early, allowing sufficient time for input to be prepared and considered, and having a say in strategic planning decisions (Kluane First Nation [KFN], 2012; Meyers Norris Penny, n.d.; Nak'azdli, n.d.). Indigenous and North Affairs Canada [INAC] (2011) states "a meaningful consultation process is characterized by good faith and an attempt by parties to understand each other's concerns, and move to address them." This means consultation is "carried out in a timely, efficient and responsive manner; transparent and predictable; accessible, reasonable, flexible and fair; founded in the

principles of good faith, respect and reciprocal responsibility; respectful of the uniqueness of First Nation, Métis and Inuit communities; and, includes accommodation (e.g. changing of timelines, project parameters), where appropriate" (INAC, 2011). Governments also recognize that meaningful consultation is an iterative process rather than a single action or event (Department of Fisheries and Oceans [DFO], 2006; Nova Scotia, 2015; INAC, 2011). For example, INAC (2011) indicates that departments and agencies are encouraged to develop long-term working relationships and processes rather than working together only on an ad hoc or case-by-case basis. Industry documents did not provide a clear definition of meaningful consultation. The Calgary Chamber of Commerce (2015) indicates the need for a clear definition, but does not offer one. Several industry documents did note the importance of involving Indigenous Peoples in determining the process itself and ensuring it is acceptable and informed by the interests of Indigenous communities (Canadian Association of Petroleum Producers [CAPP], 2006; AME, 2015; Canadian Wind Energy Association [CANWEA], n.d.).

Some of the documents produced by Indigenous groups suggest that the duty to consult comes from the unique, nation-to-nation relationship between Indigenous Peoples and the Crown. These documents outline that consultation should be driven by the political will to establish and maintain this relationship as opposed to fulfilling a legal requirement (AFNQL, 2005; Federation of Saskatchewan Indian Nations [FSIN], n.d; National Centre for First Nations Governance [NCFNG], n.d.(a)). The AFNQL argues "those seeking to consult First Nations hide behind general legislative and policy requirements without ever addressing the essence of the constitutional duty to consult and accommodate First Nations." Government documents tend to view the purpose of the duty to consult as fulfilling legal requirements (for example, INAC, 2011; Alberta, 2014). The Alberta government states that the purpose of its policy is "to be consistent with case law and demonstrate a practical approach to meeting the requirements established by the courts" (Alberta, 2014). There are a few exceptions; notably, the Government of British Columbia (n.d.) and the Government of Nova Scotia (2015). The B.C. policy on consultation emphasizes the need for "government-to-government relationships where First Nations are rights-holders not stakeholders."

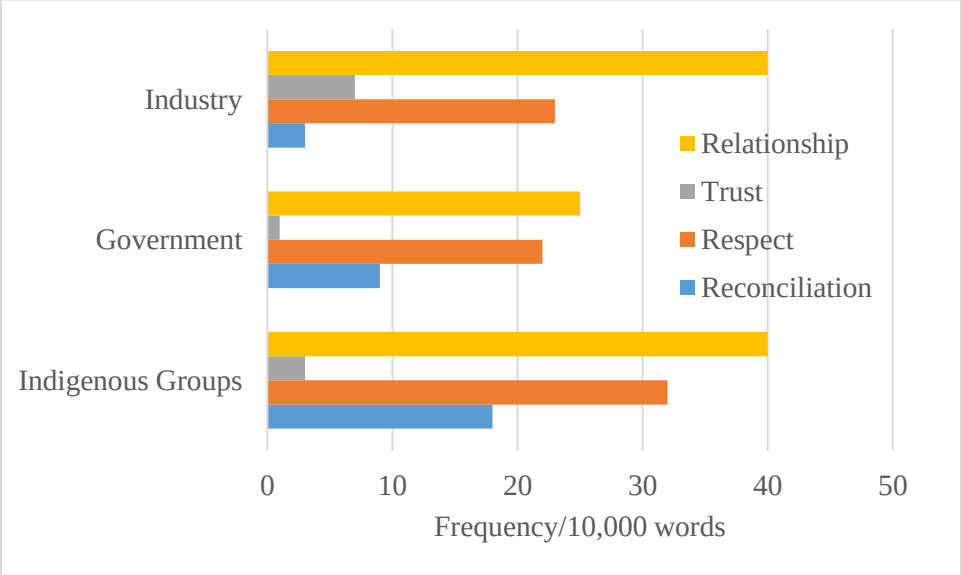
Industry documents stress the increasing uncertainty faced by resource companies, which affects their operations and ability to raise capital. (Alberta Chamber of Resources [ACR], 2006; CAPP, 2006; AME, 2015; CANWEA, n.d.). Risk management is an important motivator for industry to engage with Indigenous communities. Another reason for industry to engage with Indigenous groups and participate in consultation processes is maintaining access to labour and taking advantage of local services in remote areas (ACR, 2006; Canadian Energy Pipeline Association [CEPA], 2014). Finally, two documents listed corporate social responsibility as a motivation for engaging in consultation (ACR, 2006; Cameco, 2014). Cameco stated bluntly that consultation with Indigenous Peoples is "the right thing to do." The ACR (2006) states "corporate image and reputation have become important in marketing goods and services, and even in the ability to

access certain markets. A positive image with respect to Aboriginal relations can be a significant competitive advantage in the marketplace."

Perspectives on Reconciliation

In the reason for decision of the *Clyde River* case, Justices Karakatsanis and Brown state "this court has on several occasions affirmed the role of the duty to consult in fostering reconciliation." The principle of reconciliation refers to "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country" (Truth and Reconciliation Commission 2015). Thus, reconciliation could be an important purpose or motivator for engaging in consultation. To assess how important reconciliation in resource development was to each group, we compared the frequency with which each used the terms "reconciliation," "relationship," "respect," and "trust" (Figure 1). Documents from Indigenous groups referenced reconciliation 18 times per 10,000 words. This was twice as frequent as government and six times more frequently than industry. Trust was mentioned seven times per 10,000 words by industry, three times by Indigenous groups and one time by governments. Of note is the importance all three groups placed on the word "relationship," with equal occurrences in Indigenous and industry documents (40 per 10,000), and higher frequency than respect.

Figure 1: Frequency of Use of "Relationship," "Trust," "Respect" and "Reconciliation"



Approximately half of the government documents accounted for the references to reconciliation. As an example of the language used, INAC's consultation policy states "the Crown's efforts to consult and, where appropriate, accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation" (INAC, 2011). Just under half of Indigenous groups' documents mentioned reconciliation at least once. The National Centre for First Nations Governance states that "the consultation and accommodation process is driven by the primary purpose of

reconciliation" (NCFNG, 2009). Less than a quarter of industry documents mentioned reconciliation as part of the process of consultation and engagement.

One document, from the First Nations Leadership Council (FNLC), indicated that it does not see a good faith attempt at reconciliation through consultation, as it is occurring on the ground: "rather than building the relationships, trust and momentum required for the transformational change that reconciliation requires, the Crown's approaches to consultation and accommodation are fueling growing impatience, frustration, and conflict" (FNLC, 2013). The FNLC argues that the number of court challenges against government decisions, such as the approval of the Northern Gateway and Kinder Morgan pipelines, highlights that the duty to consult has not been implemented in a way that advances reconciliation.

The importance of considering and respecting Indigenous culture, tradition and knowledge was a commonly occurring theme throughout the documents. It was particularly important to Indigenous groups, but was also referenced frequently by industry and government (for example, ACR, 2006; Hucapasath, 2006; British Columbia First Nations Energy and Mining Council [FNEMC], 2008; INAC, 2011; AME, 2015). We find that respecting culture and tradition can occur in two ways. First, there is the substantive recognition and protection of cultural practices and rights, and ensuring development does not infringe on those rights. This could mean ensuring fishing and hunting can continue on traditional territories, or protecting ceremonial or historically significant sites. Land-use plans, which identify important areas and sites that should not be affected by development, are one way that Indigenous communities have sought to achieve this (Hupacasath, 2006; AFN, 2011a). Second, there is the need to respect Indigenous knowledge and governance practices at the procedural level. This includes the processes through which engagement and consultation occur and decisions are made. An example is avoiding scheduling consultation events during certain seasons where communities are focused on hunting, fishing or other traditional activities (DFO, 2006). This requires working with Indigenous Peoples when establishing the process of consultation.

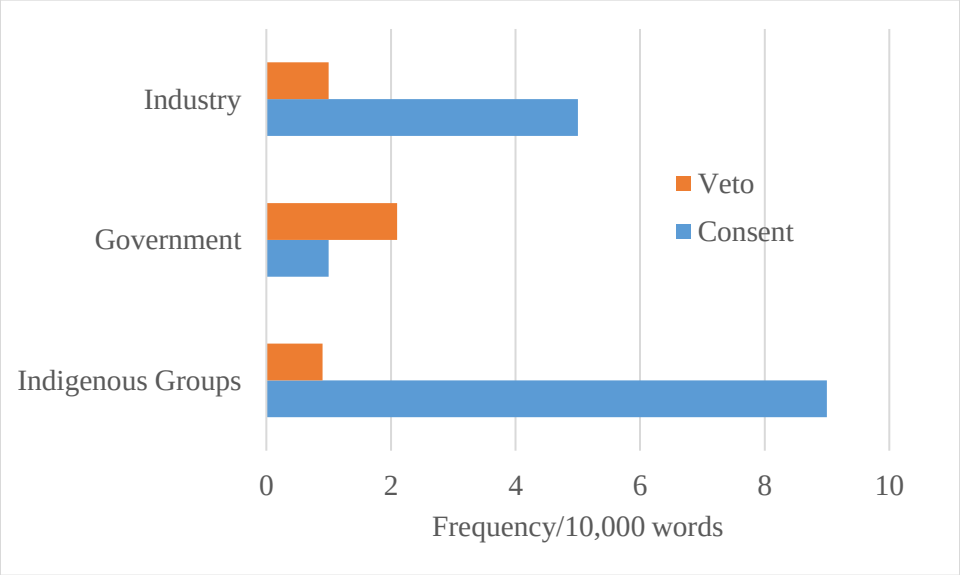
Differing Perspectives on Consent versus Veto

As mentioned above, whether Indigenous communities or nations have a veto (and whether consent is the same as a veto) when resource development infringes upon their rights remains an unsettled question that is slowly being resolved through the court system. The use of the terms consent and veto in the documents examined sheds light on the perspectives of the three groups and how the rights of Indigenous Peoples are interpreted.

Figure 2 compares the frequency with which Indigenous groups, government and industry used the terms "veto" and "consent". Indigenous groups mentioned consent nine times per 10,000 words, while industry and government referenced the term four times and once per 10,000 words respectively. Conversely, government used the term veto 2.1 times per 10,000 words, approximately twice as frequently as Indigenous groups and industry. Perhaps not surprisingly, the documents produced by Indigenous groups highlight the language used by the courts which indicates that consent is required (Hucapasath, 2006; KFN, 2012; Nak'azdli, n.d.). Government

and industry documents focus on the courts' assertion that the duty to consult does not grant Indigenous Peoples a veto on projects (INAC, 2011; Alberta, 2013; AME, 2015; Mining Association of Manitoba [MAM], 2016). The document from the FNLC (2013) provides an interesting perspective in arguing that no actor has a veto if true reconciliation is the goal. The FNLC suggests that this reflects the tradition of many Indigenous groups of consensus-based decision making, where deliberation continues until all parties agree on a decision. Further, the document indicates that, while Indigenous groups may not desire to completely stop a project on their own, the notion that it would move forward without their agreement demonstrates a lack of respect for their concerns and rights.

Figure 2: Frequency of Use of "Veto" and "Consent"

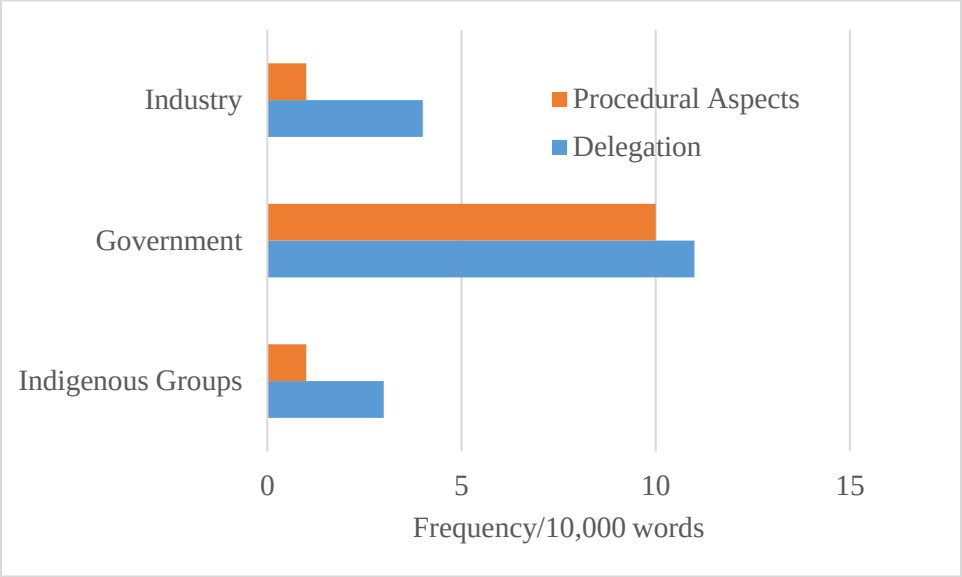


Delegation of Procedural Aspects of Consultation

As discussed above, governments can delegate procedural aspects of the duty to consult to third parties. We examined the frequency of use for the terms "delegation" and "procedural aspects" to compare how important this concern was for each group. As Figure 3 shows, governments discuss delegation and procedural aspects of the duty to consult much more frequently than Indigenous groups or industry. Government documents state that procedural aspects involve meeting with Indigenous communities, sharing and discussing information, identifying project impacts and implementing mitigation measures (Alberta, 2013; Nova Scotia, 2015; B.C., 2014). The rationale identified in the documents is that proponents are generally in a better position to fulfill this role because they have intimate knowledge of the project (for example, B.C., 2014). This can be seen by some Indigenous groups as the Crown shirking its responsibility and not promoting positive relations. For example, the FNLC (2013) indicates that just because delegation is legally permissible does not mean it is appropriate, acceptable, desirable or meaningful. Industry's primary concern is having clarity on what they are responsible for and a smooth transition to

government consultation when issues are outside their authority, such as a royalty-sharing agreement (for example, Canadian Chamber of Commerce, 2016).

Figure 3: Frequency of Use of "Procedural Aspects" and "Delegation"



Accommodation, Consultation and Engagement

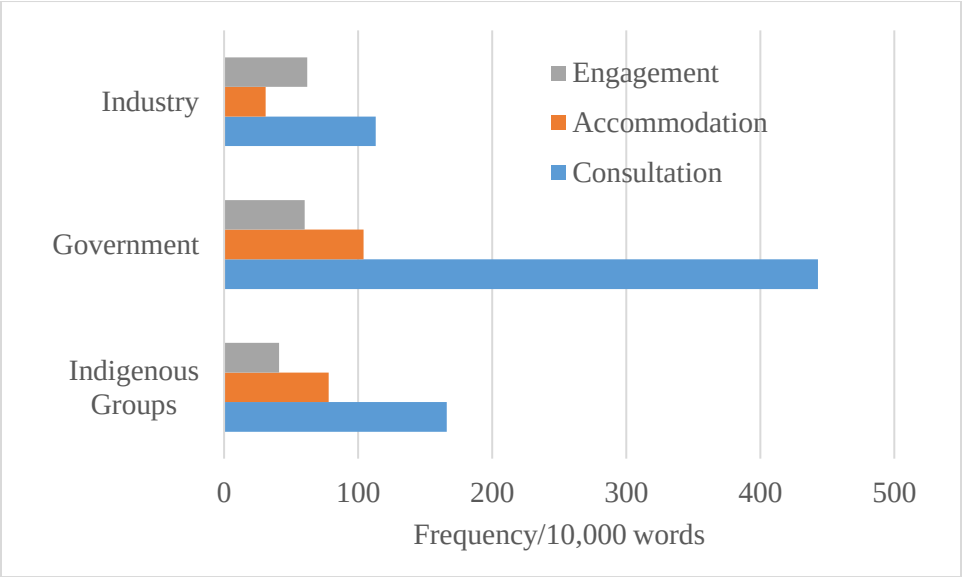
A key component of the duty to consult is accommodation when Indigenous Peoples' rights are infringed upon. To assess how often consultation was discussed compared to accommodation, we compared the frequency of the two terms for each group's documents. We also included the term engagement as it is often used in concert or even synonymously with consultation. Figure 4 shows that both consultation and accommodation appear more in government documents than those of Indigenous groups and industry. However, it is worth noting that the difference between the frequencies of use of each term is greatest among government documents. It is also worth noting that the frequency of use for both terms is the highest amongst any other term examined.[8]

Indigenous groups indicate that there is too much focus on procedures and whether the duty to consult is being conducted fairly, compared to the time spent on the outcomes and the substance of accommodation, which includes both economic and cultural components (Hucapasath, 2006; FNLC, 2013). The Hupacasath document identified several forms that accommodation could take: amendments to a project, revenue sharing, economic development opportunities, access to resources and capacity building. In contrast, governments tend to view accommodation more as a process of seeking compromise in an attempt to harmonize conflicting interests and stress that a commitment to the process does not require a duty to agree (Quebec, 2008; B.C., 2014; Nova Scotia, 2015). Industry does not make frequent mention of accommodation, though AME (2015) takes a similar approach as government in highlighting that consultation does not necessarily mean

[8] The exception is "accommodation", which has a frequency of only 31 per 10,000 words in industry documents.

reaching agreement, but provides a forum for discussion. Not surprisingly, industry used the term engagement, which refers to more informal relations outside government processes, most often, as they do not have final responsibility for fulfilling the duty to consult. However, it was used less frequently than consultation by all three groups.

Figure 4: Frequency of Use of "Accommodation," "Consultation" and "Engagement"



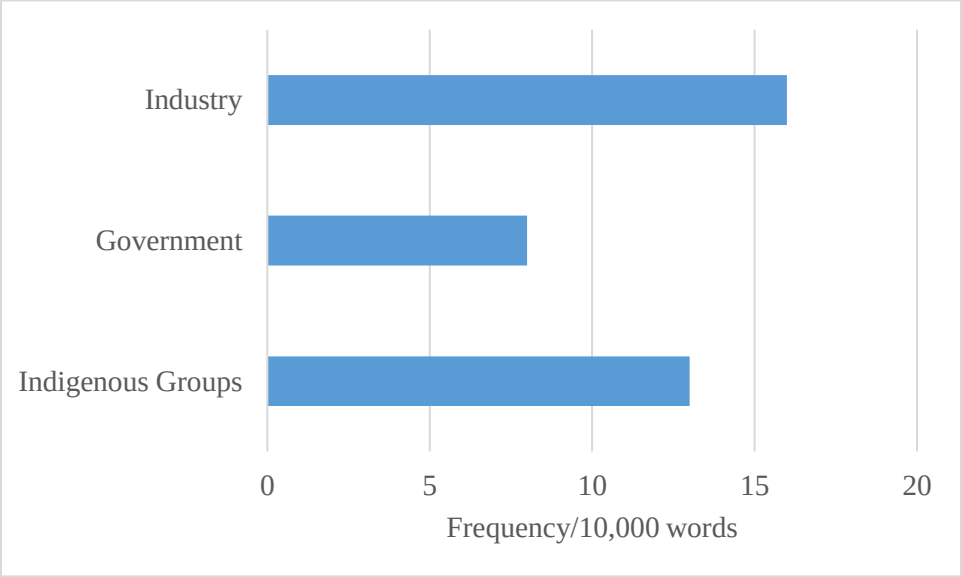
Timing of Consultation

An important concern for Indigenous groups was that consultation processes are often rushed, and that insufficient time is dedicated to establishing trusting relationships and allowing for respectful and meaningful consultation (for example, AFNQL, 2005; FNLC, 2013). Indeed, the Federal Court of Appeal ruled that federal government consultation on the Northern Gateway pipeline was "brief, hurried and inadequate" (*Gitxaala v. Canada*, 2016 FCA 187, sec. 325). However, one industry document expressed concerns about timeline extensions delaying a project and increasing uncertainty (Calgary Chamber of Commerce, 2015). Government documents discuss timing of consultation relative to statutory requirements, but the Government of Saskatchewan (2014) also stressed the importance of voluntary engagement prior to formal processes. This document highlighted the potential for early engagement to address problems before they arise and building working relationships with Indigenous communities. The document indicated that early engagement is important when determining the level of capacity funding necessary to ensure that members of Indigenous communities can adequately participate in consultation processes. The AFNQL (2005) suggested that seasonal customs and traditions of Indigenous Peoples should also factor into timing, thus creating a need for flexibility in terms of government and industry consultation processes.

Capacity Building

Capacity building refers to attempts to increase revenue, skills, infrastructure, etc., in Indigenous communities to address asymmetries in wealth, power, and knowledge, which can limit effective implementation of the duty to consult and engagement. The issue was important to all groups, but potentially most important to industry which mentioned the term "capacity" twice as frequently as government, with mentions by Indigenous groups falling about midway between the other two (Figure 5).

Figure 5: Frequency of Use of "Capacity"



Governments recognize their responsibility and are generally amenable to providing capacity support (for example, Manitoba, 2009; INAC, 2011). Of particular interest is a Government of Alberta program, the First Nations Consultation Capacity Investment Fund, which provides ongoing support for communities to participate in consultation processes and is funded by industry (Alberta, 2013). As noted previously, project proponents are not legally obliged to provide supports through the duty to consult.[9] But Indigenous groups, government and industry all note that it can help build relationships and trust (for example, KFN, 2012; Saskatchewan, 2014; AME, 2015). However, the AME raises concerns about support provision, including their ability to fund supports, ensuring funding is commensurate to the level of consultation, and ensuring that it benefits the entire community, not just a few individuals. Capacity issues can be exacerbated by the high number of consultations that many communities are required to participate in and the potential for fatigue in communities (GNWT, 2012). One community has called on government

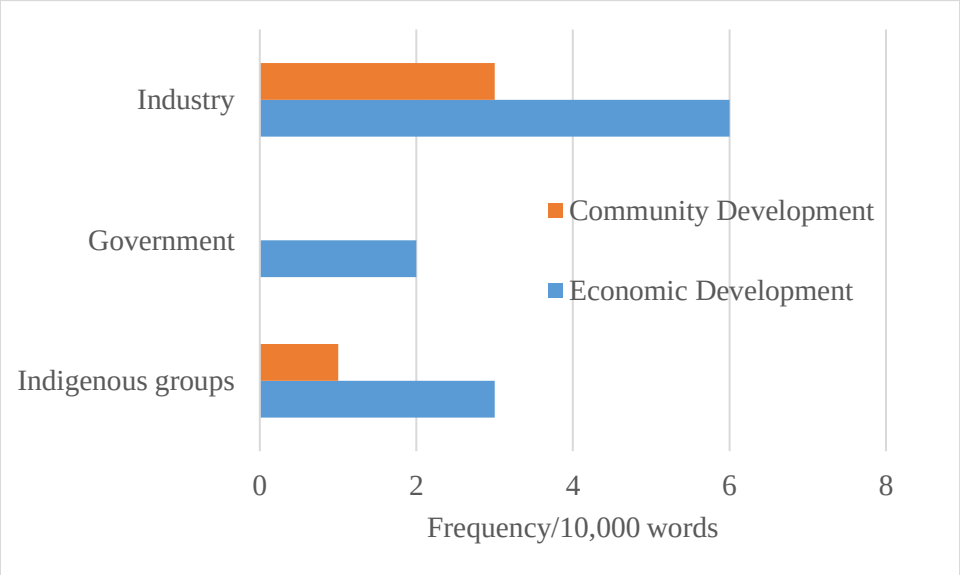
[9] Although, the Government of Newfoundland and Labrador (2013) indicates that "since Aboriginal consultation is included as part of the project assessment, proponents are required to provide reasonably necessary capacity-funding to facilitate the provision by Aboriginal organizations of pertinent information on potential impacts of project specific activities on asserted Aboriginal rights and any required financial compensation."

and industry to look for more creative ways, beyond monetary support, to ensure the full involvement of Indigenous Peoples in consultation processes (Hupacasath, 2006).

Economic and Community Development

A key point raised by the B.C. First Nations Energy and Mining Council is that communities should benefit from resource development on their traditional territories, not just be compensated or accommodated for the impacts of development (FNEMC, 2008). Industry tends to think of these benefits as directly related to the project (ACR, 2006; Cameco, 2014; BluEarth, 2015). This includes job opportunities and skills training, opportunities for local businesses to provide services and revenue sharing or partnership agreements. Increasingly, Indigenous communities are thinking beyond immediate job opportunities to revenue-sharing, partnerships, equity and other agreements, which provide more direct involvement in projects and contribute to community development (Hupacasath, 2006; FNEMC, 2008; NCFNG, 2009). However, we found that even though industry mentioned economic development more than community development, they referenced both more than Indigenous groups. The Prospectors and Developers Association of Canada (PDAC) states that "industry can view this situation as a 'double tax,' given that companies pay fees, taxes and royalties to federal, provincial and territorial governments, as well as contribute funds to Aboriginal communities through commercial arrangements" (PDAC, 2014). It is also important to note that discussion of training and education often focused on trades, rather than employment at the management and executive level (ACR, 2006; Cameco, 2014; Forest Products Sector Council [FPSC], n.d.). The FPSC also notes that more opportunities need to be created for Indigenous women.

Figure 6: Frequency of Use of "Community Development" and "Economic Development"

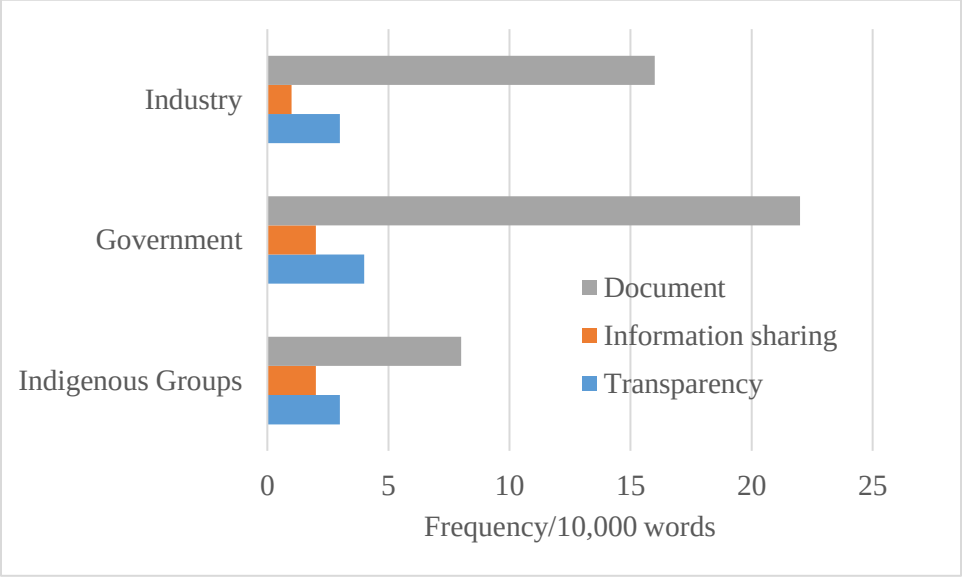


Information Sharing and Transparency

Lack of information sharing and transparency in consultation and engagement processes was a common barrier referenced by all groups. As Figure 7 demonstrates, the issue was discussed more frequently by Indigenous groups and government than industry. Government policies stress the importance of documenting all activities and materials that are undertaken related to consultation to demonstrate to the courts how it has fulfilled its legal obligations (DFO, 2006; INAC, 2011; Newfoundland and Labrador, 2013). This includes events, telephone calls, emails, site visits, and notifications about activities. Governments encourage project proponents to record all engagement activities as well, and share them with government, as they can contribute towards the Crown's responsibility. For Indigenous groups, the issue is the transparency and communication of project information and government decision making (Canadian Business Ethics Research Network [CBERN], 2011; NCFNG, n.d.(a)).

Government and industry warn that essentially no conversations should be off the record because this information may be required to prove to the courts that consultation occurred (INAC, 2011; Saskatchewan, 2014). However, this can potentially impede the establishment of good relationships. The FNLC (2013) states that "no relationship, whether Crown-Aboriginal, federal-provincial, spouses, or otherwise can be enlivened if every contact or engagement is on the record." The FSIN (n.d.) indicates "First Nations need to approach all discussions cautiously and with a view that all discussions with the Crown may ultimately be presented as evidence in a Court to determine whether the Crown is justified in infringing a First Nation's Treaty or First Nation rights or First Nation title and document, confirm and retain all dialogue." Indeed, we found that Indigenous groups reference the terms document(s) and documentation significantly less than industry and government.

Figure 7: Frequency of Use of "Document," "Information Sharing" and "Transparency"



Note: The "document" frequency count includes the sum of document and documentation.

An important concern for governments was coordinating information among departments and agencies to improve communication and decision making within government (Alberta, 2014; Nova Scotia, 2015). This included formal processes, like centralized record keeping, and informal avenues, like meeting and discussions among departments. For industry, a priority was having face-to-face meetings with communities, rather than by phone or email, to establish relationships (BluEarth, 2015; Calgary Chamber of Commerce, 2015). Members of all groups noted the importance of providing information in an accessible and culturally appropriate format, rather than long technical reports (for example, CEPA, 2014; Saskatchewan, 2014; AFNQL 2015; Suncor, n.d.). This was an important component of the *Clyde River* decision, where the proponents provided what the courts referred to as a "practically inaccessible document dump" where "only a fraction of this enormous document was translated into Inuktitut" ([2017] SCC 40: sec. 49).

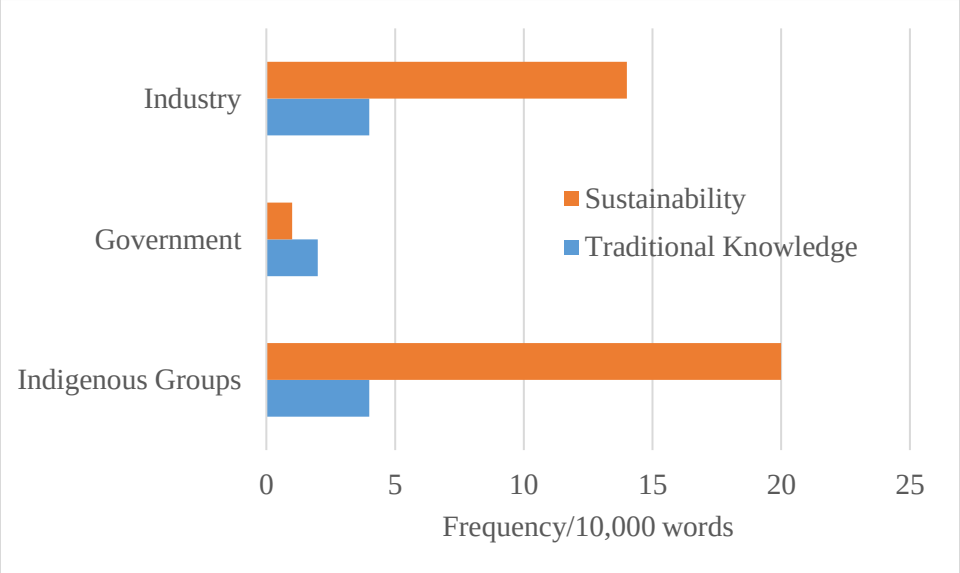
Traditional Knowledge

As mentioned above, the lack of inclusion of traditional knowledge in decision-making processes has been a barrier to effective consultation in the past. This theme was discussed in the documents of all groups; however, Indigenous groups and industry mentioned traditional knowledge twice as frequently as government (Figure 8). There is an acknowledgement within government and industry that efforts should be made to understand and consider this when consulting and engaging. For example, the ACR (2006) states "the first step is to understand cultural differences; the next step is to bridge them – not to change them." Some industry documents suggest the inclusion of traditional knowledge can improve project development, in addition to defining Indigenous rights and providing more fulsome participation in decision making (AME, 2015; MAM, 2016). This is in line with scholars who have noted that Indigenous knowledge can improve decision-making and should be incorporated into environmental assessment processes (O'Faircheallaigh, 2007; Lambrecht, 2013). Indeed, discussion of sustainability originates primarily from Indigenous groups and industry. The main themes include concerns regarding the protection of traditional land, the benefits of self-monitoring of approved projects, the provision of land-use guidelines to project proponents and the importance of negotiating long-term employment. The Government of B.C.'s (n.d.) consultation guideline is one of the few government documents that encourages the use of Indigenous knowledge of the land as a means of preserving the environment.

Working towards the inclusion of Indigenous knowledge in a meaningful way is difficult and requires more than simply reading a report or viewing information, without someone to explain it. For example, the FNLC (2013) stresses the need to have elders or knowledge holders present during the decision-making process to interpret and communicate traditional knowledge, rather than simply making maps or charting important sites. The importance of elders and other informal leaders in preserving, protecting and promoting culture and tradition was an important theme emerging from our analysis. Industry and government frequently identified the need to connect and develop relationships with these groups (Saskatchewan, 2014; AME, n.d.). This is not just to involve these groups, as it was noted the involvement can also improve the project. The Government of B.C. (n.d.), in a document for proponents on building relationships with First Nations, states "First Nations hold a wealth of knowledge about the diversity and interactions

among plant and animal species, landforms, watercourses and other biophysical features. Companies may benefit from this knowledge in order to build new practices for protecting and conserving resources, including heritage resources individuals, in addition to formal band or tribal leadership."

Figure 8: Frequency of Use of "Sustainability" and "Traditional Knowledge"



Note: The "traditional knowledge" frequency count includes the sum of traditional knowledge, traditional ecological knowledge, indigenous knowledge, aboriginal knowledge and local knowledge.

Current State of Knowledge and Areas of Future Research

This section outlines several areas of future research we have identified through the course of the knowledge synthesis presented above that will contribute to knowledge about consultation and engagement of Indigenous Peoples in Canada.

First, there has been little examination of how consultation is implemented in practice. The case law surrounding the duty to consult provides some direction by outlining the legal requirements and how they must be fulfilled. However, these decisions do not provide detailed insight into how consultation and engagement occurs on the ground or identify lessons regarding how consultation and engagement should be conducted. Scholars have begun to examine how the duty to consult has been implemented, including issues with delegation, asymmetries in information and funding, and the cumulative effect of consultation on Indigenous communities (Booth and Skelton, 2006; Ritchie, 2013). This report contributes to this line of inquiry by examining the written statements of the actors involved in the process about the conduct of consultation. We identify and expand upon barriers to consultation and how they are viewed by Indigenous groups, government and industry. The limitation of our work is that it was not feasible in the scope of this project to determine how closely these guidelines and statements are followed in practice. Clearly, more

work is needed in this area to understand how consultation and engagement occur in practice. This could include case studies of specific processes and communities or surveys of consultation officials, industry and community members.

Second, several Indigenous groups suggest that existing processes, such as environmental assessments, are unlikely to satisfy the duty to consult unless they are particularly robust (AFNQL, 2005; FNLC, 2013). In addition, a common theme from our analysis is that meaningful consultation requires involving Indigenous Peoples in the design of the consultation process itself. Therefore, future work should examine what processes, mechanisms and tools are seen by Indigenous Peoples as representing their interests, culture and traditions and which processes are more effective in reaching mutually agreeable outcomes.

Third, as argued by Sossin (2010), while the duty to consult is aimed at achieving procedural fairness for Indigenous Peoples and respect for their constitutional rights, it is not yet clear whether it will lead to more just outcomes. Indeed, there is an opportunity for more research on the link between consultation and engagement activities and the outcomes of development in communities. A study by Papillon and Rodon (2017) on mining development in Inuit communities examines the impact of the resource development on communities more broadly. The study finds mixed benefits; however, it also demonstrates the length of time required to assess the impact of development, as the authors examine changes in the communities over five decades. They also note that it is difficult to measure precisely what the benefit of greater consultation in resource development is for Indigenous communities. Thus, determining whether the emergence of the duty to consult in Canadian law has led to substantive improvements in Indigenous communities' socio-economic status is difficult at best.

Knowledge Mobilization Plan

This paper will be useful for the academic community, as it provides a summary of the state of existing knowledge and research on the duty to consult and how Indigenous communities are affected by resource development, as well as avenues for future research. However, it is more likely to be useful to the non-academic community; particularly, businesses, governments and Indigenous groups. Given the importance of duty to consult in the evolution of Canadian public policy and the advancement of the reconciliation agenda, communicating results outside the academic community will be crucial.

We propose several components[10] to our knowledge mobilization plan. The first is a public event to coincide with the publication of a peer-reviewed article based on this report. The event will be held in downtown Calgary and will be targeted at informing the public, government and business community. Smaller meetings with stakeholders to share and discuss findings are also planned. As the research paper resulting from the grant is likely to be quite long and detailed, we will also

[10] We note that the proposed activities will cost more than the amount allocated in the proposed budget. However, The School of Public Policy has a budget for various outreach activities, which will be used to offset the additional costs associated with the knowledge mobilization plan.

develop a five- to ten-page extended executive summary outlining the key research findings. This will be more useful and accessible to senior policy-makers and executives, who may not have the time to read the full research report. This will be released through the School of Public Policy's website. Finally, an op-ed piece will be written that will highlight the findings of the report in the context of current events.

Preliminary research informing report was presented at the Canadian Association of Programs in Public Administration annual conference in Winnipeg on May 16, 2017. It was also presented at the Indigenous Governance and Public Administration workshop on May 31st, 2017, as part of the Canadian Political Science Association annual conference at Ryerson University. An article based on the research will be submitted to a special issue of *Canadian Public Administration* on Indigenous governance and policy.

Summary and Conclusions

Canadian courts have established that the government has a duty to consult with Indigenous communities and, where appropriate, accommodate their concerns when approving and shaping resource development projects that are located on their land or could infringe on their rights. Both consultation and engagement with Indigenous communities have often been controversial. The goal of this report was twofold. First, to synthesize extant research literature related to the duty to consult, identifying major issues, barriers and challenges. Second, to provide a detailed analysis of policy statements and guideline documents related to consultation and engagement produced by Indigenous groups, government and industry. The detailed analysis examines these groups' perspectives on the barriers and challenges to consultation, explores how they believe consultation should be conducted and generates insights for improvement. Our research has uncovered several key conclusions, and our hope is that the research presented above will help improve consultation and engagement processes, and lead to better public policy in Canada.

Our main conclusion is that, not unexpectedly, each actor has a different motivator behind their participation in consultation or engagement activities. Government documents reveal that meeting legal requirements is a primary consideration and guiding factor, particularly as these requirements relate to procedural aspects and the delegation of authority. Documents from Indigenous groups focus on the assertion of rights and increasing autonomy, as well as increasing the role for Indigenous Peoples in decision-making. Finally, industry documents reflect a focus on reducing uncertainty in operations and investment.

Of particular note is the importance of different words used by the different groups, measured by relative frequency (counts per 10,000 words) of the words in the documents examined. The top five words used by Indigenous groups were consultation (166), rights (95), development (86), accommodation (78) and engagement (41). For government, the top words were consultation (443), rights (177), treaty (106), accommodation (104) and treaty rights (103). In industry documents, the top five words were consultation (113), development (111), engagement (62),

rights (62), and relationship (40). These frequency counts emphasize the different priorities of the different groups examined.

Related to the above is the different interpretations of meaningful consultation provided by the three groups. First, the general concept of consultation is interpreted and understood differently by the actors that are involved in the process. Indigenous groups that addressed meaningful consultation suggested that it required being engaged early, allowing sufficient time for input to be prepared and considered, and having input into strategic planning decisions. While government documents indicated consultation is an iterative process aimed at understanding concerns and addressing them, there was also a focus on fulfilling legal requirements. Industry documents were mostly silent on a definition, though documents noted the importance of involving Indigenous Peoples in determining the process itself and ensuring it is acceptable and informed by the interests of Indigenous communities.

Indigenous groups' documents revealed that resource development is often thought of in the context of reconciliation. This concept is much less prominent in industry and government documents. The perspective provided by Indigenous groups is that resource development cannot be approached as a regular business or government transaction - it is a distinct and unique relationship. The primary reason for this is that Indigenous communities and nations are rights holders, not just stakeholders. While the concepts of reconciliation and respect are much less frequently referenced by government and industry documents, the term relationship was used with the same frequency in industry documents as Indigenous group's documents (40 per 10,000), indicating an attitude more in line with the concept of reconciliation than might otherwise be inferred.

In terms of the concept of accommodation, there was relatively similar frequency of use by Indigenous groups (78) and government (104). However, our textual analysis reveals different viewpoints. Indigenous groups' language reflects substantive components of accommodation, such as changes to projects and compensation. In contrast, the government documents discussed accommodation as part of reaching compromise and focused on procedural aspects.

One instance where perspectives and objectives differed was around the timing of consultation. An important concern for Indigenous groups was that consultation processes are often rushed, and that insufficient time is dedicated to establishing trusting relationships and allowing for respectful and meaningful consultation. There is a clear tension between the time required for meaningful consultation and business risk due to delays, increasing costs and lost windows of opportunity. Interests are not aligned in this case, and documents offered little in the way of solutions to this conundrum.

Our analysis revealed that the capacity of Indigenous communities to fully participate in consultation and engagement was recognized as a challenge by all three groups. As a corollary, effectively addressing the challenge through capacity-building and the provision of supports was

also recognized as an issue. Industry documents also noted financial concerns associated with industry-provided support for capacity-building and community and economic development.

Another point of alignment amongst the three groups was the concept to information-sharing and transparency. While the concepts were not very important in terms of frequency of use, all groups agreed that transparency is a positive element of relationship-building. On the negative side, however, is government's focus on documentation and the procedural aspect of information-sharing, something that was often viewed negatively in the documents of Indigenous groups.

The lack of inclusion of traditional knowledge in decision-making processes was a theme discussed in the documents of all groups, and was acknowledged as a barrier to effective consultation. Indigenous groups and industry documents were more focused on the concept of sustainability. Some industry documents suggest the inclusion of traditional knowledge can improve project development, in addition to defining Indigenous rights and providing more fulsome participation in decision making.

Finally, we note that there is significant scope for cooperation between Indigenous communities, academics, industry, and government to improve both our understanding of consultation and engagement in theory and the processes used in practice. There is also the opportunity for more research on the link between consultation and engagement activities and the outcomes of development in communities.

Appendix A: List of Documents in Detailed Review

Government

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Appendix B: Research Codebook

The following list includes the title of the "node" or theme, followed by a detailed description.

Nation-to-nation relationships

This node refers to Indigenous groups' desire for more political autonomy and recognition within Canadian federation. Terms, phrases or paragraphs related to self-government, modern treaties (references to land claim issues that are developing) and recognition of the diversity within different nations should be coded here. Also include mentions of overlapping nations' interests.

Legal issues

The node captures the legal aspects of consultation. References related to the legal duty to consult (DTC) and the assertion of Indigenous rights and title should be included here. This could include expressions about what the DTC means, what is required to meet it and how it has affected Indigenous involvement in resource decisions. Issues like delegation of the DTC should be included here. References to accommodation and land-use rights.

Reconciliation

In this context, reconciliation refers to the establishment of mutually respectful and beneficial relationships between Indigenous Peoples, the Government of Canadian and non-Indigenous society. Terms related to how consultation and engagement contribute to reconciliation and how the concept has influenced Indigenous involvement in resource development should be coded at this node. This could include passages about maintaining trust.

Creating certainty for business

Working with Indigenous groups can avoid or mitigate legal challenges and political opposition which can affect overall business success. Text coded here includes references to improving the operations of business or the investment climate through consultation and engagement. References to maintaining access to labour and a reliable work force in remote communities should be coded here.

Sustainable communities

Resource development projects in or near Indigenous communities have the potential to affect those communities on a social, health and environmental level. References related to these impacts, both positive and negative, should be coded here. This could also include sustaining existing goods, in particular protection of the environment. This node also covers the contribution that Indigenous Peoples and communities make to sustainability and environmental protection in resource development decisions. This could include opportunities for the involvement of Indigenous People in environmental monitoring and protection activities. Community wellness.

Good practices

Indigenous consultation is often considered part of a government's public engagement strategy on important issues like resource development and a part of good governance generally. For business, consultation could be part of their corporate social responsibility plan or include

references to building long-term relationships. This theme represents the moral objective that groups may feel for participating in consultation and engagement activities. Good practices should be innovative or exceptional, and in some cases referred to by the organization as 'the right thing to do'.

Consent and veto

References to Indigenous consent in resource development projects should be coded here. This includes references to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free, Prior and Informed Consent (FPIC). A key question in this debate is whether consent constitutes a veto over a resource development project. Broader questions pertaining to Indigenous Peoples involvement in decision-making should be coded here.

Timing of consultation

This theme relates to any discussion of the length of time that consultation and engagement demand. Indigenous groups have said that companies have not taken sufficient time to engage, while industry often feels that it takes too much time. There has also been an emphasis on early engagement. Any references to these issues should be coded under this theme.

Processes used for consultation

Different processes have been used to incorporate Indigenous knowledge, perspectives and concerns in resource development decisions. Two examples are the environmental assessment process and the National Energy Board review process. Any references to these mechanisms and other processes of consultation, including who determines which processes are used, and what criteria are used to assess processes should be coded here. Steps or guides for consultation provided by different organizations (industry, government, Indigenous) should be coded here.

Capacity building

This node refers to attempts to increase revenue, skills, infrastructure, etc., in Indigenous communities to address asymmetries in wealth, power, knowledge which can challenge effective implementation of the duty to consult and engagement. Capacity building could be within the process of consultation itself, such as money for elders and knowledge-holders to attend events or for feasibility studies to be conducted. It could also be in the communities more generally, such as employment training, community infrastructure and programing. References to the benefits and the impacts of resource development on communities should be coded here. This could include references to any agreements signed between Indigenous groups and companies, such as Impact Benefit Agreements or Memoranda of Understanding or revenue sharing.

Transparency and information sharing

Knowledge and information is a key issue within consultation and engagement activities. This theme covers questions about who receives information about a project and the decision-making process, when and how that information is shared, and how this affects Indigenous communities' participation in decision-making.

Respect for Indigenous cultures, traditions and knowledge

This node should include references to the importance of considering and valuing Indigenous cultures and traditions in the consultation and decision-making process. For example, the importance of ceremony in establishing working relationships. References to the inclusion and use of Indigenous knowledge, often referred to as traditional ecological knowledge or Indigenous ways of knowing, should be coded under this theme.

Appendix C: List of Acronyms and Abbreviations

Name	Acronym or Abbreviation
Alberta Chamber of Resources	ACR
Assembly of First Nations	AFN
Assembly of First Nations of Quebec and Labrador	AFNQL
Association for Mining Exploration British Columbia	AME
B.C. First Nations Energy and Mining Council	FNEMC
Canadian Association of Petroleum Producers	CAPP
Canadian Business Ethics Research Network	CBERN
Canadian Energy Pipeline Association	CEPA
Canadian Wind Energy Association	CANWEA
Department of Fisheries and Oceans (Government of Canada)	DFO
Federation of Saskatchewan Indian Nations	FSIN
First Nations Leadership Council	FNLC
Forest Products Sector Council	FPSC
Government of Alberta	Alberta
Government of British Columbia	B.C.
Government of Manitoba	Manitoba
Government of Northwest Territories	GNWT
Government of Nova Scotia	Nova Scotia
Gouvernement du Quebec	Quebec
Government of Saskatchewan	Saskatchewan
Hupacasath First Nation	Hupacasath
Impact benefit agreement	IBA
Indigenous and Northern Affairs Canada (Government of Canada)	INAC
Kluane First Nation	KFN
Mining Association of Manitoba	MAM
Nak’azdli Nation	Nak’azdli
National Centre for First Nations Governance	NCFNG
National Energy Board	NEB
Traditional ecological knowledge	TEK

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