

The Criminogenic Potential of 'Sustainable Development': On the Production and Reproduction of Indigenous Environmental Victimisation in the Canadian Oil Sands

By James Heydon

A thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy

University of Sheffield

School of Law

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**Abstract**

The First Nations of northern Alberta, Canada, have been opposing expansion of the nearby oil sands industry for almost two decades. With the ecological disorganisation generated by this extractives activity inhibiting their ability to hunt, fish and trap on the land, the First Nations are experiencing a very specific form of environmental victimisation known as ‘cultural loss’. Existing explanations for this harm have almost exclusively focused on the national and international drivers of oil sands expansion, neglecting to account for the provincial regulatory process responsible for controlling its harmful rate of growth.

In making an original contribution to the literature, this thesis explores how, and to what extent, the provincial regulatory process prioritises economic production of the oil sands over the land-based cultural interests of First Nations. More specifically, it considers the environmental philosophy being operationalised by this regulatory process under the rubric of ‘sustainable development’. Understanding what this term means in practice is important because, from the standpoint of the First Nations, this pattern of ‘development’ is anything but ‘sustainable’. Indeed, the First Nations have legally protected Treaty rights to hunt, fish and trap on the land, meaning that any strategy advocating ‘sustainable development’ should avoid infringing these rights. In reality this is not happening, as evidenced by the reports of ‘cultural loss’. However, there also exists little detailed research into how this has been enabled by the provincial regulatory process.

As a form of up-system research, the study deploys a qualitative-driven multi-methods approach to examine how and why this environmental victimisation is occurring. This includes the thematic analysis of provincial government policy and strategy documents from 1997 onwards, and hearing documents recording the deliberations underpinning regulatory approvals of all major oil sands projects over the same period. This is accompanied by a thematic analysis of interview transcripts from 33 First Nation, government and industry personnel linked with the regulatory process. Based on the findings, this thesis shows that operationalisation of eco-modernist philosophy has underpinned government efforts at ‘sustainable development’ since the mid-1990s. This has allowed the regulatory process to place an unfounded faith in techno-scientific techniques for the mitigation of environmental risk, enabling it to prioritise economic production over the First Nations’ land-based cultural interests for almost 20 years. This operates alongside a process where First Nation input at the levels of resource policy and regulatory practice is systematically marginalised. Creating a space in which characteristics tied to Alberta’s status as a settler-colonial province exert influence within the regulatory mechanism, this ensures that the expansionary agenda of eco-modernist ‘sustainable development’ proceeds uninterrupted by legal protections afforded by First Nation Treaty rights.

This thesis builds upon existing literature, a significant portion of which is rooted in green criminological scholarship, to highlight some of the issues serving to produce environmental harm and cultural loss in northern Alberta. As such, it aims to both increase the understanding of how this form of environmental victimisation is being produced in this specific location, while also contributing to the development of green criminology more broadly.

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# List of Abbreviations

|  |  |
| --- | --- |
| ACFN | Athabasca Chipewyan First Nation |
| ACO | Aboriginal Consultation Office |
| ACSREM | Alberta’s Commitment to Sustainable Resource and Environmental Management |
| AENV | Alberta Environment |
| AER | Alberta Energy Regulator |
| AEUB | Alberta Energy and Utilities Board |
| AFL | Alberta Federation of Labour |
| AHF | Alberta Heritage Fund |
| AUC | Alberta Utilities Commission |
| BSC | British Society of Criminology |
| CAPP | Canadian Association of Petroleum Producers |
| CEEM | Cumulative Environmental Effects Monitoring Initiative |
| CEMA | Cumulative Environmental Management Association |
| CNRL | Canadian Natural Resources Limited |
| CT | Consolidated Tailings |
| DFO | Department of Fisheries and Oceans |
| EPL | End Pit Lake |
| ERCB | Energy and Resources Conservation Board |
| ESRC | Economic and Social Research Council |
| ESRD | Alberta Environment and Sustainable Resource Development |
| FPIC | Free Prior and Informed Consent |
| GDP | Gross Domestic Product |
| IFN | In-Flow Needs |
| JOSM | Joint Canada-Alberta Oil Sands Monitoring Plan |
| LARP | Lower Athabasca Regional Plan |
| LUF | Land Use Framework |
| LUS | Land Use Secretariat |
| MCFN | Mikisew Cree First Nation |
| MFT | Medium Fine Tailings |
| MRME | Muskeg River Mine |
| NAFTA | North American Free Trade Agreement |
| NEB | National Energy Board |
| NRTA | Natural Resources Transfer Agreement |
| NST | Non-Segregated Tailings |
| OECD | Organisation for Economic Co-operation and Development |
| PAH | Polycyclic Aromatic Hydrocarbons |
| PAI | Potential Acid Input |
| REDA | Responsible Energy Development Act |
| RSDS | Regional Sustainable Development Strategy |
| SCC | Supreme Court of Canada |
| UN | United Nations |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |
| UNESCO | United Nations Education Scientific and Cultural Organisation |
| UNGP | United Nations Guiding Principles on Business and Human Rights |
| WBEA | Wood Buffalo Environmental Association |

# Introduction and Thesis Structure

In late September, 2016, some fifty U.S. Native American and Canadian First Nation leaders gathered in Musqueam Territory (Vancouver) and Mohawk Territory (Montreal). At this meeting, each of the representatives signed an agreement titled the Treaty Alliance against Tar Sands Expansion (Treaty Alliance, 2016a). Its text denotes a pledge by the signatory peoples to 'officially prohibit' and 'collectively challenge and resist…the use of our respective territories and coasts for the expansion of the production of the Tar Sands' (Treaty Alliance, 2016b: 1). The pattern of industrial production to which this refers is the mining of ‘unconventional’ oil, bitumen, that lies beneath the boreal forests of northern Alberta, Canada. As a commitment, the Treaty Alliance aims to halt all existing oil sands rail and tanker proposals, along with all five current pipeline proposals for moving the resource, including the Keystone XL, Northern Gateway and Kinder Morgan projects (see Treaty Alliance, 2016a). This treaty therefore represents an unprecedented solidification of indigenous opposition to expansive oil sands production across the breadth of Canada's land mass (see Appendix I). Importantly, such extensive resistance is almost exclusively catalysed by the local and global environmental consequences engendered by this pattern of industrialisation. As the treaty itself states,

…*[Expanding transport routes for the oil sands resource] threaten[s] many Indigenous Nations' territories, waterways, shores and communities with the very real risk of toxic and hazardous oil spills. The expansion of the Tar Sands would also lead to increased destruction and poisoning of the lands, waters and air of the Indigenous Peoples…downstream of the Tar Sands…[B]y leading to the expansion of the Tar Sands, such projects will unquestionably fuel catastrophic climate change…[which] has already started to endanger our peoples' way of life and now threatens our very survival.*

(Treaty Alliance, 2016b: 1)

The Canadian Energy Pipeline Association (CEPA) responded to this treaty with a promise to '…listen to aboriginal concerns', but added that '…the fact remains there is a critical need for pipelines in Canada' (CEPA, quoted in Kennedy, 2016). The Canadian Association of Oil Producers (CAPP) offered a similarly implied difference of opinion, noting that the Treaty Alliance would not alter the way its members deal with indigenous communities and would continue with business as usual (McGuigan, quoted in McSheffrey, 2016). Considering that these are the main industry bodies representing companies operating in direct relation to the oil sands resource, the future relationship between indigenous interests, which tend to prioritise environmental protection, and those of state and corporate actors, which favour the cultivation of increasing amounts of fossil fuel capital, is likely to be characterised by antagonism and conflict. However, while this treaty represents a new, cross-national approach by indigenous peoples in their opposition to oil sands extraction, it must be understood as a culmination of nearly twenty years of struggle against its growth.

The oil sand deposit lies under 54,000 square miles of boreal forest, to the north of Alberta, Canada (European Space Agency, 2017). With the volume of proven reserves standing at 166 billion barrels, it is the third largest oil reserve in the world, after Venezuela and Saudi Arabia (Government of Alberta, 2017). Consisting of a mixture of sand, clay, water and bitumen, which is a semi-solid form of crude oil, the resource requires strip-mining or 'in-situ' techniques for its extraction (Timoney, 2013). The latter of these inject steam and solvents into the deposit to reduce its viscosity, allowing it to be pumped to the surface. This is why it is known as an 'unconventional' oil source; the techniques for its extraction differ to the 'conventional' well-drilling methods used for crude oil. However, the human and environmental costs of these 'unconventional' processes are high, causing some to label their use in the oil sands as 'the biggest environmental crime in history' (Milmo, 2007). Extraction generates up to four times more carbon dioxide than 'conventional' drilling (National Aeronautics and Space Administration, 2010), and produces waste-water ponds emitting levels of methane equivalent to half a million cattle per day (Timoney and Lee, 2009: 66). Considering that the reserves contain more than twice the total amount of oil burned in all of human history (Hansen, 2012), continued expansion of these operations will guarantee release of substantial quantities of emissions into the atmosphere for the foreseeable future. Indeed, extraction has accelerated from a rate of 1 million barrels per day in 2000 (National Energy Board, 2013: 39), to 3 million barrels per day in 2015 (National Energy Board, 2016: 52). Expected to reach 5 million barrels per day by 2040 (ibid), this will culminate in an expected 400 percent increase in the production of an 'unconventional' fossil fuel over a forty-year period (National Energy Board, 2013: 39).

The First Nations in and around the oil sands industry have been opposing this unbridled expansion for almost as long as the industry has existed in its contemporary form, since around the mid-1990s (Chastko, 2007). Initially the First Nations supported extractive operations as a means of tackling some of the socio-economic difficulties experienced by their communities, with industry investment providing opportunities for development that were simply unavailable before. To a certain extent this is still the case. For instance, the Mikisew Cree First Nation (MCFN) Elders Care Centre in Fort Chipewyan and the Steps Forward lifelong learning programme in Fort McKay, both indigenous communities, were only made possible through contributions from industry (see Church, 2014; Shell Canada, 2015: 14). On an individual level, the wage labour provided by the industry serves a similar purpose. However, despite these benefits First Nations have, over time, become opposed to continued industrial expansion, largely because of their increasing awareness of its degrading impact on the non-human environment. This shift in perception is most succinctly articulated by Allan Adam, who has been Chief of the Athabasca Chipewyan First Nation (ACFN) since 2007:

*I ran on a platform that we were going to cash in on the economic development in the region. And that was my mandate…[Now] our mandate is to protect our nation, to protect the next generations that are coming up.*

(Adam, quoted in Toledano, 2014)

This has put First Nations in a difficult position. On the one hand, they rely on the oil sands industry for much-needed income, while, on the other, its continued existence threatens the very ecosystems upon which their traditional hunting, fishing and trapping practices rest. As stated by ACFN Councillor Greg Marcel (quoted in Klinkenberg, 2014a), ‘[t]here has to be a balance between the oilsands and tradition…If you make too much money, you lose your traditions. If you try to live strictly off the land, you can’t afford it’. In light of this, First Nations have been increasingly opposing oil sands expansion on the basis that its incremental environmental degradation has surpassed tolerable limits, generating a subsequent and similarly degrading impact on their land-based cultural practices. As Deranger (quoted in Uechi, 2013), spokesperson for the ACFN explains, '[i]t's happening slowly…We're still drinking the water, and we're eating the fish, but it's getting poisoned…I don't want the tar sands to change who I am'. Such concern is indicative of the harm being experienced. Awareness of contamination prompts withdrawal from land-based practices, eroding over time the environmental aspects inherent to indigenous cultural identity. This pattern of victimisation is recognised by some as ‘cultural loss’ (see Chapter 2.2), and has provoked the social conflict underpinning the focus of this thesis.

While the environmental consequences of the oil sands industry have been thoroughly explored by scholars from a variety of disciplines (see Chapters 2), less well understood is how and why the provincial energy regulator has repeatedly sanctioned such a harmful pattern of production over time. This lack of attention in existing literature is significant because it effectively shields from view the operational machinery through which the state engenders this form of victimisation. Focusing the analytical lens onto the process regulating industrial expansion thus enables discussion to move beyond descriptions of environmental harm, shifting the gaze upwards and onto those policies, agencies, practices and relations acting to produce and reproduce it. Furthermore, the First Nations have constitutionally protected rights to hunt, fish and trap on the land, known as Treaty rights. Understanding how and why the regulatory process is able to circumvent these protections should form an important component to any account of the situation. Yet, much like the regulatory process within which these rights are supposed to be considered, the lack of attention given to their content goes largely unexplained in existing research. This has resulted in a body of literature that is analytically under-developed in its account of the operational stages of the regulatory process, over-reliant on the more macro-analytical level of political economy, and scant in its use of primary research to support its conclusions. This thesis aims to address these shortcomings and, in doing so, provide an original contribution to the literature.

Each of the thesis chapters will use specific terminology to describe the indigenous peoples of relevance. In the broadest sense, the term ‘Aboriginal Peoples’ references the descendants of the original inhabitants of North America. It is based on the definition provided under Section 35 of the 1982 Canadian Constitution Act, where the term denotes ‘…the Indian, Inuit, and Métis Peoples of Canada’ (Government of Canada, 1982). The term ‘Inuit’ references a sub-category of Aboriginal people ‘…who live in Nunavut, Northwest Territories, Northern Quebec and Northern Labrador’ (Government of Canada, 2012), and ‘Métis’ to a distinct people ‘…of mixed First Nation and European ancestry’ (ibid). The term ‘Indian’ is largely maintained as a legal term, being defined under Section 2 of the 1985 Indian Act as ‘…a person who…is registered as an Indian or is entitled to be registered as an Indian’ (Government of Canada, 1985). In turn, this references those peoples registered under Section 5 of the Indian Act, thus conferring the legal descriptor of ‘status’ or ‘non-status’ ‘Indian’. The former of these categories tends to coincide with groups of ‘Treaty Indians’, referencing those peoples, or their ancestors, who reached formal agreements with the Federal government, usually involving land surrenders. An example of such agreements would be the so-called ‘historic’, or ‘numbered’, Treaties. These were signed between 1871 and 1921 and cover most of Western Canada, including Alberta and its oil sands (see Appendix II). There are many and varied discussions and critiques focusing these aspects categorisation, not least of which is the more colloquial replacement of ‘Indian’ with the term ‘First Nation’. This came into common usage from the 1970s onwards, being used to reference both ‘status’ and ‘non-status’ ‘Indians’, and coming to replace the word ‘band’ in some communities (see Government of Canada, 2012). These discussions go far beyond the remit of this study, but here the term ‘First Nations’ will be used to reference those ‘Indian’ groups or ‘bands’ that are signatories to Treaty No. 8 of 1899. This specific Treaty includes the vast majority of the oil sands deposit of northern Alberta within its geographical remit (see Appendix II). While ‘indigenous peoples’ has a meaning divorced from the national context of Canada, as visible in the United Nations (UN) Declaration on the Rights of Indigenous Peoples (UNDRIP) (see UN, 2007), it will here be used interchangeably with ‘First Nations’ unless otherwise stated.

While the global consequences of oil sands expansion have attracted serious and popular consideration elsewhere (see Klein, 2014; Nikiforuk, 2009), they are inseparable from the more localised harms being experienced by those living in and around the oil sands deposit (see Treaty Alliance, 2016b: 1). Not only has industrial production of bitumen in the area been directly linked to hydrocarbon pollution in the Athabasca River watershed (Kurek et al, 2012), but airborne Volatile Organic Compounds, which are proven to contain carcinogens (Forrest et al, 2005; Cheng et al, 2007), have been found at levels 6,000 times higher than average in the surrounding area (Simpson et al, 2013). With the World Health Organization (2013) classifying air pollution as a leading cause of cancer deaths (see also Straif et al, 2013), evidence suggesting that the oil sands industry is not reporting all of its emissions (Simpson et al, 2013), and local doctors maintaining silence about the health implications of oil and gas operations for fear of reprisal (Edwards, 2014), the danger to the physical health of those in the vicinity is an obvious concern. Indeed, it is these global and more immediately obvious local issues that have drawn criticism towards Alberta's oil sands industry in recent years. However, there is an additional, and arguably more clandestine, form of environmental victimisation occurring in the oil sands; one that disproportionately affects the local indigenous populations by virtue of their close relationship with the surrounding environment. This is implied by the Treaty Alliance (2016b), and is the fundamental cause of their opposition to unbridled oil sands expansion.

The very particular form of environmental harm being experienced by these First Nations is tied to their ontological perception of the ecosystem as intrinsic to human life (Wheatley, 1997). As their conceptions of nature and culture are ‘braided’ to one another, representing not simply a ‘closeness’ or reliance upon nature, but an ‘embodied inscription’ where land and wildlife form a central component to their collective indigenous identity (Woolford, 2009: 91), environmental destruction is being experienced as cultural erosion. Considering the breakdown of this relationship to result in a form of victimisation known as ‘cultural loss’, Gregory and Trousdale (2009: 2470) detail what this actually entails; the ‘…adverse impacts on a range of traditional activities, emotional well-being, or social relations engaged in by an individual and/or an Aboriginal community as the result of changes in the land’. As the concept of identity ‘…usually implies a sense of attachment’ (Berry, 1999: 3), the cultural identity of a First Nation can be seen to be derived not simply from recognition of others’ membership of the collective, but simultaneous recognition of the attachment that collective maintains with the natural environment (ibid). By extension, this includes the myriad of ways and means through which they engage with non-human nature. Put another way, material engagement with the landscape, through hunting, fishing and trapping practices, for instance, is a key component to the collective cultural identities maintained by First Nations. As Smith (2005: 121) explains, ‘…when Native peoples fight for cultural/spiritual preservation, they are ultimately fighting for the landbase which grounds their spirituality and culture’. It is for this reason that environmental degradation precipitated by expansionary extractive operations precedes cultural loss; it forcibly severs the connection indigenous peoples maintain with non-human nature.

The importance of this relationship with the land was recognised by the original federal Commissioners for Treaty No. 8 in 1899, with whom the ancestors of the First Nations inhabiting what is now northern Alberta would not reach an agreement unless their hunting, trapping and fishing practices were protected. In this sense a large part of the Treaty 8 negotiations were assurances of continuity in traditional socio-cultural and economic practices (see Fumoleau, 2004), in return for permission to take up tracts of indigenous peoples’ territory ‘from time to time for settlement, mining, lumbering, trading or other purposes’ (Government of Canada, 1899). As Sifton (quoted in Government of Canada, 1899) made clear in the Report of Commissioners for Treaty No. 8 in 1899,

*…we had to solemnly assure them* (the First Nations) *that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it…We assured them that the treaty would not lead to any forced interference with their mode of life…*

Such rights have even been enshrined in Section 35 of the Canadian Constitution, where it is asserted that ‘…existing aboriginal and treaty rights…are hereby recognized and affirmed’ (Government of Canada, 1982). In light of this, the interruption of traditional hunting, fishing and trapping practices, facilitated by the ecologically disruptive activities linked with the ‘taking up’ of lands via oil sands operations (see Appendix II), indicates a form of environmental victimisation associated with an apparent breach of Treaty agreements. Indeed, this is the precise intersection at which the present study focuses its analytical lens; the point at which pressure for industrial expansion meets the Treaty protections afforded to First Nations. More specifically, it seeks to explain how, despite these Treaty rights to hunt, fish and trap on the land, and in the face of increasing opposition from the First Nations themselves, economic production of the oil sands has been repeatedly prioritised by the provincial energy regulator in its sanctioning of industrial expansion.

Existing explanations for this process of prioritisation have been offered by scholars from a variety of disciplines, not least of which is green criminology. While this body of work is evaluated in more detail in Chapter 3, it is sufficient here to note that its tendency towards abstracted and macro-level analysis is both its main contribution and key limitation. Indeed, much of this literature describes high-level international and national political and economic influences as the driving force behind environmental degradation in the oil sands, referencing the expansionary tendencies of global capitalism (Lynch et al, 2016), or the predatory influences of the North American Free Trade Agreement (NAFTA) on the ability of national governments to pursue non-capitalist avenues for development (Smandych and Kueneman, 2010). Others, outside green criminology, explain cultural loss more specifically by referencing 'cultural genocide' (Huseman and Short, 2012: 221), using this term to signify a more abstracted pattern of indigenous environmental victimisation common to the structural conditions of settler-colonial societies. Indeed, it should here be noted that the term 'settler-colonial' is used instead of 'post-colonial' throughout this thesis, as the latter suggests an end or break with the more traditional frontier-colonial period of the 16th-18th centuries. By contrast, 'settler-colonialism' denotes a continuation of the indigenous - non-indigenous relationship established during this earlier period, albeit in an altered form. As Coulthard (2014: pp.6-7) explains, a specifically 'settler-colonial' relationship is one characterised by:

*…a particular form of domination; that is, a relationship where power…has been structured into a relatively secure or sediment set of hierarchical social relations that continue to facilitate the dispossession of Indigenous peoples of their lands and self-determining authority.*

Olszynski (2015), and Slowey and Stefanick (2015) break from this trend of explaining environmental harm by recourse to broad, macro-level forces like international political-economy or settler-colonialism, looking instead at the more meso-level of analysis by concentrating on the institutional stratum of regulatory process. However, while offering greater insight into province-specific mechanisms, these still contain little detail on how the regulatory process has repeatedly prioritised economic production over the traditional land-based interests of the First Nations.

When taken together, this existing literature exhibits four primary limitations, stymying its analytical detail and, by extension, its ability to explain how economic expansion has been repeatedly sanctioned despite evidence of environmental degradation and First Nation Treaty infringements. First, its largely macro-level focus short-circuits analyses, disguising the fundamental role of the provincial energy regulator in sanctioning industrial expansion on a project-by project-basis. This obscures the position of regulation as a fundamental site of social conflict between interests pertaining to capital and those pertaining to Treaty rights.

Second, despite brief mention by Huseman and Short (2012), and Slowey and Stefanick (2015), the central role of First Nations in the regulatory process is largely overlooked. Indigenous peoples tend to be presented as passive victims of industrial expansion instead of active participants in the process determining the speed at which it proceeds. As a result, there is very little information on how the Treaty protections have been repeatedly overcome in the process of sanctioning expansion of the oil sands. Third, existing accounts tend to be based on very little detailed empirical research or primary data. This may be because they are largely focused on the macro-level of analysis, or may even have such a focus because of the absence of primary data. Either way, the reliance on secondary data compounds the problematic absence of meso-institutional and micro-individual level detail amongst the explanations. Finally, there is an absence of analysis into the strategies for the 'sustainable development' of the oil sands resource, and the environmental philosophies of eco-modernisation and eco-socialism which underpin its use in practice (see Chapter 3). This is despite the Government of Alberta advocating such an approach since at least 1999 (see Government of Alberta, 1999a; see also Government of Alberta, 1995). This situation is problematic as the 'sustainability' of bitumen extraction is one of the fundamental issues at hand, particularly when considering the environmental basis of the cultural loss being experienced by First Nations (see Chapter 2).

In light of these contributions and limits there is a need to explain how the overarching, macro-level political and economic forces discussed in existing literature are manifest in the meso-organisational and micro-individual levels of the regulatory process governing industrial expansion, if at all. As such, the mechanism that has repeatedly sanctioned this pattern of growth since the mid-1990s, at the inception of the contemporary industry (see Chastko, 2007), becomes the primary point of focus for this thesis. The features of this regulatory process can be understood as comprised of two key stages; that of 'planning', where consultation occurs with First Nations on potential oil sands projects, and 'approval', which references a subsequent stage in which quasi-judicial public hearings are called (see Chapter 3.3). This latter stage allows the energy regulator to decide whether approval of a given oil sands project would be in the 'public interest'; a determination which depends on a balance of social, economic and environmental impacts. Indeed, this latter stage is triggered when a stakeholder, such as a First Nation, submits a 'statement of concern' about a project, usually when their concerns have not been addressed during prior consultation at the 'planning' stage (see Chapter 3.3). Taken together, these two phases represent the operational sites of social conflict between interests pertaining to oil production and those to Treaty rights. Examining how this relationship has developed within these specific stages since the mid-1990s, in the incremental sanctioning of industrial growth, is therefore key to providing a detailed account of how, and to what extent, the regulatory process prioritises economic production over the land-based interests of First Nations. Not only will this explain the factors precipitating the indigenous environmental victimisation being experienced, it will provide insight into the avenues available to disrupt or inhibit such factors in future.

To examine this regulatory process, which is essentially conceived of as a 'site' or 'arena' of social conflict (Tombs, 2016: 7), an exploratory lens loosely structured around Kramer and Michalowski’s (2006: 25) state-corporate analytical model has been used. This structuring is in alignment with the attention given by the model to the 'catalysts' contributing to a particular type of harm and the mechanisms present for its 'control' (ibid). The actual content of the analytical lens is informed by the literature on green criminology, 'sustainable development' and environmental philosophy, as this provides a means by which to evaluate what Spangenberg (2010: 561) calls the 'driving forces' and 'pressures' of economic growth. The former term refers to justificatory discourses and the latter to economic policy. As Chapter 3.2 illustrates in more detail, running through this literature is a tension between the globalised imperative to pursue ‘sustainable’ economic expansion using technology, or eco-modernisation, and efforts aimed at slowing it down through opportunities for ‘non-elite’ participation in environmental decision making, which is affiliated with eco-socialism (see Chapters 3.2.1; 3.2.2). Under these terms, the 'catalyst' for harm is broadly conceived of as government policies and practices aimed at accelerating the ‘sustainable’ conversion of the oil sands deposit into exchange values. By contrast, the mechanisms for 'control' are those avenues available for First Nations to participate in decisions which have the potential to inhibit, interrupt or decelerate this expansionary pattern of production. This tension is inherent to the concept of ‘sustainable development’ (see Chapter 3.2; Connelly, 2007).

Although not clear cut, the operational stages of the regulatory process map onto this broad dichotomy. The 'planning' phase can be conceived of as the point at which First Nations can decelerate or even relocate productive operations, as there is a legal duty for them to be consulted and accommodated on any activity that may adversely impact the exercise of their Treaty rights to hunt, fish and trap on the land (see Chapter 3.3.1). The subsequent 'approval' stage of the process is that in which the Government of Alberta's policies for the 'sustainable development' of the oil sands resource are given operational form, as the hearing panels are required to balance social, economic and environmental concerns in pursuit of a 'public interest' deliberation. While the First Nations are also permitted input at these hearings, such participation is not associated with the legal duty to consult but with the more administrative right to participate in decision-making (see Chapter 3.3.2). It is at this 'approval' stage where the government policy objective of 'sustainable development' becomes operationalised in practice, having proceeded through the requirement to consult and accommodate First Nations at the precursor 'planning' stage. In accordance with these institutional characteristics, this study addresses questions surrounding the 'what' is occurring in the regulatory process to permit expansion of culturally harmful patterns of production, alongside questions of 'why' it operates in this manner (see Chapter 4.2). The research questions mirror this purpose. Sub-questions one and two are orientated towards the 'approval' stage of the regulatory process, giving particular attention to the operationalisation of government strategy within the public hearings. Sub-questions three and four are tasked with explaining the ‘planning’ stage of the process, focusing on how the duty to consult and accommodate is being interpreted by the government agencies, and why this is so. As such, the research questions are as follows:

*Central Research Question:*

How, and to what extent, does the regulatory process governing oil sands expansion prioritise economic production over the land-based cultural interests of First Nations?

*Sub Questions:*

1. What environmental philosophy is underpinning provincial strategies for the ‘sustainable development’ of Alberta's oil sands resource?
2. To what extent is this environmental philosophy being operationalised by the regulatory process in the pursuit of ‘sustainable development’?
3. How has the duty to consult and accommodate been actualised within the regulatory process to permit operationalisation of this environmental philosophy?
4. What influences are being exerted within the regulatory process to produce this actualisation?

Put simply, these research questions allow the thesis to explore how the environmental victimisation experienced by First Nations has been produced and reproduced over time, through the repeated sanctioning of individual oil sands projects, and by a provincial government espousing the central tenets of 'sustainable development'. To achieve this, the study deploys a multi-methods approach of a purely qualitative orientation. This includes the thematic analysis of seven provincial government policy and strategy documents, and twelve hearing documents which record the deliberations underpinning regulatory approvals of major oil sands projects. These documents stretch from 1997, the point at which rapid expansion of the contemporary industry began, through to 2013, when the latest open pit oil sands mine triggered a public hearing. This is accompanied by a similarly thematic analysis of interview transcripts from 33 personnel associated with the ‘planning’ and ‘approval’ stages of the regulatory process itself (see Chapters 4.4; 4.6). These methods have been deemed most appropriate for gathering data on the influences acting within the regulatory process to prioritise industrial expansion, whilst also providing information on those operating to overcome the legal protections held by the First Nations.

The research makes an original contribution to the existing body of literature in several ways. Current research is dominated by a focus on macro-level international and national factors precipitating oil sands expansion, collectively exhibiting a paucity of explanations focusing on how this has been enabled in practice, at the level of provincial regulatory operations. By focusing the analysis at this level, the study has parity with the ‘conceptual’ and ‘instrumental’ categories of ‘academic impact’ (see ESRC, 2016). With regard to the former, the contribution lies in the ability of the study to improve understanding of the area in question by detailing hitherto unexplored aspects of the case. That said, with its basis in the rapidly expanding, but still relatively young, sub-field of green criminological scholarship, as an exploratory study it also introduces concepts that have received little existing attention or application. Such theoretical, as opposed to more straightforwardly empirical, implications are particularly visible in the material on ‘sustainable development’ and settler-colonialism. In a different vein, the ability of the research to highlight areas within the regulatory process that First Nations, and aligned interest groups, may focus on to pursue beneficial change mirrors the ‘instrumental’ category of ‘economic and societal impact’. This refers to influences upon ‘…individuals, organisations or nations’ (ibid). In this sense, the contributions made by this study are both internal to academia, in both the empirical and conceptual senses, and external, towards society, with a view to using the detailed examination of the case to provide information on possible avenues to tackle the issue of indigenous environmental victimisation in the future.

## 1.1 Thesis Structure

Following this introduction, the second chapter will define and conceptualise the cultural loss experienced by First Nations in the oil sands as a form of indigenous environmental victimisation, justifying its examination under the remit of green criminology. As cultural loss is a rarely studied form of harm within criminology generally, it is here anchored to a science-based conception of ‘green crime’ which emphasises the need to provide empirical evidence for its existence. As such, this chapter explains exactly how the environmental impact resulting from the expansive oil sands industry is generating cultural loss in both a ‘direct’ and ‘indirect’ sense. The third chapter presents a review of the existing literature attempting to explain environmental harm in the oil sands. As these are spread across numerous fields of study, each of the explanations have been used as a platform from which to review the broader debates in their respective disciplines. While relatively unorthodox, this approach is required by existing literature as it is spread thinly across a number of disciplines instead of receiving focused attention within a select few. Demonstrating the contributions, limits and gaps present within existing material, this chapter provides the justificatory basis for examining oil sands growth under the terms of ‘sustainable development’. As such, it also indicates the relevance of environmental philosophies which underpin its operational existence. Finally, the third chapter narrows to outline the regulatory process in focus, illustrating the different stages involved in the sanctioning of oil sands expansion and highlighting the points at which attention will be directed in this study.

Chapter 4 provides a discussion of the research methodology used and the ethical issues considered in this ‘up-system’ study. Distinct from ‘down-system’ research, which tends to focus on ‘…people who are poor, vulnerable, oppressed or powerless’ (Williams, 2012: 1), this study operates in the tradition of its ‘up-system’ counterpart, where the subjects for analysis are associated with ‘power, elites and leadership’ (ibid: 10). Providing a detailed account of the focus and boundaries of the thesis, this chapter also reiterates the central research question and four sub-research questions in the context of the literature review conducted in Chapter 3. The specific research methods used during the fieldwork are also discussed, including methods of sampling, data collection and analysis. Information is also presented on the practical obstacles and ethical issues encountered in conducting field research abroad, with indigenous peoples and political-economic ‘elites’, and in temperatures of around -40 degrees centigrade.

The three chapters following Chapter 4 are concerned with the findings. Chapter 5 presents data from the thematic analysis conducted on the seven overarching energy policies and strategies published by the Government of Alberta since 1999. Establishing the dominant objectives forwarded by these policies, and the purported means for their realisation, it is here where the governmental ‘push’ towards deploying principles associated with the eco-modernist interpretation of ‘sustainable development’ first become visible. Chapter 6 moves into the more operational realm of the regulatory process, presenting findings from the interviews with those associated with its 'planning' stage. It is here where the systematic marginalisation of First Nation voices becomes apparent, along with the accounts used by regulatory personnel to justify such an approach. Chapter 7 is the final findings chapter, providing data from the thematic analysis of twelve decision documents pertaining to oil sands projects at the ‘approval’ stage of the process. Illustrating the extent to which the ecological modernisation seen in policy has been operationalised in practice, this chapter goes on to provide interview data from regulatory personnel explaining the influences exerted upon their decisions to repeatedly sanction oil sands expansion in the face of First Nation opposition.

The remaining chapters, eight and nine, provide the more substantive analyses of the fieldwork data. Chapter 8 focuses on the ‘catalyst’ for environmental victimisation; ‘weak’ ecological modernisation and its emphasis on narrow, techno-scientific methods for mitigating adverse environmental impacts. Situating this in the context of the provincial government’s broader neoliberal economic reforms, which have failed to diversify revenue streams for over two decades, Chapter 8 also demonstrates how perceptions of the oil sands industry as a provincial ‘social good’ influences regulatory decisions to repeatedly sanction its expansion. Chapter 9 follows this with a focus on the mechanism for ‘control’; the legal duty to consult and accommodate First Nations on any issue that may adversely affect their Treaty rights. More specifically, it demonstrates that the Government of Alberta is actualising a diluted interpretation of this duty, limiting the extent to which Treaty rights can protect against cultural loss. Permitting the systematic marginalisation of First Nation voices throughout the regulatory process, it is this that allows for the operationalisation of ‘weak’ ecological modernisation in practice. A host of justificatory denials rooted in settler-colonial society underpin this marginalisation, demonstrating the influence of context in producing the narrow interpretation of Treaty rights. Taken together, these two chapters provide an answer to the central and sub- research questions.

In the final chapter the key findings from the research are summarised along with their implications for policy, practice and green criminology as a field of study. Following the issuance of recommendations based on the analysis, the limitations of the research are discussed. Finally, the areas in which there exists potential for further research are highlighted, along with the ways and means for extending the scope of this research into the future.

# 2. Green Crime, Ecological Disorganisation and Cultural Loss in the Oil Sands

This chapter defines the cultural loss experienced by First Nations in the oil sands as a form of ‘green crime’ and provides detail on its occurrence. Deploying this term in relation to harmful activities that go beyond conventional legal parameters of criminality, here Stretesky et al’s (2014: 2) conception of ‘green crime’ is relied upon to recognise cultural loss as a form of victimisation within the remit of green criminological scholarship. While this departs from more orthodox conceptions of ‘crime’, in that it prioritises scientific evidence over criminal law, the indigenous environmental victimisation under focus is not the result of a deviation from socially acceptable behaviour. It is the recognised consequence of a normative legal and political-economic system. As such, the conception of 'crime' deployed here acknowledges that there may be ‘…very sound economic and/or political justifications for a company or a state to passively allow such [harmful] activities to continue, or even actively promote them’ (Hall, 2011: 374). This permits the harm generated by the regulatory process to be recognised under the rubric of ‘green crime’, establishing the basis for the rest of the thesis which seeks to explain how and why the process is operating in this manner.

The chapter begins by considering the definitional debate between ‘crime’ and ‘harm’, exploring the green criminological tensions around this traditional dichotomy before settling on a definition that replaces the legal basis of ‘crime’ with a scientific one. Following this, Section 2.3 explores the notion of ‘cultural loss’ as a form of environmental victimisation, presenting a discussion on the relationship maintained by indigenous peoples with their traditional lands. Indeed, while this connection to the natural world is intrinsic to the collective identity of original peoples across the world, this section outlines its centrality to the specific First Nations in and around the oil sands of northern Alberta. The final section, 2.3, examines the direct and indirect impacts of oil sands operations upon First Nation culture, drawing attention to the way in which ever-expanding oil sands operations are severing this relationship. While ‘direct’ effects materialise as a result of physical separation from the land, largely due to resource contamination and physical industrial expansion, ‘indirect’ effects manifest as the erosion of more ‘intangible’ aspects of culture, such as the loss of traditional knowledge, practices and worldviews. Such detail relates this third section to the second, meaning 2.2 and 2.3 are not mutually exclusive, only more comprehensive in the detail they provide on the indigenous-environment relationship and the way in which its interruption is manifest as ‘cultural loss’. Each of these aspects are taken in turn before a summary is presented in preparation for Chapter 3, where the analytical lens is turned upwards and onto the regulatory process sanctioning expansion of the industry responsible for producing and reproducing this victimisation.

## 2.1 Green Criminology and the ‘Crime’ versus ‘Harm’ Debate

As a sub-field of criminology, green criminology covers a broad spectrum of environmental crimes and harms, ranging from wildlife trafficking (Wyatt, 2013) and deforestation (Boekhout van Solinge, 2014; 2010), through to the abuse of animal rights (Nurse, 2013; Pellow, 2013), and global warming (White, 2012). Such diversity is reflected in the lack of a clear unitary label for the enterprise, with the terms ‘environmental criminology’ (White, 2008: 6), ‘eco-crime’ (Walters, 2010), ‘eco-global criminology’ (White, 2011) and ‘conservation criminology’ (Gibbs et al, 2010), all being used in reference to its disparate but related areas of focus. Following Lynch’s (1990) initial call for a ‘green criminology’, an early attempt to provide some delineation to the field was made by South (1998: 220) in his justification for a ‘green perspective’, or ‘…rallying point…’ (ibid: 212), able to accommodate issues pertaining to human, animal and environmental justice. Lynch and Stretesky (2003: 231) built on this, defining the ‘meaning of green [criminology]’ as specifically entailing ‘…a political stance wherein it is acknowledged that various solutions to environmental degradation may require substantial economic and political reorganisation’. Such politicisation led Gibbs et al (2010) to develop a focus on ‘conservation criminology’ over ‘green criminology’, citing as justification the risk of analytical myopia emerging from the prioritisation of economic determinants over the social. Indeed, Halsey’s (2004: 844) critique focused on the same elements of Lynch and Stretesky’s (2003) conception, dismissing its emancipatory ideal of socio-economic equality as a modernist ‘hubris’ and suggesting a poststructuralist approach in response. This unresolved debate is reflected in White’s (2013: 30) more recent concession, equating green criminology to a ‘…road wide enough for many travellers’, and is symptomatic of Downes’ (1988) broader characterisation of criminology as a ‘rendevouz’ subject, or Cohen’s (1998: 4) labelling of it as ‘somewhat like a parasite’. However, if considered a 'perspective' (South, 2014: 7), this is not necessarily a detrimental feature, because the flexibility built into it can ‘…be associated with any number of theoretical positions and schools’ (ibid). Accounting for this, and to acknowledge it as an area that ‘…is developing as an inclusive field of interest rather than a restrictive body of scholarship…’ (Hall, 2014a: 97), the term ‘green criminology’ will here be recognised in the broad manner suggested by White (2008: 8); ‘…to basically refer to the study of environmental harm, environmental laws and environmental regulation by criminologists’. It is therefore in the broadest sense that this study falls under the remit of green criminological scholarship.

With the boundaries of green criminology proving to be intentionally flexible, defining what is deemed to constitute an ‘environmental crime’ is even more ambiguous, having consequences for the terminology deployed throughout this thesis. Green criminology, much like its parent discipline, holds within it a tension surrounding what its ‘rightful’ subject matter should be. Representing a variation on a commonly recognised dichotomy, Halsey and White (1998: pp.345-346) differentiate between the ‘legal-procedural’ and ‘socio-legal’ approaches to defining ‘crime’, where the former refers to ‘…practices which are prescribed by the law’ and the latter to ‘…damaging practices which may or may not be encapsulated under existing criminal law’. Although examples exist in which literature from the more legal-procedural approach have been associated with green criminology (see Gibbs et al, 2010), where an environmental crime tends to be equated with ‘…any act that violates an environmental protection statute’ (Clifford and Edwards, 2012: 33), the field is primarily situated on the ‘socio-legal’ side of the spectrum. Here it is ‘harm’ as opposed to ‘crime’ that is of primary concern. Reflecting its disciplinary roots in radical and critical criminology, the field tends to reflect the instrumentalist conceptions of Quinney (1970), where criminal acts are seen to be defined by those with the power to do so, and the more structuralist definitions associated with Chambliss (see Kramer, 2016). This allows green criminology to acknowledge that, ultimately, ‘crime is a word, not a deed’ (Nettler, 1984: 16). Therefore, as Beirne and South (2007: xiv) argue, the discipline should ‘…begin by problematizing the nature of crime’ and ‘…try to uncover relevant sources and forms of power, including the state’s willingness or reluctance to construct certain forms of harms as crimes’. Such a position rests on the notion that ‘[m]uch depends on who is defining the harm and what criteria are used in assessing the nature of the activities so-described’ (White, 2013: 20). It is this reality that has led some to divorce ‘crime’ from the legal standards with which it tends to be defined; an approach favoured by those from within the harm perspective.

In recognising that ‘[c]rime has no ontological reality’ the harm perspective generates an expansive field of view (Hillyard and Tombs, 2004: 11), where ‘…crimes as well as non-criminal victimisations and experiences of injustice, unfairness and prejudice’ become acceptable targets for study (Davies, 2014: 207). By diverging from the more constrained definitions found in orthodox criminology, which tend towards legalism and a ‘…parochial obsession with the behaviour of poor people in rich countries’ (Ward and Green, 2000: 7), the harms-based approach was intended to overcome criminology’s continued ‘inattention’ towards the ways in which economic and political elites cause harm outside definitions provided by criminal law (Michalowski and Kramer, 2006: 5). As Hillyard et al (2005: 64) note, ‘despite decades of resistance’ from within the discipline itself, ‘criminology and criminal justice remain infected with individually-based analysis, explanation and ‘remedy’’, proceeding to describe this as a feature from which criminology cannot escape ‘…because this is what it is, where it was born and how it has been constructed’. This characterisation, of a discipline unable to separate from its orthodox foundations, led to the authors positing the social harms approach as an entirely separate field; one which ‘…starts from a different place…[with] a focus upon the *social* origins of harm, upon the structures that produce and reproduce such harms’ (Hillyard et al, 2004: 271, emphasis in original). Such disciplinary independence is yet to be realised, at least in the advocated move towards a standalone discipline of ‘zemiology’.

While providing opportunity for greater recognition of injurious and environmentally destructive activities of the powerful, the task of divorcing notions of ‘crime’ or ‘harm’ from criminal law is not without its critics. Within criminology more broadly, Tappan (1947: 99) warned against ‘[v]ague, omnibus concepts defining crime [which] are a blight upon either a legal system or a system of sociology that strives to be objective’, and with which ‘[t]he rebel may enjoy a veritable orgy of delight in damning as criminal almost anyone he pleases’. Turk (1975: 41) advised against equating crime with ‘any evil perceived in human affairs’ lest there emerge an ‘everything-but-the-kitchen-sink-list’. Shifting the gaze upwards, Cohen (1993: 98) was similarly wary of disrupting the relationship between ‘crime’ and law, favouring only the use of ‘first generation’ human rights to bring harmful state activities under the remit of criminology, and famously dismissed the efforts of Schwendinger and Schwendinger (1975) as a ‘moral crusade’ when they attempted to use ‘second generation’ human rights for the same purpose. Bohm (1982: 571) adopted a similar position when warning against equating crimes with breaches to human rights in case the concept became too broad and vague. In a more constructive manner, Green and Ward (2000: 104) tentatively suggest that ‘[i]t does not appear helpful to stretch the term ‘crime’ to cover all social harms…’, preferring instead to identify the core subject matter of criminology as ‘…behaviour that not only is, or is perceived to be, socially harmful, but is also *deviant*’ (ibid, emphasis in original).

In response to the core problems identified by other scholars, Green and Ward’s (2000) alternative conception seeks to remedy the issue with regard to harmful activities of the state. This is particularly relevant in the oil sands as it is the regulatory agencies of the provincial government that have repeatedly permitted industrial expansion of the oil sands industry (see Chapter 3.3). Using the work of Becker (1963) to outline a definitional matrix of deviance, which includes ‘…an actor, a rule, an audience and a potentially significant sanction…’ (Ward, 2004: 87), Green and Ward (2000) tie this to standards of human rights and Beetham’s (1991; see also 2013) concept of legitimacy to establish a more orthodox criminological conception of ‘state crime’. As the authors note, this term ‘…should be restricted to the area of overlap between two distinct phenomena: (1) violations of human rights and (2) state organisational deviance’ (Green and Ward, 2000: 110). With the former of these requirements being defined broadly as ‘…the elements of freedom and well-being that human beings need to exert and develop their capacities for purposive action’ (ibid), there would appear to be clear scope for including within it a wide variety of human rights abuses. Similarly expansive, the definition given for the second component, ‘state organisational deviance’, appears relevant to the particular case under examination here, being conceived of as:

*…conduct by persons working for state agencies, in pursuit of organizational goals, that if it were to become known to some social audience would expose individuals or agencies concerned to a sufficiently serious risk of formal or informal censure and sanctions to affect their conduct significantly...*

(ibid)

Expanding on this, Green and Ward (ibid) add another component to the definition, reserving ‘…the label “crime” for behaviour that is both “objectively illegitimate” …and “subjectively” deviant’. With legitimacy being ‘…a question of congruence, or lack of it, between a given system of power and the beliefs, values, and expectations which provide its justification’ (Beetham, 1991: 11), its ‘objectivity’ is derived from the notion that such congruence does not depend upon how the act is perceived by its social audience, unlike ‘deviance’ (see Becker, 1963). As such, ‘objective illegitimacy’ is characterised as a state practice ‘[which] departs from the state’s own rules or is unjustifiable in terms of the values that the rules purport to serve’ (Green and Ward, 2000: 109).

Although appearing in the first instance as wholly applicable to the cultural loss being experienced by First Nations, Green and Ward’s (2000) conception of ‘state crime’ is not without its limitations. Noting a caveat to their definition, the authors ‘…do not consider it morally or semantically appropriate…’ to use the word 'crime' to describe practices that researchers ‘…may justifiably perceive to be illegitimate, but which are generally accepted as part of the routine, legitimate activity of the state (or at least within the fair range of party-political disagreement)’ (ibid: 110). By limiting the definition in this way the authors have intentionally restricted its potential for application, so as to avoid ‘…adopting such a broad definition of “crime” as to destroy what coherence criminology has as a distinct field of study’ (ibid). However, specifically limiting it to those issues ‘…within the fair range of party-political disagreement’ (ibid) renders it somewhat blind to the subtleties of power, particularly the way in which party politics has shifted purposefully to the right of the political spectrum over the last half century, narrowing the range of topics considered acceptable for disagreement on. As Savoi (2010: 33; see also Savoi, 2013; 2008) notes with respect to Anglo-American democracies:

*In one generation…[they] went from a belief in a strong positive role for the state in managing the economy to embracing free market economics and downplaying the role of government. Those who argued against tampering with the machinery of government and the status quo became new reactionaries.*

Despite this shift, according to Green and Ward’s (2000: 110) definition applying the label of ‘crime’ to practices which may be ‘justifiably…illegitimate’ but which lie outside of this narrower, context-dependent spectrum of ‘disagreement’, is unacceptable. As such, although legally flexible in its use of human rights, this exception has the opposite effect of that intended, serving to politicise ‘state crime’ by anchoring it to the existing political-economic order. Indeed, considering that national and provincial elites have, over the last century, broadly supported oil sands expansion alongside many and various forms of indigenous subjugation, with little serious party-political resistance, or ‘disagreement’, even today (see Ralston Saul, 2014; King, 2012; Chastko, 2007), the definition effectively annexes the normative systemic characteristics which lie at the root of the indigenous environmental harm that this study seeks to explain.

In light of this debate, green criminology has taken a flexible approach to specifically environmental definitions of ‘crime’ and ‘harm’, but one which is necessarily so. Although the two terms tend to be qualitatively different and ‘frequently do not correspond or overlap’ (South et al, 2013: 27), the boundary between the two is not clearly defined and can sometimes disappear altogether (see Natalie, 2013). For instance, White (2013: 19) adopts a definition that encompasses both, asserting that ‘[i]f harm is done to humans or environments or animals, then it is argued that this ought to be considered a ‘crime’ from the point of view of the critical green criminologist’. Such a broad definition need not be relied upon in the case of the oil sands. A more specific conception can be found in the ‘treadmill of crime’ theory developed by Stretesky et al (2014), which also provides a basis for illustrating its occurrence. Indeed, this is the definition that will inform this study. With its recognition of ‘green crimes’ as including ‘…acts that cause or have the potential to cause significant harm to ecological systems for the purposes of increasing or supporting production’ (ibid: 2), the authors consider such activity to be not only public, but also ‘…patterned by and extensively connected to the economy and ecology’ (ibid: 2). While this is still broadly conceived, including behaviours defined as criminal under administrative and regulatory law, in addition to those not currently criminalised but which scientific evidence suggests could be (ibid), its definitional boundaries are recognisable by its omissions. These include ‘…forms of street crime, white-collar, corporate, state crime, and corporate state crimes that do not directly cause ecological destruction’ (ibid). Such specification provides some delineation without being overly prescriptive, thereby acknowledging that ‘…adequate analysis of environmental harm demands that the criminological gaze extend well beyond mainstream conceptions and legal definitions’ (Halsey and White, 1998: pp.345-346), while still retaining a degree of demarcation.

The treadmill of crime theory from which Stretesky et al’s (2014) definition is derived draws on three underpinning assumptions within Schnaiberg’s (1980) original work on the treadmill of production. Providing justification for the scientific dimension to Stretesky et al’s (ibid: 2) definition of ‘green crime’, and reflecting the treadmill of production’s place in the ‘materialist-realist-objectivist’ school of environmental sociology (Buttel, 2004: 325), the three assumptions draw heavily on scientific empiricism. Given the taxonomy of ‘production, conservation and entropy’ (Stretesky et al, 2014: 20), the first of these assumptions is that nature engages in production via ‘…the creation of living matter – biomass – by the processes of birth, growth and decay’ (Schnaiberg, 1980: 13), with the remaining two, conservation and entropy, being based on the two laws of thermodynamics:

*The first [law], that of Conservation of Matter and Energy, states: Matter and energy cannot be created or destroyed, they can only be transformed. The second law, the Law of Entropy, states: All energy transformations are degradations, changing energy from more to less organised forms.*

(ibid)

Not only are these laws universally applicable, ‘[r]egardless of the ecosystem under review’ (ibid), once entropy is reached it is non-reversible. The essential argument of both treadmill theories stem directly from these assumptions, viewing human economic systems, particularly under capitalism, as accelerating the pace and extent of entropy within natural ecosystems by virtue of their disorganisation-inducing production methods (see Stretesky et al, 2014: 19-21; Schnaiberg, 1980; 13-15). Collectively referenced by the term ‘ecological disorganisation’, these assumptions operate at the basis of what Stretesky et al (2014: pp.38-88) term ‘[c]rimes of ecological withdrawals’ and ‘[c]rimes of ecological additions’.

Between social production processes and ecological disorganisation there sits a fundamental linking mechanism; the ‘*additions and withdrawals*’ which stem from the former and act as the precursor to the latter (Schnaiberg, 1980: 23, emphasis in original). These are the inherent material, or physical, elements of the production process which enter into, or are removed from, the respective ecosystem which generate the imbalance. As Schnaiberg (ibid) explains:

*First, materials are extracted from ecosystems. Second, these materials are typically transformed through physical and/or chemical production processes. Third, after distribution and use, these material products are disposed of in some way…Such additions and withdrawals have the potential to disorganise ecosystems.*

Differentiating between ‘quantitative and qualitative disruptions’, Schnaiberg (ibid: 27) goes on to note that these additions and withdrawals can be understood according to their size, degree of permanence, importance of either to the organisation of the ecosystem in question, and the ‘range’ of ecosystems involved. It is from this that Stretesky et al (2014: 38-88; see also Lynch et al, 2013) justify the need for green criminology to recognise both ‘additions’ and ‘withdrawals’ as ‘green crimes’. Indeed, the expansive view such a definition permits is reflected in the authors’ use of the two categories to briefly examine pollution and global warming, with respect to ‘additions’, and timber production, various forms of mining, and gas extraction, with regard to ‘withdrawals’ (ibid). Operating from a position that acknowledges the limitations associated with conventional legal parameters of criminality, which tend to view environmental harm as either legitimate behaviour or a dysfunctional consequence of an otherwise ‘perfect’ economic system (see Hillyard and Tombs, 2004), the concept of ecological disorganisation draws attention to normalised, but nonetheless environmentally harmful, industrial activities.

To conceive of ‘green crime’ in this way is purposefully inclusive and overcomes the limited nature of more orthodox definitions. It also challenges the power behind these constructions as ‘[t]he State and legal apparatus, rather than directing…investigations’ become ‘…a central focus of investigation as a criminogenic institution…’ (Platt, 1975: 103). Indeed, as the environmental victimisation of Alberta’s First Nations is resulting from the normative expansion of the oil sands industry, the ‘gaze upwards’ permitted by this broader conception is necessary. Put another way, in the oil sands ‘it is not deviance from, but adherence to, legal norms that presents itself as problematic…’ (Halsey, 1997: 225). On this basis, and in accordance with Stretesky et al’s (2014) conception of ecological disorganisation, evidence of environmental destruction is, in Section 2.3, coupled with that pertaining to its detrimental anthropocentric consequences. While this eschews explicit reference to ecological ‘withdrawals’ and ‘additions’, favouring instead characteristics more specific to the indigenous cultural loss being experienced in the oil sands, the account given is informed by the need to provide scientific evidence of the harm being experienced. This includes both aspects of the ecological disorganisation concept, but integrates it in a manner allowing for detail to be presented on exactly how the environmental degradation is affecting the First Nations. In this sense, the cultural loss produced by extractive operations, and sanctioned by the provincial regulatory process, can be recognised as a very specific type of ‘green crime’.

## 2.2 ‘Cultural Loss’ as a Form of Indigenous Environmental Victimisation

Emerging from its broad interpretation of what constitutes its basic subject matter, green criminology has made various efforts at categorising environmental ‘crimes’ or ‘harms’. The diversity of these attempts ultimately stem from the fact that negative environmental impacts resulting from human activity ‘…are enormous in their range and variety’ (South, 2014: 9). This demands an equally flexible approach that permits both their recognition and subsequent examination. Carrabine et al (2014: 318) classify environmental ‘crimes’ and ‘harms’ as having ‘primary’ or ‘secondary’ forms, with the former referencing the more immediate consequences of ecological degradation and the latter those which follow, such as the creation of illegal markets for scarce basic commodities or the flouting of rules that seek to regulate environmental disasters. Building on this, Potter (2014: 11) develops the category of ‘tertiary’ green crimes, which he defines as those activities ‘…committed by environmental victims or as a result of environmental victimisation…’. This has parity with Hall’s (2013: 38) examination of ‘[v]ictims as offenders, offenders as victims’, which focuses on those who commit criminal or harmful offences due to environmental pressures. Indeed, Hall (ibid: pp.27-38) forwards a different typology of specifically anthropocentric environmental victimisation, classifying it along four lines in his reference to ‘health’ and ‘economic’ effects, ‘social and cultural impacts’ and ‘impacts to security’. White (2008: 98-99) adopts an alternative conception, opting to classify harms as ‘brown’ issues, which refers to pollution levels in urban locations, ‘green’ issues, referencing harms associated with the biosphere, and ‘white’ issues, which refers to the environmental impact of new technologies. Taken together, this body of literature provides a clear basis from which to describe a multitude of environmental harms and bring their study under the rubric of green criminology, or its fledgling counterpart, green victimology (see Hall, 2015; 2014b).

Indigenous environmental victimisation could be categorised using any one of these frameworks, also crossing many of the categories established within each. As evidenced in the following section, ecological disorganisation resulting from oil sands expansion is reducing the quality of resources traditionally hunted by First Nations, the consumption of which is being associated with illnesses amongst their members and precipitating a withdrawal from hunting, fishing and trapping activities. This multidimensional impact would cross all of White’s (2008) categories and at least three of Hall’s (2013). It is also not difficult to see how the enclosure of land for oil sands projects may increase the likelihood of First Nation members being accused of trespass on newly-designated private land, where hunting, fishing and trapping used to occur, thus raising the prospect of categorisation under Potter’s (2014) ‘tertiary’ label. Indeed, while providing a multifaceted basis from which to categorise specific forms of environmental harm, these typologies tend to be broadly conceived, rendering them less sensitive to the specificities inherent to the indigenous environmental victimisation under investigation here. As such, the more directly applicable thematic classification of ‘cultural loss’ will be drawn upon, in addition to a framework specifically developed to evidence its production and reproduction by processes of ecological disorganisation.

According to the preamble of the United Nations Education Scientific and Cultural Organisation (UNESCO), culture should be recognised as ‘…the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group’ and should encompass ‘…art and literature, lifestyles, ways of living together, value systems, traditions and beliefs…’ (UNESCO, 2001: 1). By going on to note that culture is ‘at the heart of contemporary debates about identity…[and] social cohesion…’ (ibid), the notion of collective identity pertaining to shared cultural characteristics is bought to the fore. The legacy of colonialism in North America has generated a contemporary situation in which the myriad of cultural characteristics maintained by each specific First Nation is collapsed into an undifferentiated label, where the image of ‘the Indian’ operates as ‘…an entity that would stand for the whole’ (King, 2012: 83). Indeed, Brody (2001: 7), speaks of this caricature as at least partially resting on an imagined difference between highly mobile “nomadic” hunters and “settled” farmers who stay in one particular area. However, this is actually an inversion of reality:

*…the stereotype has it the wrong way round. It is agricultural societies that tend to be on the move; hunting peoples are far more firmly settled. This fact is evident when we look at these two ways of being in the world over a long time span – when we screen the movie of human history, as it were, rather than relying on a photograph.*

(ibid)

Such conceptual manipulation is related to settler attempts at constructing an identity around the fixity of territoriality; a process aimed at denying the authenticity of indigenous claims to legitimate authority over land (see Chapter 9; Veracini, 2010). Yet, despite this, some cultural attributes are shared between these many, varied and specific cultures (see Berry, 1999). One of the most significant is the ‘deeply spiritual’ relationship with the land maintained by indigenous peoples globally (Anaya, 2009: 69). As Cobo (1986/87: para 196), a previous UN Special Rapporteur for Indigenous Peoples, asserts, this is a relationship ‘…basic to their existence as such and to all their beliefs, customs, traditions and culture’.

The fundamental nature of this relationship hides in plain sight, being inherent to the various euro-centric descriptors used to reference these peoples across the world. For instance, the English term ‘indigenous’, and its Spanish equivalent ‘indigena’ are both rooted in the two Ancient Greek words ‘indo’, meaning ‘inside’ or ‘within’, and ‘genous’, meaning ‘birth’ or ‘born’ (Gilbert, 2016: 3). The etymology of this means ‘…originating in the region or country where found; native’ (Barnhart, 2003: 521). Similarly, the French equivalent, ‘autochtone’, which means ‘native’ (Collins, 2016), is derived from the Ancient Greek word ‘khthon’ (Gilbert, 2016), meaning ‘land’, ‘earth’ or ‘soil’ (ibid; see also Mellamphy, 2013: 155). Such a relationship is further reflected in the final UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN General Assembly, 2007), which is the result of over two decades of indigenous advocacy and pressure in the international arena. The tie between land and culture is present in some form throughout many of its forty-six articles, where ‘land’ is mentioned four times in the preamble to the UNDRIP and no fewer than seventeen times in the articles themselves, while ‘culture’ and ‘cultural’ are mentioned eight times in the former and sixteen in the latter (ibid). Indeed, it is through acknowledgment of this relationship that, in the current ‘[a]ge of sustainable development’ (Sachs, 2015), many now consider ‘…Aboriginal cultures, their greater emphasis on sustainability, and the close integration of environmental, social and economic concerns…’ to ‘…speak to a new path forward’ (Gregory and Trousdale, 2009: 2469).

This intrinsic relationship between indigenous peoples and the lands in which they occupy is a reality mirrored by the First Nations living in and around the oil sands area of northern Alberta. Considering that ‘…different societies produce qualitatively different conceptions of space and time…’ (Harvey, 1990: 418), these First Nations maintain a relational concept of place (see Castree, 2004), where spaces are not simply ‘…locations of distinct coherence’ (Massey, 1999: 14), but ‘…nodes in relational settings’ (Amin, 2002: 391) or ‘…articulated moments in networks’ (Massey, 1994: 5). This emphasises connections between spaces rather than the points in and of themselves, introducing the notion of ‘topokinetic’ knowledge as opposed to its ‘topographical’ counterpart. Indeed, for First Nations travel through an environment is directly connected to the expression of oral traditions which encapsulates their cultural knowledge (McCormack, 2012), where movement across the landscape has an iterative association with cognition, social relationships and interactions (see Turnbull, 2007: 142-143). In noting that this relationship transcends the physical, being concurrently shaped by an understanding of the land as ‘…an autonomous living being’ (Arnold, 2001: 17, quoted in McCormack, 2012: 115), McCormack (2012: 125) provides a detailed account of this spirituality, concluding that ‘Chipewyan history, culture and religion are both encoded and demonstrated in the geography of their traditional territory’. It is for this reason that environmental degradation is so damaging to First Nation culture; it severs their tie with the past by alienating them from the land-based practices underpinning its production in the present. This erodes their collective identities over time by inhibiting its reproduction into the future.

A number of anthropological studies have described this specific type of victimisation as a form of ‘loss’ (see Gregory and Trousdale, 2009; Berry, 1999; Rose, 1994). In examining this term, Kirsch (2001: 169) outlines two concepts to which such ‘loss’ may refer. The first of these denotes possession and the loss of ‘…objects or property for which one might claim rights or ownership’ (ibid). As he is here discussing the loss felt by aboriginal peoples over land, and applying them to the concept of cultural property rights, this ‘possession’ is taken to include ‘property, land and memory’ (ibid). The second concept to which the term refers is that of kinship and belonging, both of which are seen as a key feature of the social realm because of its productive possibilities. This productivity references ‘…the social relations organized through land, as well as the capacity for reproducing these relationships in place’ (ibid). In deploying this conceptual foundation, Kirsch demonstrates that ecological destruction results in loss by destroying the former and disrupting the generative capacity of the latter. A similar concept is used by Turner et al (2008) in relation to the environmental degradation experienced by indigenous communities in western North America. However, they prefer to define this further as ‘invisible loss’ (ibid: 7). The purpose of such terminology is not to argue that knowledge of such degradation is lacking, quite the opposite, but is instead intended to emphasise that evidence surrounding the subsequent impact of this upon indigenous peoples goes unrecognised and unacknowledged by decision makers.

If defining specifically ‘cultural losses’ as ‘…adverse impacts on the range of traditional activities, emotional well-being or social relations engaged in by an individual and/or an Aboriginal community as a result of changes in the land’ (Gregory and Trousdale, 2009: 2470), then such victimisation requires detailed and evidenced substantiation. A thorough, four-stage conceptualisation has been developed by Larcombe (2012: pp.2-12 – 2-15) for such a purpose, entailing a sequential exploration into how environmental impacts affect the collective identities of First Nations. According to this model the immediately perceptible drivers of change are identified, which can include industrial activity, historical events, or regulatory actions, before examining their influence upon those conditions which support the cultural practices of First Nations. In other words, these two initial stages are largely concerned with drawing out the source of environmental change and understanding its impact on the ecological dimensions that have cultural significance to First Nations. In contrast, the final two stages detail the victimisation seen to accrue to First Nations as a result. The first accounts for the response of First Nations to these changes. Labelled ‘primary’ responses, these may include ‘avoidance’ or ‘abandonment’ of a particular resource, ‘adaptation’, which references a change in species harvested or location at which hunting, fishing or trapping is carried out, or ‘displacement’, which communicates the loss of access to a particular area or resource (ibid: 2-14). This leads onto the fourth and final stage of ‘secondary’ outcomes. Sitting at the heart of the model, these represent the core social, economic, cultural and health impacts experienced by First Nations as a result of the responses identified at the third stage. When combined, these stages permit investigation into both the drivers producing environmental victimisation and the characteristics inherent to the victimisation itself.

In its original form this model was deployed provide a broad narrative of the varied, historical and ongoing encroachments upon the land and waterscape relied upon by First Nations, meaning it is capable of examining complex, multifaceted cases of environmental victimisation. While such a detailed excavation lies outside the remit of this study, its delineation of a chain of causality, linking the drivers behind environmental change to its immediate ecological impacts, before focusing on the subsequent responses by First Nations and eventual harm resulting from this process, provides a platform from which to evidence the ‘cultural loss’ being experienced by First Nations as a result of oil sands expansion. Informed by Stretesky et al’s (2014) emphases on using scientific data to underpin conceptions of 'green crime', but without discounting traditional ecological knowledge as a valid evidential source (see Whyte, 2013; Houde, 2007), Larcombe's (2012) model is here used to structure an examination into the more ‘direct’ and material impacts, and more ‘intangible’, ‘indirect’ impacts upon indigenous land-based culture as a result of oil sands expansion.

## 2.3 The Socio-Material Dimension of Cultural Loss: Direct and Indirect Impacts

This section presents an examination of the direct and indirect impacts of oil sands operations upon the traditional practices underpinning First Nation culture, describing how adverse environmental effects are generating the 'cultural loss' discussed in Section 2.2. While not mutually exclusive, 'direct' effects reference the more material, physical separation of First Nations from the land, largely due to industrial expansion and resource contamination, whereas 'indirect' effects refer to the erosion of the more 'intangible' aspects of culture, such as the loss of traditional knowledge and practices. In describing these different dimensions the term 'cultural significance' is used to denote aspects of the natural environment that are particularly relevant to indigenous land-based culture, signalling a relationship between human and non-human nature that is particularly important for its continuation. As such, this section builds on the social harm material explored in Section 2.1 by detailing the specific form of indigenous environmental victimisation experienced by the First Nations. This establishes a basis for the subsequent chapters and central focus of the research study; the regulatory forces responsible for sanctioning industrial expansion and, by extension, producing and reproducing ecological disorganisation and cultural loss.

### 2.3.1 Direct Impact on Indigenous Culture

Members of northern Alberta’s First Nations have been displaced from their culturally significant lands in a number of ways. As oil sand extraction companies exercise exclusive surface rights to prohibit access (see Chapter 3.3), methods of exclusion and restriction such as gates, barriers and fencing have diverted First Nations away from particular areas (Macdonald, 2012; Marcel et al, 2012). Serving to alienate these peoples from their traditional lands, this directly inhibits the production of indigenous knowledge by impeding trails and access routes to traditional resource areas and sites of cultural relevance. In one area of Athabasca Chipewyan and Mikisew Cree territory, research found oil sands activities to have disturbed 56 percent of the land base (see Appendix III), and that if this rate of conversion was to continue then undisturbed land in the area would be non-existent by 2031 (Management and Solutions in Environmental Science, 2010: 2). Accompanying this development is the expansion of linear features, such as roads, rail routes, cut lines and pipelines, which dissect traditional territories and create transport routes facilitating further expansion of extraction operations. Komers (2009, cited in Larcombe, 2012: 4-44) measured this development in an area just North of an ACFN reserve between 2001 and 2008, finding that 229km of additional linear features had been built each year; an annual pace of almost four times that observed during the period between 1992 and 2002. As such, it is not only the existence of oil sands developments that pose a threat to land-based culture, but also the rate of its expansion.

The environmentally harmful withdrawal of water levels in the lower Athabasca watershed have had, and continue to have, a corrosive effect on First Nations by displacing them from the waterways. The ACFN in particular note that the destruction of the delta following the building of the WAC Bennett Dam in 1967, which saw a subsequent decline in muskrat populations and relative inaccessibility on the waterways, was an important factor in their relocation to the indigenous settlement of Fort Chipewyan (ACFN, 2003). While traditional land-based activities were still practiced from the fixed location of the town, this eventually led to further integration into the labour market as they could no longer rely on trapping alone (McCormack, 2012). Following the rapid withdrawal of the waterways and its associated environmental damage, the Athabasca Chipewyan in particular ‘…suffered extreme hardship and economic loss’ (Prentice et al, 1998: 78). Indeed, the further withdrawal of the Athabasca River and its tributary system has the potential to cause considerable environmental harm because of its central position in the lives of the First Nations. As Candler et al (2010: 14) highlight,

*Water-based access by boat is…the preferred mode of practicing aboriginal and Treaty rights, including hunting, trapping, and fishing, even where road access is possible. The ecology of the delta and Athabasca River means that, at good water levels, a web of interconnected waterways exists that can be used to ‘go anywhere’ in the delta area…Moose, the preferred game sought by most ACFN hunters, tend to congregate near water in summer months, so boats make for an ideal means of locating, shooting, and carrying the many hundreds of pounds of meat that results from a successful kill. Boats also allow for procurement of fish or other resources adjacent to river banks, and allow ACFN members to access territories without disturbance from industrial traffic associated with many of the roads closer to Fort McMurray and the oil sands developments.*

This relationship, already endangered by the previous damage caused by the WAC Bennett Dam, makes the water from the Athabasca River and its delta even more important than it had been before. Indeed, a study into the cumulative effects of water withdrawal found that all mitigating alternatives of removing water would result in the maximum degree of ‘negative’ ‘moderate impact’ upon indigenous ‘traditional knowledge transfer’; a variable that encompasses the effects on access to traditional use sites and activities, fish abundance and harvesting opportunities, and, importantly, the extent to which the river is seen to have an inherent value (Westland, 2009, quoted in Ohlson et al, 2010: 98).

First Nation concerns regarding waterway diversion and alteration centre on the amount of water drawn directly from the Athabasca River for use in the mining industry (Candler et al, 2010). As a recipient of 74.5 percent of all surface water allocations in 2010 (Sauchyn, 2015: 12621), which equates to 13 times the provincial average (ibid), oil sands operators used 170 million litres of water in 2011 alone (Grant et al, 2013a: 26). This connection tends to be dismissed by government and industry, however, which claims to remove only 1 percent of the long-term average annual flow of the River (Government of Canada, 2015). This was determined by the Phase 1 Water Management Framework that was in effect between 2007 and 2015, which recommended 15 m3/s of water to be the limit for winter withdrawals (Government of Alberta, 2007a: 10). However, Schindler et al (2007: 11) concluded this to be:

*…inadequate to protect the Athabasca River system…Its reliance on past conditions offers little protection for the ecosystem from low oxygen, high contaminant concentrations or reduced winter habitat under winter ice...It does not account for the effects of climate warming…Projected bitumen extraction…will require too much water to sustain the river and the Athabasca Delta.*

Indeed, industry demand actually accounts for a much greater proportion of the natural water supply in winter when the river is low. For instance, in January 2010 the flow in the river declined to 106 m3/sec, yet the industry was still allowed to withdraw 10 m3/sec, equating instead to 9.4 percent of the river’s flow; an amount almost ten times greater than that claimed by officials (World Wildlife Federation Canada, 2011: 9). While there is difficulty in determining ‘acceptable’ levels of water withdrawal due to the natural fluctuation of the ecosystem in question, extraction by industry is exacerbating the situation (Timoney, 2013). The committee responsible for determining limits in Phase 2 of the Water Management Framework, which was supposed to be introduced in 2011, were criticised for overlooking the indigenous relationship with the river, including the type and cargo weight of the boats used by ACFN members and their reliance upon the River to exercise their Treaty rights (Candler et al, 2010). Phase 2 was never implemented as limits established under the Lower Athabasca Regional Plan (LARP) were introduced in 2015 (Government of Alberta, 2016a), the efficacy of which has yet to be determined. However, considering that freshwater use in mining operations is predicted to rise in accordance with industrial growth, doubling to reach 772,900 cubic metres per day by 2022 (Grant et al, 2013b: 3), the displacement of First Nations from the waterways upon which their culture depends is likely to continue.

Alongside displacement from the land, the avoidance and abandonment of traditional locations and resources is also inhibiting the continuation of indigenous cultural practices. Larcombe (2012: 5-15) characterises ‘avoidance’ as the interruption of harvesting a particular type of resource in a specific location across a broad geographic area, and ‘abandonment’ as cessation of the harvesting of all resources in an area, noting that each arises in response to concerns about the health of animals, fish and plants, and the quality of water. The consequences of this are similar to those associated with displacement, but are more targeted in the type of resources affected. The effect of this upon First Nations is explained by Brody (1981, quoted in Larcombe, 2012: 5-15), who notes that such impacts are ‘…inseparable from the social and individual well-being of a people whose domestic economy, historical experience and sense of identity are focused on the land and its resources’. Indeed, despite the fact that ‘…precise links in the causal chain from environment to society are not easily spelled out’ (ibid), signs of avoidance and abandonment of resources indicate this chain to be in effect, serving to generate the sense of loss common to indigenous accounts of land alteration (see Section 2.2).

Concerns surrounding water quality feature particularly heavily in explanations of resource avoidance and abandonment. This is due to its central place in the ecosystem of northern Alberta and the lives of nearby First Nations. In explaining the importance of the Athabasca River to indigenous existence, one member of the ACFN stated that ‘…it brings life to the delta…it also kept our people healthy, our population stable and, in other words, it sustained our way of life for our people…’ (Candler et al, 2010: 11). Descriptions of the water as the ‘lifeblood of ACFN culture' similarly reflect the fact that this river, along with Lake Athabasca, not only facilitate travel to culturally significant locations, as discussed above, but also sustains each of the animal and plant species that are culturally, spiritually and socio-economically significant to First Nation livelihood (MacDonald, 2012; McCormack, 2012). The Athabasca River and Lake also used to be the primary sources of drinking water for Fort Chipewyan residents and other traditional land users, but since industrial development began in the 1960s a decline in water quality has seen such practices become almost obsolete for these peoples. This situation has been compounded by the cost of accessing clean sources of drinking water and rising concerns about the human consumption of contaminants through food washed or grown using the water. Although it cannot be considered statistically representative due to its small sample size, one survey of ACFN members found that a majority of those asked would not be comfortable giving their family members untreated drinking water from the Athabasca River and surrounding area (Candler et al, 2010: 18-19).

First Nation avoidance and abandonment of the water, and the resources they perceive as being contaminated by it, are linked to the pollutants released by the bitumen industry. Following Timoney’s (2007: 73) study of water and sediment quality in Fort Chipewyan, which concluded that the ‘explosive growth’ of northern Alberta’s bitumen industry ‘poses risks to environmental and public health that demand immediate attention independent of provincial and industrial oversight’, a number of studies have reached similar conclusions. After observing elevated concentrations of contaminants upstream and downstream of the industry to be magnified two-fold in winter and twenty-fold in summer, Kelly et al (2009: 4) likened the amount of bitumen deposited on the land via air and water pathways to ‘be equivalent to a major oil spill, repeated annually’. Following a conclusion made in its companion study, which stated that ‘[c]ontrary to claims made by industry and government in the popular press, the oil sands industry substantially increases loadings of toxic PPE (priority pollutant elements) to the AR (Athabasca River) and its tributaries via air and water pathways’ (Kelly et al, 2010: 5), a report by the Royal Society of Canada on the environmental and health impacts of the oil sands criticised the research on the grounds of the sampling method they used (Gosselin et al, 2010: 148). However, the Water Monitoring Data Review Committee disagreed with this criticism following further elaboration on the methods by Kelly, concluding instead that ‘[t]here is nothing to suggest that the methods they used in sample collection were not scientifically rigorous’ (Dillon et al, 2011: 11). Indeed, the study by the Royal Society of Canada (Gosselin et al, 2010: 285), which concluded that oil sands activities are ‘not a current threat to aquatic ecosystem viability’ (ibid), has been criticised for not conducting any research of its own and for ignoring First Nation input (Adam, quoted in Sierra Club, 2009).

The licensed and unlicensed release of waste water into the Athabasca River is a particular issue when discussing water contamination. Although companies are prohibited from discharging untreated waste water, ‘treated’ waste water can be released according to provincial guidelines. However, providing evidence of the ‘veil that has been drawn over provincial river monitoring activities’ (Timoney, 2007: 53), Timoney (2013: 411-413) highlights how the 11.9 billion litres of licenced wastewater released into the River by Suncor in 2007 did not include the numerous unlicensed discharges from spills and leaks. Detailed research into the ecological and human health impacts of such spills and leaks has yet to be conducted. Indeed, tailings ponds, which hold the waste by-product from the oil sands extraction process, contribute heavily to this unlicensed pollution. Occupying an area of 25 square kilometres in 1998, which had increased to 182 square kilometres by 2011 (Government of Alberta, 2015a), the ponds are expected to expand to fill 250 square kilometres by 2020 (Simieritsch et al, 2009: 34). This is a particularly destructive pattern of development considering that latest estimates place unlicensed seepage from a single pond at 6.5 million litres per day (Frank et al, 2014; Weber, 2014), and from fourteen ponds at 4 billion litres per year (Environmental Defence, 2008: 14). These figures gain prominence when considering that the content of tailings, which encompasses naphthenic acids, polycyclic aromatic hydrocarbons (PAHs), phenolic compounds, ammonia, mercury and other trace metals (Nix and Martin, 1992), is acutely toxic to aquatic organisms and mammals (Gosselin et al, 2010; Scarlett et al, 2012; MacKinnon and Boerger, 1986).

This destruction of the aquatic ecosystem is causing the widespread avoidance and abandonment of culturally significant land and water-based species that rely upon its continued existence. While ‘cultural keystone’ species will be the focus here, defined as those which ‘…shape in a major way the cultural identity of a people, as reflected in the fundamental roles these species have in diet, materials, medicine, and/or spiritual practices’ (Garibaldi and Turner, 2004), this is not to suggest that other species are insignificant. Indeed, the holistic worldview maintained by First Nations emphasises the complex net of relationships that exists within and between all forms of life. As the notion of ranking certain species above all others is antithetical to this position, all that the ‘cultural keystone’ concept denotes is that certain relationships vary in strength to others and, as such, so too do the effects that arise from their severance. For this reason, plants, and animals such as fish, caribou, moose, and migratory wildfowl will be focused on as they are variously identified as species of social, economic and cultural significance to the First Nations (see Larcombe, 2012; McCormack, 2012; Candler et al, 2010). Indeed, the environmental contamination resulting from industrial development does not discriminate against different species, but there are a number which are particularly important to indigenous cultural practices.

Directly affected by this decline in water quality and quantity are fish; a species which are fundamental to the traditional practices of the First Nations. As McCormack (2012: 29) explains with regard to the ACFN in particular,

*Fish have always been a subsistence mainstay of Chipewyans, both before and after the treaty. They had extensive fishing technology and knowledge of fish stocks and their locations…Residential locations for the local bands were typically in areas where fish could be caught, because it gave Chipewyan’s at least two different options for food. If meat was in short supply, they probably had fish to eat.*

The avoidance of fish in certain areas is linked to increasingly prevalent observations of fish deformities in the vicinity of Fort Chipewyan. Traditional users have identified ‘lesions, internal and external tumors [sic], and deformed skulls, skeletons, and fins’ (Timoney and Lee, 2009: 77), with one elder describing deformed pickerel in Lake Athabasca as having ‘[p]ushed in faces, bulging eyes, humped back, crooked tails...never used to see that. Great big lumps on them... you poke that, it sprays water...’ (Ladouceur, quoted in Timoney, 2007: 62). While fish abnormalities can result from natural causes, such as injury, disease, parasites, spawning, or poor nutrition, ‘strong evidence’ links these defects with water quality in the region (Timoney, 2013: 421). Indeed, an increase in mortality rate, craniofacial irregularities, cardiac dysfunction and a reduction in size have all been observed in fish exposed to PAH's from the Athabasca River (Colavecchia et al, 2007; Colavecchia et al, 2006; Tetreault et al, 2003), concentrations of which are now between 2.5 and 23 times greater than in 1960 as a direct result of oil sands developments (Kurek et al, 2012). Similarly, malformations and hatching alterations have been found to result from exposure to natural bitumen from the Athabasca River and waste water pond sediment, with haemorrhages, spinal malformations and oedemas, which is an excess of fluid beneath the skin, being observed in larvae (Colavecchia et al, 2004). These detrimental effects of oil sands contaminants have been echoed by various other studies (see Incardona et al, 2004; Parrott et al, 2004), supporting First Nation concerns surrounding the water contamination resulting from industrial operations.

Emerging alongside this evidence has been official warnings against eating fish from areas near to the Athabasca River and Lake Athabasca, mainly due to the elevated risk of mercury consumption. An area of clear concern, the chemical element is classified as ‘very toxic’ when inhaled or exposed to over a long period of time, and is associated with neurological and biological disorders which include damage to immune, nervous and cardiovascular systems (Canadian Centre for Occupational Health and Safety, 2013; UN Secretariat, 2010: 1). The Government of Alberta issued one such warning to women of child bearing age and children under the age of 15 against eating certain fish from the Athabasca River, recommending all others not to eat more than one fish-based meal per week due to the detection of high levels of mercury in those who regularly take part in its consumption (Regional Aquatics Monitoring Program, 2004; 2009). This was first stated in 2003 before being repeated in 2009. Indeed, a study prepared for Canadian Natural Resources Ltd and the ACFN supported this warning after finding mercury concentrations to be higher in all species of fish from the Lake Athabasca area than those in nearby Richardson Lake (Hatfield Consulting, 2006). As such, it made the additional recommendation that, due to the ‘high nutritional, cultural and economic value’ of fish to the Athabasca Chipewyan, smaller fish, along with the ‘lake whitefish’ species, should be eaten owing to their lower concentrations of the chemical element (ibid: viii). However, these recommendations have been criticised. As Larcombe (2012: 5-19) makes clear, nets do not distinguish between species, ‘[f]ood wastage is considered highly disrespectful in most First Nation cultures’, and it is ‘psychologically difficult’ to have faith in certain species of fish over others within a shared body of water. Not only flawed in their recommendations, these official warnings, combined with the evident water pollution and clearly visible deformities in the fish themselves, are intensifying indigenous reluctance to consume a traditional resource (Timoney, 2013; 2007, McCormack, 2012). This adaptation may be presently limited to the avoidance of certain species, but ‘it would appear they (First Nations) are running out of options for places to acquire fish that are considered safe to eat’ (Larcombe, 2012: 5-19).

Concerns surrounding the quality of land-based animal resources may also impair their use by First Nations. Species of particular concern, for both cultural and subsistence reasons, are those of the muskrat, bison, caribou, moose and migratory wildfowl, of which the latter three will be focused on here. Listed as some of the fundamental resources for the continuation of the MCFN’s traditional knowledge (Centre for Indigenous Environmental Resources, 2010; see also Droitsch and Simieritsch, 2010), Marcel et al (2012: 3) make clear that:

*Thunzea (woodland caribou…), et’thén (barren ground caribou…) and dechen yághe ejere (wood bison…) have always had a central role in ACFN’s distinctive Dené culture, and are now rare or hard for our people to find within our territories. We rely on these species for our continued existence.*

While the ability to hunt woodland caribou has already been affected by lower water flows and declining moose populations (ACFN, 2003), their need for ‘large areas comprised of continuous tracts of undisturbed habitat rich in mature to old-growth coniferous forest, lichens, muskegs, peat lands, and upland or hilly areas’ means that expansive oil sands developments compound the issue (Environment Canada, 2012: vi). With the species already categorised as ‘threatened’ under both the Alberta Wildlife Act and the Federal Species at Risk Act (Athabasca Landscape Team, 2009), and Alberta’s entire population of woodland caribou being classified as ‘unlikely’ or ‘very unlikely’ to be able to sustain itself without intervention (Hervieux et al, 2013: 872), a report by the Athabasca Landscape Team (2009: i) emphasised that ‘[t]ough choices need to be made between the management imperative to recover boreal caribou and plans for ongoing bitumen development and industrial land-use’. McCormack (2012) builds on this, arguing that the majority of studies into the demise of the woodland caribou consider predators to be the problem without giving any consideration to habitat loss as a result of oil sands developments. Yet, the government’s national species recovery strategy did recognise the importance of habitat, along with the need to reduce habitat disturbance, in its recommendation to maintain ‘a perpetual state of a minimum of 65 percent of the [national] area as undisturbed habitat’ (Environment Canada, 2012: vii). The issue with this, however, is that the policies intended to effect this change at the provincial level, the Alberta Woodland Caribou Recovery Plan (Alberta Woodland Caribou Recovery Team, 2005) and the Woodland Caribou Policy for Alberta (Government of Alberta, 2011a), have been criticised for failing to ‘articulate clear and substantive steps towards reducing the amount of disturbed lands’, and for focusing instead on mitigation efforts ‘that appear unlikely to drastically reduce the disturbance footprint in Alberta’s caribou ranges’ (Unger, 2012). In other words, the proposed solutions do not tackle the issue of industrial expansion, rendering them unlikely to result in the minimum standards needed to sustain caribou populations.

Similar in significance to caribou, moose are a ‘highly desired and valued food by Athabasca Chipewyans for community dinners and feasts and other events that are culturally significant…’ (McCormack, 2012: 31). They are also a source of moccasins, mitts and jackets, all of which are visible markers of First Nation identity (Centre for Indigenous Environmental Resources, 2010). However, the low water levels are making it increasingly difficult to access the waterways needed to hunt the animals from boats (McCormack, 2012), and First Nation concerns regarding species contamination are raising the possibility of resource avoidance. As one ACFN elder (quoted in Larcombe, 2012: 5-15) explains:

*If the moose we’re killing are harvested close to the mine sites, we don’t know if the moose was in a tailings pond, or getting water – they’re a water species and they eat wetlands. So we don’t know if the wetlands they are consuming are safe. Therefore we don’t know if the moose we’re eating are safe. I prefer to harvest, take my kids, to where I know the food is safe and the medicines, berries, wildlife are safe to eat. Now it’s getting harder and harder to find those places. It’s getting harder to travel the Athabasca River because of the water levels.*

These concerns are not unfounded. One Suncor study suggests consumption of arsenic-contaminated moose meat in the region risks an additional 453 cases of cancer per 100,000 people (TheEcumenicalCouncil for Corporate Responsibility, 2011: 7). This chemical element is linked to elevated risks of liver, lung, urinary tract, and skin cancers; vascular diseases; and type II diabetes (World Health Organization, 2012; Guo, 2003). While the Suncor results have been disputed by Imperial Oil (CBC, 2006), and directly challenged by a subsequent government study which instead placed the cancer risk at 17-33 times the acceptable level (Alberta Health and Wellness, 2007: iii), the notable difference between results, coupled with a lack of rigorous peer-reviewed research, has done little to alleviate worries surrounding this traditional resource. Further compounding this issue are First Nation concerns regarding the research methods employed in scientific inquiry. Evidence of this can be seen in a discussion on the results of a study into hydrocarbon contamination of moose, muskrat and duck, which found muscle meat to be safe but kidneys and liver unsafe for children or pregnant and nursing women (MCFN, 2013). Here, members of the Mikisew Cree highlighted that the samples for the research were all taken from local people; a problem because ‘[t]he hunters know what animals are sick and they don’t take them home to their freezer’ (ibid). Put another way, a study into unhealthy animals was based on a sample frame that excluded unhealthy animals.

Species of migratory wildfowl are culturally significant to the First Nations, but the birds encompassed by the term are also some of the most at-risk from oil sands developments. Recognised as ‘a tremendously important food source in the Fort Chipewyan region for everyone - Chipewyans, Crees, other aboriginal people and traders’ (McCormack, 2012: 32), migratory wildfowl are now only hunted in spring or autumn due to restrictions, and, similar to other culturally significant animals, this practice is dependent on water levels for access (ibid). With the bitumen industry being located within a convergence zone of all four North American waterfowl flyways, it has been estimated that millions of migratory birds pass through the area annually, on the way to and from the Mackenzie River valley, the arctic coast and tundra breeding grounds (Timoney, 2013: 419). As the birds stop in and around standing bodies of water en-route, for foraging, roosting, nesting and resting opportunities (Ronconi, 2006), industry has attempted to discourage this behaviour using various means, including propane cannons and scarecrows (Ronconi and Claire, 2006). However, the detrimental impact on bird populations continues. One analysis of MCFN traditional knowledge found that birds caught on wetlands affected by oil sand activities were recognised as having ‘[h]igh parasite loads and poor body condition’ (Management and Solutions in Environmental Science, 2010: 125), with one elder stating, in reference to such symptoms, that ‘…it was never like that in the past’ (Labour, 2010: 14). While the exact cause of these effects are rarely clarified in research studies, elevated levels of arsenic were observed in common tern eggs and California gull eggs from areas within and near to Lake Athabasca, with levels of mercury and PAH's highest at points downstream of industry on the Athabasca River (Herbert et al, 2011). Mortality rates are also a cause for concern, with Timoney (2013: 419) evidencing a variety of cases where birds from at least 46 species have been killed due to contamination from tailings exposure. Indeed, two large mortality events occurred when around 1,600 waterfowl died at the Syncrude Aurora North tailings pond in April 2008 (Fluker, 2011: 1), and at the Syncrude Mildred Lake Settling Basin two years later in October 2010, where 457 birds were found dead or oiled and subsequently euthanized (St Claire et al, 2012: 5). The total estimated bird mortality rate, due to exposure to tailings, has been placed at between 458 and 5,029 birds each year (Timoney and Ronconi, 2010: 1), raising further questions regarding contamination of the food chain.

Much of this contamination has been associated with human health risks; a common thread running through First Nation reluctance to consume culturally significant resources. In addition to waste water leaks and releases, another basis for this pollution is the air emissions which accumulate on land and water through the process of wet and dry ‘deposition’. This term refers to the means by which aerosol particles collect or deposit on solid surfaces via acidic rain, fog or snow, for the former, and acidic gases and particles, for the latter (Hwang et al, 2008). As discussed in specific reference to water contamination above, significant amounts of these industrial particulates, which include PAH’s and heavy metals such as mercury and arsenic, are deposited on the landscape and waterways each year near Fort McKay, upstream from Fort Chipewyan (Kelly et al, 2009; 2010). Chronic exposure to such particulates is related to increased risk of cardiovascular disease, respiratory symptoms and lung cancer (Rosenthal et al, 2008). Indeed, Canadian Natural Resources Limited (CNRL) has recently been fined $500,000 for two large-scale releases of hydrogen sulphide gas, for failing to immediately report the incidents, and for providing misleading information to both the government and Fort McKay First Nation (CBC, 2016). Hydrogen sulphide in particular has, in various concentrations, been linked with asthma, cancer, pulmonary oedema, neurological difficulties, and a range of other health issues (Timoney, 2013). Such associations, between environmental pollution and human health, are supported by Timoney (2007; 2013). He presents an extensive array of scientific evidence suggesting that contamination linked with non-human health should not be considered in isolation from its risk to human health, especially if the human groups in question have a particularly close relationship with the natural environment. This gains prominence when considering that heavy metals and PAH’s have been found to ‘bioaccumulate’ within marsh and aquatic plants (Meudec et al, 2006; Madejon et al, 2006; Lafabrie et al, 2011); a process defined as the ‘biological sequestering of a substance at a higher concentration than that at which it occurs in the surrounding environment’ (United States Geological Survey, 2007). As such, it is not only direct exposure to air and water pollution that poses a risk to human health, but also the indirect exposure facilitated by subsistence based on wild food. The process of bioaccumulation presents a pathway by which these contaminants can enter the diets of various non-human animals and, in turn, the diets of humans, especially as the latter are at the very top of the food chain (Timoney, 2013; National Aboriginal Health Organization, 2008a).

The official position of the provincial government holds there to be ‘no evidence of increased rates of cancer or other illnesses in Fort Chipewyan’ (Renner, 2010 quoted in Timoney, 2013: 429), with research commissioned by the Government of Alberta stating that ‘the overall cancer rate in the community is not significantly higher than expected’ (Talbot, 2014). However, a number of studies challenge the credibility of such conclusions. In 2006, local physician John O’Connor was the first to publicly cite disproportionate levels of disease in the community of Fort Chipewyan, including leukaemia, lymphoma, lupus, colon cancer and Graves’ disease, also bringing attention to the unusually high levels of rare bile duct cancer (Brethour, 2006). After O’Connor suggested that these illnesses could be related to oil sands contaminants, the provincial government released a report refuting his findings before formally complaining to the Alberta College of Physicians and Surgeons for ‘causing undue alarm’ (Greer, 2013). However, these charges were subsequently dismissed following a study by the Alberta Cancer Board (Chen, 2009: 44), which supported O’Connor’s concerns in its conclusion:

*The number of cancer cases observed in Fort Chipewyan was higher than expected for all cancers combined and for specific types of cancer, such as biliary tract cancer and cancers in the blood and lymphatic system. In particular, increases were found for biliary tract cancer in men and for lung cancer in women.*

According to this study, the overall rate of cancer in fort Chipewyan is 30.8 percent higher than expected by chance (ibid: 8). Indeed, research conducted by the University of Manitoba, part-funded by Health Canada as part of a three-year $1 million project and peer-reviewed by its scientists, suggests similarly adverse effects. It found 23 cases of cancer reported among 94 people from Fort Chipewyan (Klinkenberg, 2014b); a community with a total population of around 1,008 (Regional Municipality of Wood Buffalo, 2013: 24). As John Dennis (quoted in Klinkenberg, 2014c), an adjunct professor of biological science at the University of Alberta, stated in response to the recent decision by the provincial government not to investigate the cause of these illnesses, ‘[i]f anybody crunches the numbers for Fort Chipewyan, no matter how they are massaged, they wouldn’t show anything but a cancer cluster’.

Despite this, the exact cause of these illnesses is as yet unverified; a situation that reflects the difficulty in not only establishing the cause of illness itself, but also that involved in identifying victims of environmental harm more generally. This tends to be because of the delay between a particular activity and the emergence of its often-clandestine symptoms (see Hall, 2013; White, 2010). As Timoney (2013: 430) summarises after acknowledging the extensive scientific research needed to address such knowledge gaps, ‘[i]n the meantime, many people in Fort Chipewyan live in fear while senior government officials deny that a problem exists’. It is the protraction of this ‘fear’, intrinsically related to the physical contamination of the resources upon which their way of life depends, that continues to drive the First Nations away from their culturally significant land-based practices.

### 2.3.2 Indirect Impact on Indigenous Culture

As already noted, the ‘direct’ effects of oil sands operations on First Nations culture subsequently impacts upon the more immaterial aspects of indigenous socio-cultural and economic well-being. By coercively separating First Nation members from their traditional practices, the more immaterial aspects of culture become slowly eroded as those physical activities operating as an intergenerational conduit for norms and values become interrupted. As Staples and Poushinksky (1997, quoted in Larcombe, 2012: 6-3) explain,

*It has been well documented that what is referred to as subsistence, sustenance or traditional use is more than a loose amalgam of discrete hunting, trapping, fishing and gathering activities. It is a complex set of social and economic relationships, based on principles of respect, responsibility, obligation and reciprocity, which guide activities associated with the domestic production, distribution and consumption of resources. The social and cultural organization linked to traditional land and resource use is also the glue that binds a community together.*

As such, displacement from, and avoidance and abandonment of, traditional lands and resources erode those aspects of collective existence which form the immaterial substance of First Nation identities. Indeed, Natcher (2009) and Nelson et al (2009) demonstrate that the economics of indigenous peoples are not only defined by highly specialised modes of production, but that these modes also involve the transmission of social values; a reality mirrored in Natcher’s (2009) use of the concept ‘social economy’. An account of this is presented by a member of the Deh Gah Got’ie Dene First Nation, who explains that once the traditional relationship with the land changes ‘…it means that we are not distinct anymore, we are not Dene anymore…’, going on to note that this is ‘…the most important thing and the very biggest challenge we are dealing with; once we stop hunting and doing those traditional things, we are not Dene’ (quoted in Guyot et al, 2006: 414). Similar recognition can be seen in the work of Neale (1971, quoted in Lonner, 1980: 5), who refers to ‘psychic income’ and non-monetary awards associated with traditional practices, and Freeman (1986: 29, quoted in Natcher, 2009: 85), who notes that participation in subsistence activities is crucial to maintaining the ‘social vitality’ and cultural continuation of indigenous communities. Ultimately, as the Expert Panel on the State of Knowledge on Food Security in Northern Canada notes in regard to the harvesting of traditional foods, it is ‘…integral not only to the cultural but to the social and economic lives of individuals and communities…food provides an opportunity to express and develop relationships among people’ (Council of Canadian Academies, 2014: 77). Put another way, the ‘less tangible’ aspects of indigenous land-based culture are also being eroded as a result of environmental destruction.

As a consequence of their alienation from the land and its resources, First Nations are experiencing the loss of their traditional knowledge and skills. This a situation is particularly damaging as it also encompasses the interruption of its inter-generational transmission. As Ruddle (1993) makes clear, the transmission of traditional knowledge over several generations causes routine practices to become customs; a transformation which, over time, causes them to develop into social institutions. This embodies the social world within traditional knowledge; particularly for children, where ‘a community’s customary way eventually becomes the given-received social world, an analog of the biological-physical world with which it overlaps’ (ibid: 19). With First Nation confidence in traditional resources receding as a result of industrial development, this linkage between past, present and future is diminishing, subsequently diluting their land-based social institutions. As one member of the ACFN (quoted in Larcombe, 2012: 6-14) states in reference to the absence of birds from traditional hunting areas,

*I can’t hunt as much. It affects me a little bit in the hunting part for my son and that to pass on the knowledge* [sic]*, because it is getting very, very hard because there’s less animals and birds and stuff and it’s getting harder and harder to find them. It’s making it harder on me to teach my son, to show him where the birds were supposed to be and then they’re not there anymore. And same thing as moose…Like I said, there’s no water and places are drying up and where I was taught to go, you can’t go there no more and it’s kind of hard for me to teach my son.*

The consequences of this are inferred by McCormack’s (2012) explanation of Dene spirituality. Expanding on Chipewyan understandings of the land as an autonomous being, and reflecting Arnold’s (2001: 17, quoted in McCormack, 2012: 115) assertion that this bond with the environment is maintained via ‘…a performative process by which meaningful orientation to the landscape is promoted and sustained’, McCormack (2012: 118) notes that First Nations ‘do not just think about the land, but they visit it and do things on it which relate to the reciprocity between themselves and the spiritual entities that inhabit the land’. Indeed, Larcombe (2012) explains how the inability to pass on stories associated with areas of, and pathways through, the land causes the loss of continuity and connection to place with the passing of each generation. This inevitably results in the long-term disruption of the spiritual relationship of which McCormack speaks; a process which evidence suggests is already underway in northern Alberta (ibid: pp. 6-18). As such, while it would be misplaced to lay sole responsibility for the inhibition of First Nation cultural transmission at the base of oil sands operations, industrial development upstream of First Nation communities is exacerbating the situation by restricting access to, and eroding confidence in, the lands and resources upon which indigenous identity depends.

Evidence also suggests that the interruption of the land-culture relationship is influencing the economic well-being of the First Nations and their cultural norms surrounding the sharing of resources. Economic well-being is worsened by displacement, avoidance and abandonment because traditional land users have to travel further to access abundant or healthy resources, incurring greater time, labour and fuel expenses relative to their usual hunting, trapping and fishing areas. Candler et al (2010: pp.18-19) also note the costs incurred by damage to boats, engines and equipment resulting from the greater number of sand bars emerging in tandem with the lower levels of water. This situation is exacerbated for those living in Fort Chipewyan in particular, where freight costs increase the price of ordinary food products to such an extent that prices in the only grocery store in the community are almost double those seen in the rest of Alberta (Klinkenberg, 2014a). However, even if these were more affordable, providing a separate food source that could be increasingly drawn upon as engagement with traditional food sources declines, the National Aboriginal Health Organization (2008b: 7) has warned:

*A shift away from traditional foods towards southern market foods is often cited as the basis for the declining health status of Aboriginal Peoples in Canada. A diet of more processed foods high in sugar and salt increases the incidence of diabetes, obesity, heart disease, and other chronic diseases. Obesity rates among children and youth in Canada have nearly tripled in the last 25 years. Among First Nations children, the rates are two to three times higher.*

Compounding this issue, the cultural imperative to share resources has been affected by environmental destruction. Traditionally, indigenous peoples would share food in order to account for the temporal and spatial variations in resource availability, thereby minimising misfortune and reducing the consequences of environmental and economic difficulty (Nelson et al, 2008). While this basic purpose still continues (see Natcher, 2009; ACFN, 2003), evidence suggests that, in addition to the introduction of technology such as freezers and quicker modes of transporting traditional foods home, higher harvesting costs are influencing sharing behaviours (Larcombe, 2012). Indeed, one report even suggests values of sharing and equity are ‘giving way to a more individualistic ethic, with consequent effects on social cohesion’ (Golder Associates, 2013: 42; see also ACFN, 2003: 88).

## 2.4 Conclusion

As can be seen, the expansion of the oil sands industry has, over time, had far-reaching and substantive effects upon the land-based culture of First Nations. Not only has the degradation of this collective identity been produced by displacing First Nations from the land and waterways, the contamination of the delta system has also displaced them from particular resources and locations of cultural significance. Indeed, when coupled with the tendency of First Nations to avoid or abandon contaminated resources, including fish, caribou, moose and species of wildfowl, the extent of these more direct impacts of oil sands expansion is brought into view. The more ‘intangible’ effects emerging from these pressures include the interruption of inter-generational skills transmission, an increase in obesity rates and decrease in traditional sharing norms. Stemming from the environmental impact of rapid oil sands industrialisation, these effects can quite clearly be conceptualised as a form of ‘cultural loss’. By extension, after taking into account the definitional debate within criminology more broadly, and its green sub-field more specifically, the expansion of extractive activity in the face of evidence pertaining to this form of victimisation can be recognised as a form of ‘green crime’, particularly when considering the extent of the scientific research lending support to such claims.

Although the purpose of this chapter has been to illustrate the extent and seriousness of the indigenous environmental victimisation being experienced, this in and of itself is a limited endeavour. Providing little information on the regulatory process permitting continuous industrial expansion, or the embedded social relationships of power that operate within and through this mechanism, such an exercise is restricted in its explanatory potential. It is on this basis that the analytical focus now shifts away from detailing adverse environmental consequences of production. Indeed, this is what green criminologists have spent a large proportion of the previous twenty-five years doing by ‘…devot[ing] most of their attention to *illuminating* and *describing* different types of environmental harm’ (Brisman, 2014: 2, emphasis in original). Instead, following a review of existing explanations for this pattern of indigenous environmental victimisation, the analytical lens is trained upwards. The focus now turns towards the provincial regulatory mechanism that has enabled supposedly ‘sustainable’ expansion of the oil sands industry in the face of First Nation opposition, and despite their repeated calls for this victimisation to be recognised and mitigated.

# 3. Existing Explanations for Environmental Harm and the Relevance of ‘Sustainable Development’ to the Regulatory Process

In outlining ‘[t]he future of green crime’, Stretesky et al (2014: 148) propose that ‘…green criminologists [should] identify those situations where production is central to the economy, and then examine how economic production is prioritised over ecological production’. Implying a need to examine not only the principles upon which a system of production rests, but also the organisational characteristics through which its material consequences are realised, this statement directs analyses towards the mechanisms and justifications which actually enable industrial expansion. Indeed, it is not enough to condemn a system of production for its consequences alone, particularly if a detailed explanation of a particular pattern of victimisation is being sought. Instead, ‘…a full understanding of environmental crime requires an analysis of…practices pursued by legitimate actors and political representatives’ (Ruggiero and South, 2013: 370). White (2008: 56) adopts a similar position, asserting that:

*From the point of view of environmental criminology, analysis of the nature of environmental harm has to take into account objective and subjective dimensions of victimisation. It also has to locate the processes of environmental victimisation within the context of the wider political economy. That is, the dynamics of environmental harm cannot be understood apart from consideration of who has the power to make decisions, the kinds of decisions that are made, in whose interests they are made, and how social practices based on these decisions are materially organised.*

It is to these calls for a contextualised analysis of the processes acting to produce and reproduce the objective and subjective dimensions of victimisation examined in Chapter 2 that this research now turns. More specifically, considering that the First Nations are experiencing a form of harm tied to cumulative environmental effects, the analytical lens will be trained towards the institutional junctures at which industrial growth is prioritised over First Nation concerns. In this case, it is the regulatory process governing the industrialisation, or ‘sustainable development’, of the oil sands resource that is pulled into focus.

Presenting a review of existing literature, Section 3.1 draws upon previous explanations for ecological disorganisation and environmental victimisation in the oil sands. This uses the fields within which they are situated as a platform to examine associated material and debates of relevance. Moving from the more abstracted and macro-level analysis provided by studies within the fields of human rights, state-corporate crime and green criminology, a review is then presented of those more meso-level analyses which explain environmental harm using perspectives on regulation and First Nation consultation. The contributions, limits and gaps identified within this literature are then summarised before moving onto Section 3.2, which justifies the use of ‘sustainable development’ as a concept through which the regulatory process governing oil sands expansion can be examined, and some of the shortcomings in existing literature addressed. This also incorporates a discussion of the environmental philosophies which underpin use of the term in policy and practice. Finally, Section 3.3 details the regulatory process of focus, explaining the features that have remained constant since the mid-1990s, when rapid oil sands expansion began, solidifying those more functional aspects that have consistently played a role in industrial expansion.

## 3.1 Existing Explanations for Ecological Disorganisation and Cultural Loss in the Oil Sands

### 3.1.1 Structural Genocide

The work conducted by Jennifer Huseman and Damien Short (2012) is the most direct, singular attempt at explaining the specifically indigenous environmental victimisation resulting from oil sands expansion. Of those accounts presented in this chapter, their explanation also operates at the most macro-analytical level. Making use of the term ‘cultural genocide’, Huseman and Short (ibid) echo the position taken by the spokesperson for the ACFN, Eriel Deranger (quoted in Uechi, 2013), in her description of the effects of oil sands expansion policies upon the First Nation. This interpretation is shared by George Poitras, the then-chief of the MCFN, who states that ‘[i]f we don’t have land and we don’t have anywhere to carry out our traditional lifestyle, we lose who we are as a people. So if there’s no land, then its equivalent in our estimate to genocide…’ (Poitras, quoted in Peterson, 2007). Operating from a socio-legal standpoint, Huseman and Short (2012: 216) use this term to label the effects of the oil sands upon indigenous peoples as a ‘slow industrial genocide’, referencing the process by which the environment in which the First Nations exist is knowingly destroyed by industrial pollution. Such an argument focuses on the original conception of genocide as devised by its inventor, Raphael Lemkin, before it was narrowed to include only physical destruction by members of the UN in 1948 (see Robertson, 1999). Derived from fusing his notions of ‘barbarity’, which involved the physical killing of a group, with ‘vandalism’, which entailed the undermining of the collective way of life (Vrdoljak, 2010: pp.1176-1177), Lemkin’s original crime of ‘genocide’ actually had a far greater emphasis on cultural destruction than that favoured by the UN. As Lemkin stated in 1946, with regard to the behaviour of the Nazis during World War 2:

*It appears in light of this evidence that the term genocide is a correct one since the defendants aimed to destroy, cripple or degrade entire nations, racial and religious groups. The terms mass-murder or mass-extermination in the light of hitherto produced evidence seems to be inadequate since they do not convey the racial and national motivation of the crime. [M]ass-murder or extermination do not convey the elements of selection and do not indicate the losses in terms of culture represented by the nation’s victims.*

Lemkin (1946, quoted in Moses, 2008: 12)

This emphasis on transcending the physical destruction of a group led Moses (ibid) to conclude that Lemkin ‘…was more concerned with the loss of culture than the loss of life’. Short (2010: 842) builds on this, arguing that the erosion of culture is absolutely central to the conception of genocide, as it is the erosion of a collective existence, or ‘social death’, that makes an act or series of acts genocidal, and not the method by which it is achieved. This would appear to be in accordance with Lemkin’s original assertion that the ‘machine gun’ would be the ‘last resort’ of an oppressor, following a ‘coordinated plan aimed at destruction of the essential foundations of life’ by ‘…the forced disintegration of…the culture of the people’ (Lemkin, 1945). It is on this basis that Huseman and Short (2012; see also Short and Huseman, 2011) describe the purposeful expansion of the oil sands, its adverse effects on the traditional cultural practices and health of First Nations, and concomitant breach of substantive Treaty rights, as a form of ‘cultural genocide’.

While framing oil sands operations in these terms draws attention to the substantively harmful nature of cultural loss, it must be remembered that defining an activity as a ‘genocide’ hinges as much on the outcome of the act as it does on the intention behind it. As Serbyn (2008: 7) makes clear, ‘it is not enough that destruction takes place; it must be intentional and not accidental, a byproduct or “collateral damage” of another action’. As such, ‘cultural genocide’ is generally used in reference to activities *intended* to erode a collective identity, such as the residential schools used to assimilate indigenous peoples in the USA and Canada (Davidson, 2012; Macdonald and Hudson, 2012; Woolford, 2009), ethnic cleansing in Israel and Palestine (Davidson, 2012), or the coercive assimilation of Tibetan religion and language by the Chinese state (Sautman, 2003; Davidson, 2012). Despite this, Huseman and Short (2012: pp.10-11) link the term to the case of the oil sands via the assertion that ‘[g]enocidal murders…can be produced without specific ‘intent to destroy’, through uncoordinated action, an incompatible expansionist economic system or attempts to ‘enlighten, to modernise, to evangelize’. While accurately reflecting the ontological notion that, for indigenous peoples, ‘where they are is who they are’ (Wolfe, 2006: 388), alluding to the reality that destruction of their environment also entails the destruction of their collective cultural identity, this recognises cultural genocide as a largely structural issue, rooted in features common to settler-colonial societies (see Veracini, 2015).

In itself, such an explanation is neither controversial nor inaccurate, at least from a sociological standpoint. After all, ‘…invasion is a structure not an event…’ (Wolfe, 1999: 2; see also Regan, 2009). However, despite being multi-faceted, the level of analysis at which Huseman and Short (2012) direct their study does mean their explanation grants little attention to the operational conditions serving to produce and reproduce these structures. For instance, the drive for expansive production is seen to result from the entering of Canada and America into the global ‘energy race’ following the end of the Cold War (Huseman and Short, 2012: 223), and use of a ‘colonial trick’ by the federal government which facilitates the necessary encroachment on traditional indigenous territories in pursuit of natural resources (ibid: 220). This latter argument references the federal government’s evasion of its obligations under Treaties. Huseman and Short also consider the federal and provincial governments to display a purposeful ignorance towards the health implications of the oil sands industry itself (ibid: 225), which allows for the continuation of industrial operations without delay or serious challenge. While such factors provide important insight into definitional debates, historical legacies and broader factors contributing to industrial expansion, they leave little room for detail on exactly how such expansion has been permitted by the provincial regulatory apparatus. Similarly, while the substantive Treaty rights of First Nations are discussed at length, their associated, and arguably more significant, procedural right to be consulted and accommodated on any activity that may adversely affect the exercise of these rights is overlooked (see Section 3.3). Indeed, considering the incremental indigenous and public opposition to oil sands expansion in recent years (see Slowey and Stefanick, 2015), the efficacy of this participatory role in the regulatory process should be central to any explanation of environmental harm, indigenous or otherwise.

### 3.1.2 State-Corporate Relationships

As of March 2017, there exist only two dedicated criminological studies into environmental disorganisation resulting from oil sands expansion, neither of which consider its concomitant cultural impacts on indigenous peoples. The first, and most detailed, is that conducted by Smandych and Kueneman (2010). Using Kramer and Michalowski’s (2006) ‘integrated analytical model’, the authors examine the role played by aligned state and corporate interests in the production of environmental degradation in the oil sands. This is a dominant approach used within criminology to study state-corporate crime. Based on Quinney’s early work on radical criminology, the conceptualisation ‘…blends the phenomenology of lawmaking with the political economy of crime into a single framework…’ (Kramer et al, 2002: 4). Operating at three distinct levels of analysis (Kramer and Michalowski, 2006: 25), each stratum has a corresponding criminological theory of explanation. The ‘individual’ level has its basis in Sutherland’s work on differential association, the ‘organisational’ level is based on organisational deviance theories, and, finally, the ‘institutional’ level explains criminogenic activity using theories associated with the wider political-economic structure of society (Kramer and Michalowski, 2006: pp.21-26). It also accounts for two dimensions of criminal activity; on the one hand, it directs attention to aspects of a case that are ‘catalytic’ in the production of harm, also raising questions as to why mechanisms for the ‘control’ of such harm appear to be ineffective (ibid: 25). Perceiving deviant organisational activities as ‘…not discrete acts, but rather the outcome of relationships between different social institutions’ (ibid: 21), the framework brings attention to the ‘horizontal’ relationships which exist between economic and political institutions, and the ‘vertical’ relationships which exist at different levels of organisational activity (ibid). This, the authors suggest, provides a more intricate understanding of the processes which lead to deviant organisational outcomes (ibid).

Developed from three of the first case studies into state-corporate crime, one into the Challenger Space Shuttle Disaster (Kramer, 1992), one into nuclear weapons production processes (Kauzlarich and Kramer, 1993), and another into a fire at a food processing plant where 25 people were killed and 55 injured (Aulette and Michalowski, 1993), the analytical model has been used to examine a variety of ‘criminal’ and ‘harmful’ events for over two decades since. An investigation into the 1996 crash of ValuJet 592, in which 110 people died, led Matthews and Kauzlarich (2000: 284) to consider it a form of ‘…state-facilitated state-corporate crime…’. Using the analytical model, they regard the incident to have resulted from ‘…the pursuit of profit by corporations along with the failure of state agency to effectively monitor them’ (ibid). Similarly, Whyte’s (2003: 599) study into the regulation of private security providers considers the state to be ‘catalytic’ in the creation of an environment favourable to the commission of state-corporate crimes. Bruce and Becker’s (2007: 38, emphasis in original) investigation into the Paducah Gas Diffusion Plant concluded its harmful effects to result from ‘…instances of *both* state-initiated and state-facilitated state-corporate crime’. More recently, the analytical model has been directed towards both climate change (see Kramer and Michalowski, 2012), and government and corporate responses to the 2010 Gulf of Mexico oil spill (see Bradshaw, 2014). Taken together, these case studies clearly demonstrate the broad appeal and utility of the analytical model when analysing various forms of environmental harm in specific instances.

Smandych and Kueneman (2010: 47) use the state-corporate model to develop a multifaceted explanation for the ‘environmental carnage’ seen in the oil sands. They argue that state-corporate relationships have produced this outcome by ‘…discourage[ing] open public scrutiny and potential opposition to development…’, and by ‘…significantly reduc[ing] the likelihood of successful interventions by environmental regulatory agencies’ (ibid: 88). Other contributory factors include ‘…consciously planned and executed campaigns aimed at deceiving the public about the actual harms and risks posed…’ (ibid: 97), the underfunding of research into clean energy alternatives, and the ‘gutting’ of the provincial environmental department (ibid: 101). To these broader, ‘institutional’ level problems is added the more organisational issue of environmental monitoring initiatives being funded and controlled by industry, which has caused some ‘non-elite’ groups, including First Nations, to doubt their credibility and impartiality. It is this that leads the authors to label the situation in the oil sands as one of ‘effective deregulation’, which is being purposefully pursued by the Canadian and Albertan governments with the support of industry actors (ibid: 91). Ultimately, the picture painted by Smandych and Kueneman (2010) is one in which state and corporate interests have worked, over time, to dilute oil sands regulation and restrict opportunities for public participation in decisions pertaining to energy and the environment. It is this combination that is taken to have caused the ecological destruction seen in the surrounding area.

Despite such multifaceted content, Smandych and Kueneman’s explanation shares similar limitations to the account given by Huseman and Short (see Section 3.1.1), stemming from its foundations within a largely macro, political-economic level of analysis. One of the consequences of this is a disproportionate focus on the Government of Canada, serving to pull attention away from the relationships of power operating within Alberta itself. Indeed, this leaves provincial factors unanalysed, situating most of the responsibility for environmental protection at the level of the federal government. For instance, in asserting that the Government of Canada has essentially protected its provincial counterpart from pressure for greater environmental protection, Smandych and Kueneman (ibid: 101) claim that ‘…in effect, the Alberta government has been left to decide on its own how to put into place and enforce environmental regulations’. Such an assessment neglects to mention that the provincial government has had primary control over its natural resources since the introduction of the Natural Resources Transfer Agreement (NRTA) of 1930. This has led to a contemporary situation in which, as Vlavianos (2007: 4) notes with specific regard to environmental regulation, ‘…[b]y far the largest scope of power falls to the province of Alberta’. Indeed, while the lack of coercion exerted by the federal government on its provincial counterpart is an issue, the conflict both preceding and following the signing of the NRTA has instilled a long-held reluctance on behalf of the former to infringe on the authority of the latter (Bowness and Hudson, 2013). This is particularly so in the wake of the 1980-85 National Energy Program, which was ‘bitterly unpopular’ in Alberta as it forced the province to operate as a subordinate partner in the Canadian confederation (Stefanick, 2015: 118). In light of this, it would be more appropriate to direct the analytical lens to the influences and relationships inhibiting environmental protections within the boundaries of the province itself, instead of attributing responsibility to the standoffish attitude maintained by the federal government.

Another consequence of this high-level analysis is that, although Smandych and Kueneman's (2010) explanation includes isolated elements of the meso-level operational regulatory process and its associated sphere of monitoring, the predominance of the macro-level approach generates an absence of operational detail within some of the arguments made. For instance, reference is made to the ‘effective deregulation’ of the oil sands (ibid: 91), but there is no mention of the process governing industrial expansion in and of itself. This limits the scope of explanation by focusing only on the mechanisms used to control environmental degradation after projects have been approved, instead of looking at those which repeatedly permit growth of the industry. Short-circuiting the analysis, this focus on broad government and industry pressures at the international, national and, to a much lesser degree, provincial levels, overlooks how these pressures are mobilised by the regulatory process governing ‘sustainable’ expansion in the first instance (see Section 3.3). Indeed, by this account there would appear to be very little, if any, regulation governing industrial growth at all, as if state and corporate power is proceeding totally uninhibited on its way to industrialising the oil sands in whatever manner it wishes. In reality, despite being largely absent from Smandych and Kueneman’s (2010) explanation, the opposition-through-participation permitted by the regulatory process actually marks it as a fundamental site of social conflict.

Flowing from this macro-level lens, the ‘…most prominent social forces and actors’ are considered to be those involved in the signing of multi-national trade agreements (ibid: 88). Indeed, the authors borrow Clarke’s (2008: pp.110-111, quoted in Smandych and Kueneman, 2010: 88) sentiments in his assertion that ‘Canada has in effect surrendered sovereignty over its energy resources to the USA’. Such a claim is premised on the Canada-US Free Trade Agreement of 1987 (Government of Canada, 1989), and the subsequent NAFTA of 1994 (The NAFTA Secretariat, 2014). Article 605a of the latter agreement is of central concern to the authors, as it states that restrictions on the export of ‘an energy or basic petrochemical good’ to the USA may only be justified if Canada maintains the previous three-year proportional average of energy exports of total energy supply (Ibid: Article 605a). With ‘total energy supply’ consisting of domestic production plus imports, the agreement essentially stops Canada from prioritising use of its own energy supplies if such activity were to lead to a reduction in the proportion of stocks exported to the U.S. This reality is particularly problematic in the context of global agreements on emissions reduction (see United Nations, 2015). Smandych and Kueneman’s (2010) explanation for environmentally harmful oil sands expansion thus includes the challenge this legislation poses to state sovereignty, recommending a withdrawal from the NAFTA as a means of sensitising the domestic governments to more environmentally responsible behaviour.

The NAFTA is quite clearly an obstacle to reducing instances of environmental harm, particularly as it directly and explicitly prohibits a reduction in production. However, there are several issues associated with its positioning as a fundamental determinant of oil sands expansion. Firstly, the NAFTA ‘did not significantly alter energy agreements between Canada and the United States’ because it only echoes clause 904a of the previous 1987 Canada-U.S. Free Trade Agreement (Chastko, 2007: 215). The NAFTA was a creature of this previous period, with its introduction symptomatic of a desire to attract foreign investment to the stagnating oil industry during the 1980s; a need which emerged against a backdrop of globalisation that saw Canadian industries increasingly exposed to international competition and decreasing prices for conventional oil (ibid). Indeed, signing the NAFTA was actually one of the key voter issues with which Mulroney’s Federal government gained majority power in 1988 (ibid), demonstrating how viability of repealing such agreements is heavily dependent on the political and economic context in question.

Secondly, Smandych and Kueneman’s (2010) recommendation to support political action aimed at compelling the Canadian government to regain control over national energy supplies, by withdrawing from the agreement, echoes Friedman’s (1999: 87) labelling of it as a ‘Golden Straightjacket’, ‘narrow[ing] the political and economic policy choices of those in power to relatively tight parameters’. Although true to a certain extent, this does imply an overt form of ‘state capture’. The difficulties inherent to such a perspective are neatly depicted by Halsey (2004: 843), who notes that if ‘…the capitalist state is the archetypal example of an institution suffering from chronic regulatory capture’, then explanations need to be offered as to ‘…how such an institution could ever see its way clear to criminalise all those events which, to put it bluntly, make capitalism work’. Put another way, the NAFTA is not an aberration from the international system of state-sponsored capitalism but a routine part of it. For instance, as of February 1st 2017, 635 notifications of Regional Trade Agreements have been made to the World Trade Organization (2016), of which 423 were already in force. Ultimately, increasing the *ability* of central governments to pursue economic expansion without recourse to the extraction of natural resources is no guarantee that it will occur, especially where those natural resources present such lucrative opportunities in the global marketplace. Indeed, a state does not have to be 'captured' by interests enshrined in international treaties for it to pursue these opportunities.

Positioning the NAFTA as a fundamental problem is further complicated once Alberta’s dependence on oil is recognised. As a percentage of the total revenue collected by the province, in 2013/14 the resource revenue derived from non-renewable sources stood at 17.95 percent (Government of Alberta, 2016b). Between 1996 and 2014 the percentage of this provided by oil sands increased from 11.2 percent to 54.3 percent (ibid), meaning that in recent times almost 10 percent of provincial revenue is garnered from this resource alone. The recent drop in oil prices make visible the repercussions of disrupting this flow; for every $1 drop in the price of a barrel of oil the province loses $215 million in revenue (Giovanetti, 2014). Considering that this fell by $28 between July 2014 and May 2015 (Nasdaq, 2016), contributing to the loss of 14,000 jobs in February 2015 alone (Government of Alberta, 2015: 64), it is highly unlikely that revoking the NAFTA without accounting for the social relationships which orchestrated its introduction, or tackling those which have solidified around the industry since, would significantly alter the situation. Indeed, repeal of this legislation without accounting for such support could actually further environmental destruction by unshackling production from U.S demand. With the Pacific and Asian markets to the East, and the other Provinces and European markets to the West (Canadian Association of Petroleum Producers, 2016), the withdrawal of a guaranteed US market could provoke greater pressure to develop existing pipeline infrastructure. If export routes were successfully negotiated, together these markets would be large enough to stimulate production levels past those constrained by US demand (Angevine, 2013; Angevine and Oviedo, 2012). Smandych and Kueneman’s (2010: 106) suggested repeal of the NAFTA would therefore have to be more than a ‘…starting point’. It would have to be part of a holistic strategy which first aimed to tackle the underpinning multiplicity of social actors and institutions which would seek alternate means of increasing production levels in its absence.

Although testifying to the utility of the integrated analytical model, its focus on singular events and factors has drawn criticism from some quarters of radical and critical criminology. Writing from a traditional Marxian perspective, Lasslett (2010a: 218) identifies the tendency within state-corporate criminology to uncritically accept ‘…immediately perceived forms and surface appearances’. This, it is argued, emerges from an empiricist stance that has three interrelated methodological problems; it deploys an ‘*unmediated approach to the comprehension of reality’* in the process of using *‘an abstract method of abstraction’* to achieve *‘a reductionist mode of theorisation’* (ibid: 220, emphasis in original). Collectively referring to the way in which sense perception is not distilled through a ‘qualitative process of theoretically guided, scientific abstraction…’ (ibid), this is deemed to result in a field characterised by organisational, and particularly state, fetishism (Lasslett, 2013). Although such a traditionally Marxist critique cannot be fully addressed without dedicated recourse to one of the many and varied interpretations of dialectics, Lasslett is essentially advocating development of a cohesive Marxian theory specifically focused on explaining state crime; an endeavour which lies outside the remit of this study. Nevertheless, the need to account for factors beyond immediately perceived organisational forms, such as the political-economic and environmental philosophies underpinning regulator and policy justifications, or the relationships between key social actors which become visible through said institutions, should not be dismissed.

The charge of superficiality is compounded by the very specific way in which the integrated analytical model has been applied over the years. In recognising that much of the state-corporate literature is based on ‘what are essentially forms of discrete joint ventures between corporations and states’, Tombs (2012: pp.174-175) echoes Lasslett’s (2010a) sentiments in his warning against abstracting ‘…events from ongoing relationships and wider contexts, each of which may require theoretical comprehension in their own terms as well as to perceive event(s) under consideration’. This issue is symptomatic of a field overwhelmingly focused on activities characterised by ‘specific instances of harm arising from imperfect operation’, as opposed to ‘systemic harm which is created by normatively sanctioned forms of activity’ (White, 2008: 91). Indeed, this renders state-corporate crime research less attentive to transgressions not defined by clearly identifiable cross-sectional moments in time. Such a focus ultimately hinders its contribution to studies examining the multiple clandestine and protracted forms of environmental victimisation that result from political and economic ‘business as usual’ (see Hall, 2013: pp.25-48). This is a substantial limitation when considering the systemic victimisation being experienced by the First Nations (see Chapter 2), partially explaining why Smandych and Kueneman’s (2010) account of ecological destruction focuses largely on environmental mitigation measures instead examining the regulatory process by which industry has been permitted to exist on such a significant scale in the first instance. Ultimately, despite its dominance in critical criminology, these features make wholesale use of the ‘integrated analytical model’ a less attractive proposition for examining the factors precipitating the production and reproduction of indigenous environmental victimisation in the oil sands.

### 3.1.3 The Treadmills of Production and Crime

The second, more recent criminological paper on environmental harm resulting from oil sands expansion is written by Lynch et al (2016). Presenting five ‘unifying propositions’ derived from broader eco-socialist and radical ecology scholarship, its purpose is to develop a theoretical basis for green criminology in order to ‘ground’ any future analyses conducted under its rubric (ibid: 2). Although of general use to green criminological literature, the five ‘unifying propositions’ do not in themselves offer anything new to the study of the oil sands per se. This is largely because the paper makes use of the case within an ‘exemplary case study’ design (see Chapter 4.3), meaning that the oil sands are used only to demonstrate the applicability of theory instead of acting as a focal point for investigation. As such, while the propositions themselves are a useful, if basic, guide, the case is actually drawn upon to such a brief extent that the paper lacks substantive explanatory power in terms of the environmental destruction arising in the oil sands deposit. The macro-level of analysis at which the paper is directed also generates an explanation that contains no detail on regulatory processes and, in a similar manner to Smandych and Kueneman’s (2010) study, makes very little mention of Aboriginal peoples except in a footnote about victims of bio-piracy (Lynch et al, 2016: 154). Nevertheless, the ‘unifying principles’ do operate at the base of a theoretical approach previously formulated by the authors. Known as the ‘treadmill of crime’ theory, it directs attention to the social relationships underpinning political-economic institutions without disregarding organisational forms themselves, making a review of its associated literature relevant here.

The ‘treadmill of crime’ identifies the contemporary political-economic imperative to increase production as the basis for ecological destruction and subsequent environmental harm (see Stretesky et al, 2014; see also Lynch et al, 2013). Although not an entirely new creation, owed to its basis in Schnaiberg’s (1980) ‘treadmill of production’ theory, it is arguably the field’s most comprehensive singular theoretical adaptation reflecting Lynch’s (1990) early call for a radical green criminology rooted in political economy. As an archetype of the production-orientated theories developed during the 1970s (Rudel et al, 2011), the treadmill of production has been deemed ‘…the single most important sociological concept and theory to have emerged within North American environmental sociology’ (Buttel, 2004: 323). Part of this stems from Schnaiberg, Gould, Pellow and Weinberg’s incremental updating of the theory (see Gould et al, 2008; Schnaiberg et al, 2002; Gould et al, 1996), but such longevity is also owed to its unyielding adherence to fundamental processes of production in the face of shifting theoretical ‘adversaries’ (see Buttel, 2004: 332).

After initially standing in opposition to the early Malthusian-base of environmental sociology, which essentially posited population growth as the cause of ecological destruction (see Mayerfeld Bell, 2012; Buttel, 2004; Schnaiberg, 1980), the broader treadmill of production theory now stands in conflict with another of environmental sociology’s ‘sacred cows’; ecological modernisation (Buttel, 2004: 331; see also Gould et al, 2004; Schnaiberg, 1997). However, such staunch adherence to the structural dimensions of political-economic power has caused its influence to wane as context has become less receptive to critiques focusing on the capitalist mode of production. Mirroring the challenges faced by similar schools of thought in criminology (see Tombs, 2003), and not discounting the displacing effect of increasingly popular schools of cultural sociology in Europe and the UK (Buttel, 2004: 326), or the rise of more recent literature which views the economy as no longer independently driving society (see Fisher, 2002), such critical scholarship has ultimately had to ‘…watch its back in an era of neoliberalism’ (Buttel, 2004: 326). Nevertheless, the theory is highly applicable to those situations which demand an examination of production processes and the social relationships which underpin their function.

In addition to viewing production as the logical forerunner to consumption, treadmill theories maintain this focus because it forms the central point at which the relationships of power behind ecological destruction can be most effectively observed, measured and addressed. As Gould et al (2004: 303) note, production is the point at which ‘…industry leaders will fight the most to maintain their autonomy vis-à-vis the state, environmentalists and labour’. Clearly demonstrating the bio-social nature of the theory, where material ecological destruction arises from the activities of social actors, this statement also introduces the three core groups which influence the relationship between ecology and economy; agents of capital, labour organisations and the state. Although not absolute – a reality giving rise to the conflicts and contradictions which make alternative patterns of production possible (see Schnaiberg, 1980) – each of these has an incentive to continually accelerate production. Corporations have to do so because of the growth imperative, labour does so because it seeks improved living conditions through the medium of job creation, wage increases and reduced unemployment, and the state does so because of its need for additional tax revenue and political contributions from wealthy benefactors (Gould et al, 2008; Schnaiberg, 1980). Concentrating on the relationship between these three actors moves analyses past the socio-environmental disorganisation resulting from ecological additions and withdrawals (see Chapter 2), and draws attention to the organisational structures and participant agency contributing to its production and reproduction.

Although this trio attracts primary focus in a number of criminological case studies deploying the Treadmill of Production (see Long et al, 2012; Stretesky and Lynch, 2011), First Nations sit uncomfortably within the typology. Their gradual and forceful integration into colonial institutional structures, concurrent inclusion in an economy built on wage labour (McCormack, 2012), and increasing creation of Aboriginal-owned and controlled corporations appears to disrupt the distinctions between the three. Nevertheless, aboriginal peoples have been, and still are, subject to the same processes of ‘primitive accumulation’ which dissolved the bonds between pre-capitalist European workers and the land by forcing them into wage labour (Marx, 1976: pp.873-940). This is a fundamental moment in the development of capitalism, and is elsewhere termed ‘the racial reconfiguration and redistribution of wealth’ (Kulchyski, 2012: pp.27-28), or the process of ‘accumulation by dispossession’ (Harvey, 2009). Although this has permitted Widdowson and Howard (2008) to view indigenous peoples as part of the working class, Kulchyski (2012: 30) disputes this line of argument, noting that such conceptions eviscerate First Nations from the land by requiring them to support capital projects to get ‘…a good as deal as is possible for themselves as workers’. This is a mirror image of Schnaiberg’s (1980) original critique of organised labour and its self-serving role in decisions pertaining to environmental disorganisation. Instead, Kulchyski (2012; see also McCormack, 2012) argues that aboriginal peoples were never actually a structurally significant part of the broad working class in Canada, recognising that their relationship was one primarily orientated around economics, due to their 300-year involvement in the fur trade, and only recently shifted to one organised around politics and state apparatus. It is this reality that enabled First Nations to stay apart from the major confrontations between capital and labour throughout Canada’s history, leading to another set of equally important confrontations, but between capital and the natural environment:

[*A]lthough increasing numbers of aboriginal people have joined the labour force in the past few decades, and although aspects of working class culture are embraced by aboriginal people…the defining struggles of aboriginal people have been over land use.*

(Kulchyski, 2012: 29)

Manifest in the numerous land-orientated protections afforded by the various Treaties, and the Aboriginal Title intermittently but progressively elaborated on by the Supreme Court (see Chapter 3.3.1), the very specific consequences of these conflicts are qualitatively different to those more traditionally associated with the labour movement. However, the treadmill theories do contain a fourth group of influential social actors; one which is less central than the trio outlined above, but actually holds much more relevance to the land-based interests of indigenous people.

The fourth category within the Treadmill theories is that of ‘environmental groups’. While associating First Nations with classifications generated without accounting for the context of colonialism is not ideal, this theoretical construct has parity with their land-based interests. Given the label of ‘non-elites’, Gould et al (2004: 301) note that such participants ‘…alter the nature of social system-ecosystem interactions through pressuring private capital and/or state decision makers to make more pro-environmental decisions in the production process’. Stretesky et al (2014: pp.132-138) separate this overarching group further, sub-categorising these ‘environmental enforcement organisations’ as those having a preoccupation with either ‘advocacy’ or ‘operations’. With the former pursuing the creation of greater enforcement of environmental laws and regulations through lobbying and awareness raising, and the latter pursuing similar goals via legal procedures or monitoring efforts (see Stretesky and Knight, 2013: pp. 15-16, cited in Stretesky et al, 2014: pp. 133-135), the addition of these to the trio of primary actors echoes Schnaiberg’s (1980: 364) original view of environmentalists; as ‘…creators rather than creatures of social change’. First Nations can be seen as spanning both ‘advocacy’ and ‘operations’ sub-categories, but the legal power they wield, by virtue of their Treaty rights (see Chapters 1; 3.3.1), edges them closer to the latter of the two. As such, their procedural right to be consulted and accommodated, when a proposed activity has the potential to adversely affect the substantial component of their Treaty rights, grants them greater access to operational decision-making procedures than those environment-orientated actors without such legal support.

Theoretically, such rights mean that First Nations have a substantial capacity to slow production, making them a potentially significant adversary to interests pursuing its acceleration. However, beyond observing that states and corporations are breaching the substantive Treaty rights of First Nations (see Chapters 1; 2; Section 3.1.1), little explanation currently exists as to how and why their associated procedural rights have been ineffective at forcing the protective compromise needed. In light of this, an assessment of the participatory opportunities afforded to First Nations throughout the regulatory process, and the subsequent means by which their voices are accommodated, over-ridden, negated or ignored, becomes central to addressing Stretesky et al’s (2014: 148, emphasis added) call for future green criminological research to examine ‘…*how* economic production is prioritised over ecological production’. Recognising the importance of this particular relationship shifts the required analytical lens towards the organisational level of the regulatory process and the role of First Nations within it, signifying a necessary departure, though not a break, from some of the macro-level analyses presented in a large proportion of the existing literature. It is to the explanations offered within this more organisational stratum of analysis that the chapter now turns, where attention is directed towards environmental decision-making and the participation of ‘non-elites’ in the regulatory process governing oil sands expansion.

### 3.1.4 Risk-based Regulation

The decision-making approach deployed by the provincial regulatory agencies charged with managing the oil sands resource falls into a category known as ‘risk-based regulation’. This is described by Baldwin and Black (2008: 12) as ‘…a targeting of inspection and enforcement resources that is based on an assessment of the risks that a regulated person or firm poses to the regulator’s objectives’. As an approach to regulation, Olszynski (2015) notes that this has been adopted across Canada, by the Department of Fisheries and Oceans (DFO), Environment Canada and National Energy Board at the federal level, and the Alberta Energy Regulator (AER) at the provincial level. However, in explaining the use of risk-based regulation by these agencies as a response to cumulative environmental effects issues, Olszynski (ibid: 708) characterises risk-based regulation as ‘…a force pushing in the opposite direction’ to approaches which set environmental thresholds for certain activities. Indeed, he describes the specific limits of using risk-based regulation in the context of cumulative effects:

*On its face, such an evidence-based rationalisation of resources appears eminently sensible, especially considering the resource constraints currently facing most government agencies and departments. The reality, however, is that risk-based approaches are inherently complex and give rise to a number of challenges, the most relevant being a tendency “to neglect lower levels of risk, which, if numerous and broadly spread, may involve considerable cumulative dangers”.*

(ibid: 710)

It is this that leads Olszynski to a largely doctrinal analysis of the applicability of the ancient common law maxim *de minimis non curat lex*, which translates as ‘the law does not concern itself with trifling matters’ (ibid: 711), to Canadian environmental law. In essence, the legal argument forwarded is that the maxim can be used as an aid in statutory interpretation, to account for, rather than ignore, cumulative effects. It does this by providing a two-stage test to determine whether or not a given conduct should be subject to a regulatory regime. This suggests that, even when environmental effects appear to be trivial, and thereby excluded under existing regulations, lower level risks should be included in regulatory frameworks if there is *potential* for cumulative harm. Such analysis raises relevant points about the scope of environmental impact assessments within corporate applications to build oil sands projects, and the extent to which they can exclude from the offset certain factors that may result in significant ecological impacts.

In following this line of argument Olszynski’s account tends to over-emphasise regulatory procedure, framing the issue of cumulative environmental effects as one of process instead of power. While this could be interpreted as a consequence of the legalistic standpoint adopted, such an observation would only be partially accurate. Indeed, it can be more readily attributed to the risk-based regulation that Olszynski has chosen to critique, in that he has focused upon a relatively narrow target in an attempt to suggest improvements to the system as it currently exists instead of positing one that ought to be. However, with risk-based regulation operating throughout Canada and Alberta (ibid), and the approach being used in the specific management of the oil sands resource, the wider material on regulatory theory requires further examination whilst giving particular attention to the position of risk-based regulation within its boundaries. Whyte (2004: 133) categorises this body of work into four schools of thought; the ‘neo-liberal perspective’, ‘capture theories’, ‘consensus perspective’, which includes risk-based regulation, and the ‘critical perspective’. As the consensus perspective is by far the dominant approach to regulation in most advanced economies (Tombs and Whyte, 2009; see also Braithwaite, 2000; Hutter, 1997), and the ‘critical perspective’ stands in direct opposition to this, these two schools of thought will form primary focus here.

According to Whyte (2004: 140), the ‘consensus perspective’ refers to those approaches where ‘strict enforcement and prosecution are minimised in order to encourage the active participation of business self-regulation’. Subsumed within this heading is the ‘compliance school of regulation’ and the distinct but associated work of John Braithwaite; approaches which tend to be pragmatically apolitical and tend not to associate regulatory deficiencies with structural issues (Tombs, 2015; Pearce and Tombs, 1990). Referring predominantly to the work of Hawkins (2002; 1991; 1990), Hutter (2001; 1997), Black (1997), Kagan and Scholz (1984), and Baldwin (1997), the ‘compliance school' was initially associated with the Oxford School of Socio-legal Studies. This pursued business self-regulation instead of the more prescriptive and state-directed ‘command and control’ varieties (Tombs, 2002: 120), valuing it over more aggressive regulation for fear of disrupting the ‘delicate’ relationship between regulators and regulatees (Gray, 2006: 882). Such a stance is justified on the basis that more prosecutorial approaches encourage companies to withhold information about compliance issues (Gunningham and Kagan, 2005), unnecessarily expend scarce state resources (Hopkins, 1994), and needlessly pursue violations which are, in the majority of cases, minor and not serious (Hawkins, 1990). The criticisms of this approach, posited in large part by the ‘critical school’, acted as a catalyst for the emergence of Braithwaite’s work on ‘enforced self-regulation’; an attempt to ‘bridge the abyss between deregulatory and pro-regulatory rhetoric’ (Ayres and Braithwaite, 1992: 15). This sees the use of both ‘pyramids of support and pyramids of sanctions’ (Braithwaite, 2010: 1), where the techniques within the former are initially used to assist corporations to compliance, and the latter relied upon if the initial, negotiation-based attempts fail. This still permits ‘[p]artnership with those one intends to regulate’ (ibid), largely because regulators are ‘able to speak softly when they carry big sticks…’ (Ayres and Braithwaite, 1992: 19).

In recent times this ‘consensus perspective’ has, to a greater or lesser extent, seen these two approaches integrated with a third which focuses on risk. Building on Ayres and Braithwaite’s (ibid) work on ‘responsive regulation’, commentators from the Oxford School of Socio-Legal Studies have become associated with the Centre for the Analysis of Risk and Regulation at the London School of Economics, championing the move towards a ‘risk-regulation paradigm’ (Tombs, 2015: 59; see also Black and Baldwin, 2010). Embodying a new and ‘striking wave of regulatory homogenisation’ (Black and Baldwin, 2012: 2), this approach entails, ‘at a minimum’, ‘…the use of technical *risk-based tools* emerging out of economics (cost-benefit approaches) and science (risk assessment techniques)’ (Hutter, 2005: 3, emphasis in original). However, this apparent techno-centricity does not negate the fundamental focus on bargaining. Instead, there is recognition that ‘[a]ppropriate levels of risk regulation’ can be ‘negotiated’ with ‘interested groups’, ultimately because the risks under review ‘involve difficult political and ethical decisions about priorities and balance rather than absolute choices’ (Hutter and Lloyd-Bostock, 2013: 4). This mirrors elements within other approaches, including those advocating ‘twin-track’ regulation (Gunningham and Johnstone, 1999), where a choice is presented between regulation according to prescribed specifications or a more flexible principle-based approach based on ‘responsibility, mutuality and trust’ (Black, 2008: 428), ‘smart mix’ regulation (Gunningham and Grabosky, 1998), which seeks to obtain compliance using a combination of ‘command and control’, ‘voluntarism’, ‘self-regulation’ and ‘information’ strategies (Gunningham and Sinclair, 1999: pp.853-854), and ‘really responsive risk-based’ regulation (Black and Baldwin, 2010), where both regulation and categories of risk are determined in accordance with factors such as the attitude, culture, institutional environment and regulatory performance of the company in question (ibid: 210). The similarities between these approaches outweigh their differences to such an extent that Almond and Colover (2012: 1010) categorise them en-masse as the ‘regulatory orthodoxy’.

Standing in direct opposition to this ‘consensus school’ is the ‘critical perspective’. Viewing regulation as both the site and result of ‘ongoing struggles between opposing social forces’ (Whyte, 2004: 133), it is more closely wedded to ‘command and control’ regulation, where the state prescribes in detail the standards required and, if broken, responds punitively. With a view to producing both general and specific deterrence, this approach advocates greater criminalisation of corporate behaviour using measures intended to develop a more stringent regulatory environment (Gray, 2006; Snider, 1987). These include the sanctioning of executives instead of corporate entities and the rigid prosecution of ‘petty’ violations (Hopkins, 1994: 432; Pearce and Tombs, 1990). Although this approach has been attacked for operating at an ideological level of how regulation ‘ought’ to work (see Hawkins, 1990; 1991), such criticism is to be expected when the target places such high value on understanding the context in which certain patterns of regulation are conceived. Indeed, the chief contention directed by critical scholars at the orthodoxy focuses on the tendency of the latter to deploy apolitical and overly-empirical analysis; characteristics which are seen to blind it to fundamental influences external to the immediately-perceived regulatory environment. The omissions resulting from such a preoccupation are clearly identified by Tombs (2015: 67), who notes that:

*…the academic literature on regulation is a small industry, a torrent of self-referential banality from which considerations of power, capital, class and even crime are notable for their absences.*

Such a view emerges from the perceived limitations of four fundamental assumptions underpinning the ‘consensus school’; that the state does not possess the capacity to regulate private actors; that regulation should be targeted at firms or sectors where risk of non-compliance is greatest; that management of risks should be decentralised to companies themselves; and that corporations have moral and social commitments to mitigate risk (ibid: 59; see also Tombs and Whyte, 2013). Tombs and Whyte (2009: pp.103-116) also identify a fifth assumption; that the state is positioned to intervene against capitalist organisations. To this can be added a sixth; that the orthodox literature tends to focus on regulation within an already-existing industry, thereby overlooking instances in which regulation of industrial growth itself is of primary importance.

The first assumption, of the state lacking the necessary resources to regulate corporate entities, is referred to repeatedly by the orthodoxy in justification for the second assumption of ‘decentring’ regulation (see Baithwaite, 1981: 482; Hutter, 1986: pp.118-119; Gunningham and Kagan, 2005: 213; Black and Baldwin, 2010: 181). The primary contention held by critical scholars is not that this assumption is incorrect, however, but that its proponents fail to adequately question the origin of such resource scarcity; a trait which interprets this lack of capacity as an interminable truth. Indeed, the withdrawal of regulatory resources since the 1980s is widely accepted by critical scholars, but it is tied to the march of neoliberal ideology in the U.K., U.S., and Canada more broadly (Bittle, 2015; Olsyznski, 2014; Snider, 2000; Pearce and Tombs, 1997). Notwithstanding the sources from which the Centre for the Analysis of Risk and Regulation garner funding (see Tombs, 2015), orthodox inattention to such dynamics can be explained by the level at which it conducts its analysis. As Tombs (2002: pp.112-123) recognises of Braithwaite:

*[he is] good on seeing the trees, but is all too easily forgetful of the wood in which they stand: his understanding of power is based upon a detailed knowledge and recognition of the micro-dynamics of power, of the ways in which the relationships between regulators and the regulated proceed in specific contexts, with too little consideration of the more macro, structural dimensions of power.*

An attempt to address this non-contextualisation appears in the more recent work of Hutter and Lloyd-Bostock (2013: 383), where it is argued that ‘...regulation and debates and conflicts surrounding it are embedded in – indeed created by – social and cultural environments’. However, their exclusive focus on socio-cultural dimensions is divorced from the arguably more politically antagonistic counterpart of political-economy, demonstrating a continued reluctance to engage with the dimensions spoken of by Tombs (2002) over a decade earlier.

Emerging directly from this presumed lack of state capacity is the third assumption challenged by the ‘critical school’; that scarcity of resources requires attention to be focused predominantly on those companies deemed most likely to act contrary to regulatory standards (Tombs, 2015). Associated with the idea that most regulatory violations are minor (Black and Baldwin, 2012; Braithwaite, 2008; Hawkins, 1990), the orthodoxy suggest that resources should be directed towards those more serious actors and activities. However, in contrast to the recognition given to the asphyxiation of state regulatory capacity, critical scholars directly contest this assumption. Responding to Hawkins (1990), Pearce and Tombs (1991: 423) note that focusing solely on ‘major’ violations ‘obscures the fact that “minor” violations can and do have “major” consequences’. Gray (2006) supports this observation using empirical data from the health and safety industry, finding that, under such circumstances, minor regulatory violations are ignored until a major accident takes place. This causes a ‘a cumulative effect in the normalization of deviance’ (ibid: 884). It is not difficult to see how this would apply in an environmental context, with regard to a reduction in routine inspections of equipment, for example. Furthermore, no indication is given as to how regulators would identify failing companies in the first instance, or which practices should be subject to formal enforcement over others (Tombs and Whyte, 2012).

The fourth underpinning assumption challenged by critical scholars is that corporate entities ‘are not reducible to artificial amoral, calculating, profit-driven entities’ (Tombs, 2015: 59). Intrinsically connected to the field of corporate social responsibility (see Glasbeek, 1987), where corporations are seen as capable of ‘…benefit[ing] society in ways that go above and beyond what companies are legally required to do’ (Vogel, 2005: 2), those within the ‘consensus school’ contend that businesses can be negotiated with in order to produce socially beneficial outcomes. In response, Pearce and Tombs (1997: 83) criticise such initiatives as simply ‘efforts to maintain the conditions within which long-term accumulation is maximised’ because, as Glasbeek (1987: 363) highlights, ‘[l]egitimacy, responsibility and accountability are essential to any power system if it is to endure’. Indeed, for Tombs (2002: 121), ‘power’ is the very concept which the orthodoxy is reluctant to speak of; an omission related to the ‘…sociologically naive and empiricist’ ways in which corporations are seen as responsible citizens (Pearce and Tombs, 1997: 80). Building on Moran’s (2010) call for regulation academics to recognise that ‘democracy matters’, Tombs (2015: 68) criticises the manifestation of this reluctance as it finds form in the orthodox tendency to view the accumulation of capital as equivalent to other social interests. As such, attention falls on the resulting ‘…liberal balancing act’ (ibid), bringing into view the underpinning political philosophy of pluralism which assumes that a democratic equilibrium can be reached through bargaining by different groups. Although the forms and criticisms of pluralist philosophy are many, varied and contested (see Pearce, 1976; Newton, 1969; Bachrach and Baratz, 1962), the essential point of the ‘critical school’ is that such a position overlooks concentrations of power (see Tombs and Whyte, 2015; Pearce and Tombs, 1997; 1990; Pearce, 1976). This ultimately echoes Schattschneider’s (1960: 35) early contention, that ‘[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upperclass accent’.

The perceived fifth flaw in the regulatory orthodoxy is that it considers the state in isolation from corporate entities. Expanding on this, Tombs and Whyte (2009: 108) argue that by focusing only on the ‘negative enforcer’ role of the state, which encompasses its law-based coercion mechanisms, the image drawn is always going to be one of opposition. Such an approach obscures the fact that the state is limited in the extent to which it can intervene in matters of economics, as Poulantzas (2014 [1978]: 191) explains:

*…the contemporary State is caught in its own trap…from now on the State can go neither backwards nor forwards, can neither stand outside or control the heart of the economy. At one and the same time, it is driven to do both too much (crisis-inducing intervention) and too little (being able to stop the deep causes of crises). The State is constantly oscillating between the two terms of the alternative: withdraw and/or get further involved. It is not an all-powerful State with which we are dealing, but rather a State with its back to the wall and its front poised before a ditch.*

According to critical theorists, this nuanced view of state capacity for action demonstrates the limits on regulatory intervention in interests pertaining to capital. With regulation emerging from social conflict (Snider, 1991), and state capacity for such regulation being stymied by its reliance on capital, it follows that ‘…regulatory agencies are largely symbolically created and maintained as a means of pre-empting class conflict over certain forms of corporate activities or inactions’ (Tombs, 2002: 122). As such, the power of capital depends not on the shrinking of the state or a reduction in its capability to regulate, but in its ‘successful mediation and dissipation of particularly contentious issues’ (Tombs and Whyte, 2009: 110). The ‘critical school’ therefore considers state regulatory mechanisms to be the primary means by which this arbitration, and subsequent maintenance of ‘business as usual’, is achieved; a consideration which it deems absent from the regulatory orthodoxy.

As noted above, to these five dimensions can be added a sixth; that the orthodoxy tends to focus on control within an industry. This overlooks situations in which growth of that very industry is the key issue. This is related to the contention raised by White (2002: 95; see also Lasslett, 2014), who considers orthodox regulatory literature to ignore ‘…the structural imperatives of capitalism in its general tendencies (i.e. to expand)’. Although attracting only very slight attention in the broader regulatory literature, Tombs (2002: 119) identifies this in his recognition that orthodox approaches tend ‘not to provoke counter-productive tendencies’. Indeed, the ‘consensus school’ is partially blind to those mechanisms governing expansion because the issue at hand is not limited to individual acts of corporate deviance within an already-existing industry. Such questions are more closely tied to the broader economic priorities of nation states, creating an overlap with the more general inattention given to the position of the state in regulatory processes. As Whyte (2004: 144) notes, ‘[i]n addition to recognising regulatory under-enforcement as a major barrier to criminalisation’, it needs to be understood that ‘some of the most destructive and deadly harms committed by corporations are not crimes at all but are activities sanctioned and legitimated by states’. Raising questions over whether an industry should exist in the first place and, if so, to what extent and in what form, this brings the analysis to bear on those regulatory processes which specifically govern expansion. However, these mechanisms are tied to debates, and their expression in policy, over what is valued under social, economic and environmental terms. Regulatory policy and practice therefore needs to be evaluated, but ‘…within the context of broader philosophical perspectives on the nature of human-environment interaction’ (Halsey and White, 1998: 347). As such, Section 3.2 will demonstrate how the concept of ‘sustainable development’ provides an appropriate medium through which to analyse in this way the regulatory process governing oil sands expansion.

### 3.1.5 First Nation Consultation under Neoliberalism

Explaining the ecological destruction resulting from oil sands expansion, and the concomitant infringements of Treaty rights experienced by First Nations, Slowey and Stefanick (2015) provide an explanation focusing on the lack of indigenous participation in decision-making. Although couched in the broader macro-level material similar to that examined above, the authors direct their analysis towards the role of consultation in the expansion of the oil sands industry at the more meso-analytical level of regulatory operations. In writing about the ‘dampening’ of citizen engagement in decisions pertaining to resource extraction, the essential point made by the authors is that, over the last fifty years, the role of the state in dealing with public concerns has become truncated (ibid: 217). In its place has risen the ‘…indifferent, invisible hand of the market’, narrowing non-elite participation in decision-making and allowing for the sacrifice of Aboriginal rights ‘at the altar of economic development’ (ibid). This is largely due to the simultaneous growth of neoliberalism in political and economic circles. Although this argument briefly points to the exclusion of broader members of the public within consultation processes, its primary concern is with the exclusion of First Nations and apparent ignorance towards their right to be consulted and accommodated on any activity which may impact their Treaty rights (ibid: 212; see Section 3.3). Slowey and Stefanick argue that infringement of these rights is occurring because there is no legal requirement for industry or government to reach impact benefit agreements (IBAs) with First Nations. These are essentially contracts which attempt to offset any adverse impacts of a project by providing socio-economic remunerations to those affected (see Mills, 2011). Indeed, the ACFN launched a lawsuit in 2012 alleging that Shell had not complied with those made previously (Slowey and Stefanick, 2015: 212). The delegation of the consultation duty to industrial proponents, and the absence of any compulsory requirement for concluded agreements to be made publicly available, are also seen as compounding factors. Taken together, this leads the authors to conclude:

*Concretely, this means that, as matters presently stand, the Alberta government does not directly discharge its duty to consult with Aboriginal communities, nor does it formally delegate procedural aspects by demanding that industry proponents engage in such consultation.*

(ibid)

Although these points highlight some of the weaknesses within the consultation process, important operational details have been obfuscated and smoothed over, weakening the relationship between evidence and conclusion. For instance, delegation of the duty to consult to industry proponents does not in itself necessarily mean that government is ‘…increasingly withdraw[ing]’ from its role as mediator' (ibid: 215). As stated in the Government of Alberta’s (2005: 5) first policy on First Nation consultation, while Alberta ‘…will require Project Proponentsto conduct procedural aspects of project-specific consultation’, it will also ‘…retain responsibility to determine whether consultation has been adequate in the circumstances’. This is repeated in its subsequent 2013 policy, where it is the responsibility of the Aboriginal Consultation Office (ACO) to ‘…manage all aspects of consultation, including…[a]ssessment of consultation adequacy’ (Government of Alberta, 2013a: 5). As such, while the process of consultation is delegated to industry, the Government of Alberta has consistently retained ultimate power to determine whether or not an industry's attempt to meet this duty is ‘adequate’. Accounts which dwell on the delegation of procedural responsibilities to industry, along with the associated quality of its conduct, therefore provide only partial explanations for deficiencies in consultation. Analyses should instead prioritise on the ways and means by which the substantive determinations of adequacy are made by Government of Alberta, and how these facilitate the acceleration of production despite First Nation opposition.

Slowey and Stefanick (2015: 216) also conclude that ‘[i]f democracy rests on the consent of the governed then Aboriginal dissent caused by industrial degradation of treaty land implies that the institutions of governance in Alberta lack legitimacy’. While this sidesteps the difficult tensions associated with First Nation decision-making in the context of a liberal democracy, the very legitimacy of which rests upon the vote-derived consent of a settler majority (see Chapter 9.2.1), such an argument does highlight the need to be mindful of the political-economic context in which opportunities for public participation are realised. As Barton (2002: 84) notes, ‘[i]f public participation is indeed so political…[w]e need to think carefully about our assumptions about political organisation’. Slowey’s (2008: pp.xiiii-xv) earlier work holds relevance in this regard, where consideration is given to the broader opportunities for self-determination afforded to the MCFN under Alberta’s neoliberal political-economic system. Characterising this as one which prioritises privatisation and emphasises global competitiveness, while concurrently shrinking the welfare state, Slowey considers the way in which this has constrained the ability of the MCFN to ‘…freely determine their political status and freely pursue their economic, social and cultural development’ (UN, 2007: 3). As explained:

*Although the larger First Nations vision of self-determination is based on inherency, the pragmatic goal of self-determination is to achieve change within the current political and economic framework. Self-determination in the neoliberal context therefore refers specifically to First Nations political and economic development in the global economy and requires First Nations to be fiscally autonomous…Capital and an economic base are therefore vital for increased, meaningful political independence; and to that end, First Nations must strive to achieve some level of self-reliance and end their historical dependence on government. This requires the ability to make economic decisions that will ultimately enable them to become disentangled from the state.*

(Slowey, 2008: pp.12-13)

This essentially translates into a situation where First Nations are able to pursue a type of self-determination, but only as long as they are a wealthy First Nation and the self-determination sought is based on market participation. Opportunities for opposing development outright are therefore limited in the context of neoliberal political-economy.

As an approach in and of itself, the power of non-elite participation in decision-making mirrors Dryzek’s (2013: 99) concept of ‘democratic pragmatism’, which he sees as ‘…a problem solving discourse reconciled to the basic status quo of liberal capitalism’. Divorced from broader questions of political economy, the purpose of democratic pragmatism is to make administrations more adaptive, in response to changing social, economic or environmental circumstances, and imbue environmental decisions with legitimacy derived from broader public involvement (ibid). However, the way in which Slowey (2008), and to a lesser extent Slowey and Stefanick (2015), describes the influence of broader political economy upon participatory opportunities exposes the limits to such a staunch focus on decontextualised procedure. As Barton (2002) argues, neoliberal political-economy tends to generate governments that ‘…as far as possible promote market competition, mimic market arrangements, and favour outcomes that tend towards economic efficiency’ (ibid: 95), are ‘…fundamentally and inevitably susceptible to appropriation by special interests’ (ibid: 94-95), and construct regulatory approval processes which give ‘…undue power to unaccountable bureaucrats’ (ibid: 95). In essence, owners of transferable rights, or those in the market to purchase them, are prioritised as participants in decision-making. The overarching neoliberal system therefore colours and constrains opportunities for participation by ignoring or actively obstructing those avenues which permit engagement beyond the limited sphere of the market. Exactly how these broader political-economic forces are manifest at the micro- and macro-levels of the regulatory process governing oil sands expansion is a key focus of this study.

### 3.1.6 Summary of Existing Literature: Contributions and Limits

Existing literature aimed at explaining environmental harm in the oil sands is diverse, spanning a variety of fields and deploying a range of theoretical perspectives. The work on cultural genocide stands out as that primarily concerned with the structural legacy of settler-colonialism, and its continued existence within and through impersonal industrialisation processes that pay little attention to the substantive Treaty rights of First Nations. Similarly, the literature from the field of state-corporate crime brings attention to the macro-level public relations campaign embarked on by powerful actors and their corrosive effect on environmental monitoring initiatives, precipitating the loss of First Nation confidence in their impartiality. The state-corporate analytical model itself also highlights the need for explanations to account for not only national and international factors driving harmful patterns of production, but also for the absence of mechanisms expected to act in control. While Lynch et al's (2016) paper on the principles of radical ecology offers little explanatory detail in itself, its associated treadmill theories are effective at directing the analytical lens towards those groups with the ability to either accelerate or slow production. Similarly, the literature on regulation illustrates how state regulators can be considered catalysts for victimisation if they lack the capacity to oppose industrial expansion, instead of the more traditional view of their acting as mechanisms for its control. Finally, those explanations which focus on consultation processes highlight the importance of procedural rights in explaining environmental victimisation in the oil sands, particularly the ways in which they are subverted by powerful interests.

Despite its explanatory potential at the higher, macro-level of analysis, this literature displays a number of limitations that provide direction for further research. Firstly, the level of analysis from which it approaches environmental victimisation tends to obscure the regulatory process governing industrial expansion, presenting a situation in which political and economic forces appear able to construct oil sands projects without opposition. This is an inaccurate depiction and should be addressed, particularly as the regulatory process is a critical site of social conflict. Indeed, as noted in Chapter 2, it is cumulative environmental effects resulting from the normative operation of industry that is the issue, and not simply individual, project-level breaches to environmental thresholds. Secondly, and in a related fashion, despite the efforts of Slowey and Stefanick (2015), and Huseman and Short (2012; 2011), the central role of First Nations, and their right to be consulted and accommodated in the process of oil sands expansion, is being overlooked. The almost total absence of indigenous peoples from the explanations, whose even minimal inclusion seems to be contingent on their being perceived solely as victims, displays traits associated with settler-colonial narratives. This serves to subvert indigenous claims to sovereignty by denying their continued relevance or existence (see Veracini, 2010; Regan, 2010). Finally, most of the literature reaches conclusions which are based on very little, if any, detailed empirical work. Slowey and Stefanick (2015) cite a very small number of quotes from interviews, but, even then, inclusion of this data is unsystematic. Smandych and Kueneman (2010) also reference an interview, but in both of these accounts it is clear that the conclusions have not been, and indeed could not be, generated from this data alone.

From these contributions and limits can be identified directions for further research. There is a need to explain how the political and economic forces driving growth at the macro provincial and national levels are manifest in the meso-organisational and micro-individual aspects of the regulatory process governing expansion. Instructive on this point is Spangenberg’s (2010: 561) multiple dimensions of economic growth, which encompasses both ‘driving forces’ of justificatory discourse and the ‘pressures’ of economic policy. Such a distinction highlights a need to explain how the objective of economic growth is both sought and interpreted by the provincial government, its regulatory agencies and personnel, particularly when its pursuit appears to come at the cost of First Nation Treaty rights. Indeed, to use the language of Kramer and Michalowski’s (2006: 25) state-corporate analytical model, as facilitators of industrial expansion, environmental degradation and the subsequent victimisation of the First Nations, the activities of these state regulatory agencies can be conceived of as a ‘catalyst’ for harm. This is particularly so when considering their operation in the context of government economic policy.

Accounting only for the contextual regulatory features ‘driving’ growth continues the dominant trend within the literature, excluding First Nations and failing to explain how they have been unable to successfully decelerate or displace production despite their constitutionally protected Treaty rights. This requires a concurrent focus on the ‘operationality of control’ (ibid: 24), to draw again from the language used in the state-corporate analytical model. Mirroring the need to analyse the provincial policy objectives for growth and the justifications for their implementation, an analysis of the participatory mechanism therefore requires a similarly dual focus. Considering that the duty to consult and accommodate has been clarified to some extent by the Supreme Court of Canada (SCC) (see Section 3.3), the actualisation of this duty within the regulatory process, alongside the justifications offered for this particular manifestation, require attention. In pursuing this agenda, this study will not only address the questions surrounding ‘what’ is occurring within the regulatory mechanism to permit expansion of culturally harmful patterns of production, but also those concerned with answering ‘why’ it operates in this manner (see Chapter 4.2). In this context, the absence of dedicated primary research is problematic, particularly in terms of understanding the justifications offered by those facilitating production processes which the First Nations are in open disagreement with. Furthermore, while researching ‘elites’ harbours well-known difficulties within social research more broadly (see Chapters 4.5; 4.7.4), and the inclusion of indigenous peoples must be undertaken with care (see Chapter 4.7.5), the gaps in the existing literature expose a fundamental need to gather primary data to develop a more detailed explanation of the situation.

## 3.2 The Conceptual Contours of ‘Sustainable Development’ and its Relevance as an Exploratory Lens

In recognising that ‘…corporate crime and harm is nothing more or less than a power relationship that is guaranteed, underwritten and also enjoined by states’ (Tombs and Whyte, 2015: 93), the regulatory process which exerts control over the ability of state and corporate actors to realise industrial expansion should attract primary focus. However, before outlining the regulatory process in Section 3.3, the exploratory lens through which it is to be examined requires both justification and clarification. Considering that the process in question corresponds to environmental regulation more generally, along with natural resources projects more specifically, and that the issue at hand for First Nations is whether such developments can exist without breaching ecosystem limits (see Chapter 2), the notion of ‘sustainability’ becomes central to the inquiry. Furthermore, with the concept gaining substantial social and legal standing since the late-1980s (see Boyd, 2012; Pepper, 1996), the UN recently establishing an international ‘Agenda for Sustainable Development’ to be completed by 2030 (UN, 2016), and Sachs (2015) considering the ‘age of sustainable development’ to have come, then broader context would appear at least conducive to such an inquiry. These contextual factors gain relevance when considering that public institutions are driven not only by instrumental rationalities but also by wider, social, political, economic and cultural issues (Reitan, 1998). This ultimately means that regulatory operationalisation of political-economic imperatives communicated through the language of eco-philosophical justifications should attract detailed analytical attention.

The influence of this broader shift towards 'sustainability' has long been visible in Canada and Alberta, particularly within policies governing oil sands expansion (see Chapter 5). The Government of Alberta has explicitly advocated ‘sustainable development’ of the oil sands resource since at least 1999 (see Government of Alberta, 1999a; see also Government of Alberta, 1995), with legislation governing the provincial energy regulator being required to balance social, economic and environmental factors in the process of facilitating industrial expansion (see Section 3.3). Highlighting the association between the meso-level activities of regulatory operations and the macro-level policies driving oil sands expansion, interrogating the conceptual content of this relationship will provide detail on the imperatives underpinning industrial expansion. This includes the reasons why its continued pursuit has yet to be considered ‘unsustainable’ by decision-makers. Additionally, First Nations appear to be advocating a similar goal by promoting a balance between industry and environmental integrity (see Klinkenberg, 2014a; Sweetgrass 2014). Suggesting a *prima facie* alignment of interests between both parties, this raises questions as to why conflict and environmental victimisation has ensued despite these apparently analogous objectives. Ultimately, closer inspection of ‘sustainable development’ as a concept is needed before examining the form advocated in government policy and actualised through regulatory practice.

The concept of ‘sustainable development’ provides an appropriate means of evaluating the meso-level, organisational process facilitating production, directing attention towards both the regulator and the provincial policy context in which it operates. Broadly defined by the 1987 Brundtland Commission as ‘…development that meets the needs of the present without compromising the ability of future generations to meet their own needs’ (UN General Assembly, 1987), the concept has been variously criticised as ‘…misunderstood…’ (Mawhinney, 2002: 5), ‘…contestable…’ (Jacobs, 1991: 5), and ‘[f]raught with contradictions...’ (Redclift, 1997: 438). Elliot (2013: 19) notes that such ambiguity actually suits its purpose of drawing together a variety of ‘possibly incompatible’ interests in pursuit of less socio-environmentally harmful practices (see also Sneddon et al, 2006), going on to argue that it may be more appropriate to instead to define what the concept is not; unbridled economic growth. Green criminology has traditionally dismissed the concept, labelling it as 'in essence…a form of "green capitalism"' (Halsey and White, 1998: 350), or seeing it as a governmental mechanism for the ‘denial of harm’ which ‘fundamentally involve[s] further environmental degradation’ (White, 2002: 86). Such views tend to suggest a largely unbreakable conceptual tie with the capitalist mode of production; a feature shared by Rosmarin (1990, quoted in Beder, 1994: 9), who notes:

The two words sustainable and development are in a strict sense contradictory. Sustainable implies the elements of long-term renewal, maintenance, recycling, minimal raw material exploitation and management of people’s needs on a collective basis. Development can be interpreted in many different ways but according to our present industrial-based culture it implies short-term planning, minimal maintenance, waste, maximal exploitation of raw materials and emphasis on the individual.

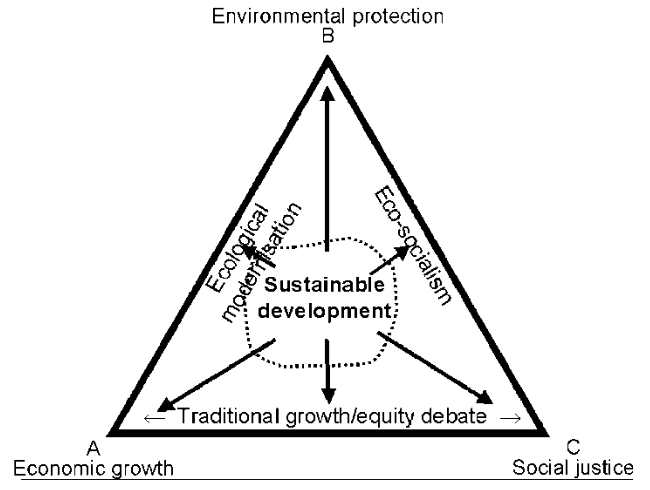
Although mirroring a reality where ‘…commitment to sustainable development *can* be entirely hollow, often cynically manipulated, often merely meaningless’ (Hay, 2002: 217, emphasis added), such opinions surrender the concept to terms defined by interests pertaining to capital. This overlooks the fundamental difference between ‘sustainable development’ and ‘sustainable growth’, mistaking the former, which Daly (1990: 1) refers to as the ‘qualitative improvement or unfolding of potentialities’, for the latter, which is defined as the ‘quantitative increase in physical scale’. Burkett (2005: 94) adopts a similar position in his separation of ‘sustainable capitalism’ from ‘sustainable development’. Accounting for the subtleties and tensions inherent to this difference allows for a more incisive examination of the environmental policies and regulations pursued in the oil sands.

In line with Elliot’s (2013) attempt to define it in opposition to uncontrolled industrial growth, the conceptual contours of ‘sustainable development’ have been associated with various notions of ‘balance’, ‘equality’ and ‘justice’. Such a view is echoed in the work of Beirne and South (2007: 10, emphasis in original) who note that, among its academic proponents, the concept ‘…is held to mean more than continued or accelerated economic growth’, and that ‘…justice is a part of the *content* of ‘sustainable development’ as a social, economic and political strategy’. This close affinity with environmental justice is mirrored by Lowe (1999) and Walker (2012), with Sands (1995) recognising the concept as exhibiting the four characteristics of inter-generational equity, sustainable use, intra-generational equity, and integration of environmental protection and development. Although broad support for such conceptual association is clearly present throughout the literature, David (1988: 153) notes that it ultimately depends on whether it is interpreted from a ‘narrow economic’ or ‘holistic’ perspective, where the former is ‘synonymous with wealth creation or economic growth’ and the latter considers ‘the requirements of sustainability and justice to coincide’. Jacobs (1999) recognises this, seeing the link as one of four major ‘faultlines’ on the environmental question invoked by the notion of ‘sustainable development’, and a subsequent extension of the debate surrounding the concept itself.

Although coalescing around broadly similar notions of ‘justice’, the body of work underpinning ‘sustainable development’ still represents a non-consensus; a reality which appears problematic when attempting to evaluate policies and regulatory practices which make use of the term. Indeed, Kates et al (2005: 20) cautions that ‘if anyone can redefine the term to fit their purposes, it becomes meaningless in practice, or worse, can be used to disguise or greenwash socially or environmentally destructive activities’. Although correct to a certain extent, the implication is that a widely accepted, shared meaning of the term is achievable; a position which is recognisably ideological when considering the dominance of non-consensus over the last three decades. However, despite such discord, ‘…we should not throw the concept out just because it is contestable’ (Hay, 2002: 217). On the contrary, Connelly (2007: 260) considers the ‘conceptual ambiguity and ensuing contestation over the ‘true’ meaning of the term’ as ‘inevitable’, recognising it as an ‘inherently political concept’. This position builds on the work of Haughton and Counsell (2004: pp.72-73) who recognise a ‘multiplicity of sustainabilities’, directing attention towards ‘the ways in which these are shaped and mobilised’ instead of searching for a definitive meaning of the term. Accepting this disparity provides a foundation upon which the regulatory and policy justifications for negating First Nation concerns can be identified and evaluated in the context of overarching political-economic interests. This can then be used to interpret the policy objectives and regulatory justifications which over-ride non-elite interests, providing a more defined and detailed target from which to develop an explanation for the indigenous environmental victimisation explored in Chapter 2.3.

Considering arguments over the meaning of ‘sustainable development’ to be not only ‘semantic disputations’, but to actually conceal substantive political arguments with which the term is connected, Connelly (2007: 262) goes on to note the importance of paying attention to how the ideals inherent to the concept, of compromise between social, economic and environmental concerns, are given concrete meaning. This, it is suggested, ‘…avoid[s] the pitfalls of conflating opposing positions that are cloaked within [its]…comforting rhetoric’ (ibid: 259). Shifting the underlying image from that associated with the Brundtland Commission (UN General Assembly, 1987), where ‘sustainable development’ sits at the confluence of three overlapping circles representing social justice, environmental protection and economic development, Connelly conceives of a model in which each of these are situated at points perpendicular to one another, also positioning the three dominant eco-philosophies to which they are aligned along their axis (see Figure 1).

#### Figure 1) ‘Sustainable Development’ and its Underpinning Eco-Philosophies



Connelly (2007: 270)

Most important, for present purposes at least, are the three dominant eco-philosophies which are visible in and through the particular configuration of factors prioritised in any given scenario. For instance, the philosophy known as ecological modernisation tends to underpin concepts of ‘sustainable development’ which emphasise balance between economic growth and environmental protection (see Mol, 2001, and Mol and Spargaaren, 2000). This places less emphasis on social justice and is considered the contemporary ‘theoretical adversary’ of the Treadmill of Production’ (Buttel, 2004: 332; see also Gould et al, 2008). In a similar vein, the philosophy of ‘eco-socialism’ can be seen to result from the prioritisation of balance between environmental protection and social equity. As expected, there is far less emphasis placed here on economic growth; a characteristic which reveals its affiliation with the treadmill theories (see Wright, 2004; Schnaiberg, 1980). The third and final philosophy seen to underpin ‘sustainable development’ interpretations are those which de-emphasise political considerations pertaining to the environment; an area associated with the more traditional political sphere. Taken together, the suitability of this particular conception of ‘sustainable development’ is made clear:

…*[It] is intended to have a normative, critical purpose. Practically, it can be used in a very directly critical way…corresponding policy rhetoric and policy impacts can be mapped, in order to identify and draw attention to, for example, the difference between governmental commitments to a balanced interpretation of sustainable development and less balanced actual progress…which [may] clearly show more progress on economic and social factors than on the environment.*

(Connelly, 2007: 275)

In allowing for the underpinning philosophies of ‘sustainable development’ to be identified at the level of regulatory policy and reality, the model provides a means of adhering to Redclift’s (1987: 34) early contention; that ‘advocating sustainable development…in principle does not commit governments or international organisations to its achievement in practice’. Indeed, drawing out the philosophies underpinning this language serves to direct inquiry to a number of more specific characteristics which would otherwise remain hidden from view, enabling procedural features to be crystallised and analysed according to the philosophical category to which they bear relevance and from which they garner theoretical support. As the philosophies of ecological modernisation and eco-socialism are the two dominant and duelling paradigms underpinning the language of ‘sustainable development’ it is important to conduct a brief review of the literature to outline their central tenets.

### 3.2.1 Eco-Modernist Philosophy

The term ‘ecological modernisation’ references both a social theory and a discourse or environmental reform program (Hayden, 2014). With regard to the former, ecological modernisation is considered the most contemporary and dominant social theory on environment. Indeed, Mol (2001: 49) views it as the latest in three historical ‘waves of environmental concern and reform’. The ‘first wave’ of ‘nature conservation’ existed around 1900 and had a focus on protecting reserves and species, the ‘second wave’ emerged around 1970 and centred on minimising environmental additions and withdrawals, and the ‘third wave’, which emerged in the late 1980s and includes ecological modernisation, has a focus on ‘sustainable development’ (ibid). Rudel et al (2011) depict a similar transition, noting the dominance of theories concerned with the political economy of environmental decline in the 1970s and 80s, and their succession by the more institutional responses of the 1990s and beyond. Different reasons are posited as the catalyst for this shift. Cohen (1997) links it to the emergence of Beck’s (1992) ‘risk society’, Mol (1995) associates it with the more recent restructuring of industrial production processes along ecological lines, and Fisher (2002) relates it to a Habermasean ‘legitimation crisis’, where the shift from liberal to advanced capitalism has encouraged the search for crisis solutions in areas beyond economics. Although Buttel (2000: 62) considers a more pragmatic reason for the emergence of ecological modernisation in particular, where it has ‘become attractive…because it provides alternatives to the pessimistic connotations of frameworks such as the treadmill of production’, the fundamental message is the same; ecological modernisation essentially aims to address ‘environmental crises without leaving the path of modernisation’ (Spaargaren and Mol, 1992: 334).

With industrial sectors making greater use of precautionary, risk-based approaches to the environmental management of their resource use and waste streams, as opposed to the more reactive approaches used prior to the 1990s (Howes et al, 1997), the *theory* of ecological modernisation is an attempt to account for the nature of this transformation (see Mol, 1996). However, as noted above, ‘ecological modernisation’ is also used to reference a discourse or reform program (see Hayden, 2014). In this study, unless specific reference is made to ‘eco-modernisation’ as a theory of social change, it is in the sense of the latter that the term is being used. Indeed, the discourse and reform program tend to operate in tandem, pointing to the reality that operational efforts at ‘greening’ capitalism are often buttressed by an accompanying ‘…rhetoric of reassurance…’ which suggests capitalism can be made compatible with environmental protection (Dryzek, 2013: 159). This is reflected in its ‘core’ philosophical assumption, which is that ‘eco-efficiency gains can be achieved without radical structural changes in state and civil society’ (Buttel, 2000: 62). Indeed, eco-modernist reforms tend to signal apolitical, techno-centric and rational elitist approaches to environmental management, and mirror the ‘win-win’ characteristics associated with the ‘consensus’ school of more general regulation (see Chapter 3.1.4; see also Humphrey, 2007; Backstrand and Lovbrand, 2006; Schnaiberg, 1997).

Although eco-modernist reform programs all advocate ‘cleaner’ technologies, the various means by which this is achieved belies a tension at the heart of the philosophy, and one which maps onto the spectrum established by Connelly (2007) above (see Section 3.2). For instance, while some approaches advocate large-scale transitions to renewable sources of energy, others tend to favour narrow alterations to existing industry by calling for developments in sustainable fossil fuels (see Hayden, 2014). This represents the tension between ‘strong’ and ‘weak’ forms of the philosophy. The notion of structural conditions being unchangeable is most visibly reflected in Christoff’s (1996: 490) description of ‘weak’ ecological modernisation, which is not only ‘technocratic’, ‘neo-corporatist’ and ‘closed’ to broader forms of democratic participation, but also primarily concerned with making ‘narrow’ technological adjustments to address environmental issues. Indeed, Christoff (ibid) explains that, in deliberating over whether to use ‘weak’ as a descriptor, ‘one is tempted to write, false’. Having greatest parity with the ‘oxymoron’ of ‘sustainable growth’ (see Daly, 1990: 401), this strain of the philosophy tends to pursue narrow efficiencies of production and techniques aimed at ‘decoupling’ economic growth from adverse environmental effects (Sezgin, 2012). Indeed, it is this ‘weak’ variant that has ‘…gained considerable policy and financial support from governments in Europe and North America…’, in spite of ‘…warnings over their negative social and ecological impacts’ (Hayden, 2014: 18).

Juxtaposed against this is Dryzek’s (1997: 172) ''[r]adicalised' ecological modernisation'. Corresponding with Christoff’s (1996: 490) ‘strong’ conceptualisation, this advocates ‘a restructuring of political and economic life, rather than a mere re-tooling of industry’ (Dryzek, 1997: 172). Under this variant such ‘restructuring’ occurs along more ecological lines, has more open and democratic channels for decision making and approaches environmental issues from a position acknowledging their international dimension (Christoff, 1996). Berger et al (2001: 62) augment this macro level of analysis with ‘regional and local level[s]’, recognising the necessity of holism in addressing ecological disorganisation. It is these features that imbue the ‘strong’ approach with a transformative potential, enabling Gleeson (2006) to position it as a transition strategy towards more sustainable practices which are ‘decoupled’ from economic growth on a macro scale. However, it is this tendency to go ‘…further toward advocating extensive social change…’ that has caused this particular strain of the philosophy to be ‘…less influential in mainstream politics…’ (Hayden, 2014: 18).

In continuing its relationship with the ‘consensus’ school of more general regulation, eco-modernisation is also affiliated with environmentally-specific forms of risk-based reasoning, including application of the precautionary principle. Not only does this relationship exist because the technology so central to eco-modernist philosophy ‘…creates as many uncertainties as it dispels’ (Lee and Stokes, 2005: 104; see also Beck, 1992), but also because ‘[u]ncertainty is the unifying hallmark of environmental and natural resource regulation…’ (Doremus, 2007: 548). While it has a number of different interpretations (see Martuzzi, 2007), the precautionary principle is generally seen as a response to potential threats to human and environmental well-being, requiring ‘…official action to be taken to protect people and environments where there is scientific uncertainty as to the…potential damage or the likelihood of risk’ (White, 2008: pp. 55-65). Put another way, the concept operationalises the notion ‘better safe than sorry’ (Giddens, 2011: 55), supporting regulatory action in response to an actual or perceived risk to human beings or the environment (see Rushton, 2007). However, it is the spectrum of approaches taken towards this uncertainty or risk that is key. Much like eco-modernisation, the precautionary principle has ‘weak’ and ‘strong’ forms, with designation similarly depending on the extent to which it has the potential to alter existing structural conditions. For instance, the former variation references precautionary measures which permit continuation of an activity, but only under intense scrutiny and at risk of potential, albeit narrow, alteration, whereas the latter, ‘strong’, form involves the prohibition or phasing out of a particular activity in the face of uncertainty or risk (Tickner and Raffensperger, 2003). It is because of this that the latter, ‘strong’ variant poses a challenge to existing patterns of expansive production, leading Sunstein (2002) to criticise it as the ‘paralyzing principle’. Nevertheless, these two features essentially correspond to the broader variants of ‘strong’ and ‘weak’ ecological modernisation, providing insight into the type of precautionary measures present under each philosophical position.

### 3.2.2 Eco-Socialist Philosophy

Within green political thought there are number of socialist positions, which Hay (2002: pp. 255-301) categorises as three core traditions; ‘democratic socialism’, ‘Marxism’, and ‘classical anarchism’. The first emphasises the role of trade union-based parliamentary parties in prioritising environmental quality (ibid: 255), which tend to succumb to the issues identified by treadmill theorists in Section 3.1.3. This is where labour unions tend to accelerate production because of its intrinsic relationship with wages and employment. The second tradition, Marxism, contains a variety of sub-categories which vary according to their integration with environmental scholarship. This emerges from Marx’s recognition that human labour is contingent on the prior products of nature’s labour, attempts to subsume ecological positions into its remit, and considers technology to be instrumentally neutral and capable of being used for liberation depending on those who control it (ibid: pp.262-276). Finally, the anarchist strain of eco-socialism operates from the standpoint that ‘…small is beautiful because small is natural’, being associated with the observation that ‘…small, non-hierarchical social unit[s]…corresponds to what is to be found in nature’ (ibid: 279). As expected, positions affiliated with this tradition tend to advocate a shift away from centralised and state-led social arrangements (see Bookchin, 1982). While these are only very brief outlines of the central tenets associated with one typology of traditions, which are contested even within their respective categories, the point is that eco-socialism does not denote a monolithic or broadly unified philosophy, at least not to the extent of eco-modernism. As such, in order to provide some delineation, the literature within the arguably dominant Marxist tradition will form primary focus. This will include a return to the treadmill theories (see Section 3.1.3), which fall within this bracket (see Buttel, 2004), to enable identification of more specific regulatory measures associated with eco-socialist philosophy.

Much like eco-modernisation, eco-socialism can be read as a social theory, albeit one that is far more historical and class-based in its analysis. At the root of its explanation for contemporary ecological degradation is Marx’s understanding of the complex and inter-dependent relationship between human and non-human nature. Indeed, he considered the raw materials provided by nature to be an essential, *a priori* ingredient to all human labour; ‘[l]abour is, first of all, a process between man and nature…He confronts the materials of nature as a force of nature. He sets in motion the natural forces which belong to his body…to appropriate the materials of nature in a form adapted to his own needs’ (Marx, 1976: 283). He described this relationship as an ‘interdependent process of social metabolism’, to which the capitalist mode of production causes an ‘…irreparable rift’ (Marx, 1981: 949). Foster (1999: 383) recognises this environmental aspect of Marx’s work, using it to label the severing of the human/non-human relationship as the ‘metabolic rift’ and defining it as ‘…the material estrangement of human beings in capitalist society from the natural conditions of their existence’. Marx’s original conception of this ‘rift’ was developed from findings within 19th century chemistry, observations on the way in which crop nutrients were consumed in the city of London without being returned to the original soil source, and recognition of the economic shift away from reliance on solar energy in agriculture towards fossil fuel use in urban areas (ibid). However, its essential elements can be distilled as follows:

*…capitalism’s uncoupling of production from the solar budget constraint, and its tremendous acceleration of matter-energy throughput, had led to an entropic degradation of natural conditions – a metabolic rift between human reproduction and the conditions needed for this reproduction to be healthy and sustainable.*

(Burkett, 2002: 204)

This situation has its origins in the commons enclosures in Britain between the fifteenth and eighteenth centuries (Foster, 2009). Prior to this, farming occurred within a relatively localised religious, political and environmental context, but the transference of common land to private ownership allowed for the capitalist mode of production to emerge. Resulting in the commodification of labour, land and tools, this enabled a new ‘science’ of economics to be applied to the process of alienating workers from the products of their own labour (Burkett, 2005). The concurrent movement of workers from the country into the urban population centres also generated oppositions between ‘town’ and ‘country’, and global North and South; points which came to denote the origins and final destinations of commodities. Precipitating the emergence of large-scale capitalist agriculture, this unidirectional movement of products made using the soil’s ‘constituent elements’ (Marx, 1976: 638) essentially leads to the ‘squandering’ of its ‘vitality’ (Marx, 1981: 949; see also Toivanen, 2015). Even industrial, techno-scientific attempts at replenishing this nutrient base furthers the degradation, as it is not part of a broader process in which original nutrients are returned to the ground from which they were taken, thus belying the unsustainability of the capitalist system a whole. Indeed, it is for these two conjoined reasons that Marx ultimately viewed capitalism as ‘…simultaneously undermin[ing] the original sources of all wealth – the soil and the worker’ (Marx, 1976: 638; see also Foster, 2000).

It is worth noting that Foster’s (1999) contemporary conception of the ‘metabolic rift’, as a split in the relationship between human and non-human nature, has been criticised by others within the eco-socialist tradition, particularly Moore (2015). Moore's chief contention is that Marx’s original notion of ‘social metabolism’ has been reinterpreted as a metabolism between ‘society’ and ‘nature’, meaning that the former ‘…has been cleansed of its double internality’ (ibid: 75). This references not only the reliance on a Cartesian dualism, but that each of these categories are founded on a ‘violent abstraction’, where the essential relations internal to each are removed ‘…in the interests of narrative or theoretical coherence’ (ibid: 76). Put another way, if ‘[t]o say that man’s physical and mental life is linked to nature simply means that nature is linked to itself, for man is part of nature’ (Marx, 1974: 328), then ‘society’ cannot be separated from ‘nature’ using two isolated yet relational categories. The latter is also inherent to the former and, as such, exhibits a ‘double internality’ (ibid: 75). This is why Moore (2015: 76) speaks of Foster’s (1999) conception not as a ‘metabolic rift’, but as an ‘epistemic rift’. While this is an important point, it is a relatively recent debate internal to eco-socialist philosophy, and is deployed in a largely analytical capacity to further possible explanations for ecological degradation. What remains consistent is the fundamental notion that the capitalist mode of production undermines both the ability of human and non-human nature to reproduce themselves. As such, suggestions for regulatory and policy responses tend to target this locus of power in an attempt to move towards a system which achieves the ‘systematic restoration’ of its reproductive metabolism with the land (Marx, 1981: pp.949-50). This, however, requires ‘co-operation and the possession in common of the land and the means of production’, based on ‘the transformation of capitalist private property…into social property’ (Marx, 1976: pp.929-930).

In explaining what eco-socialism would look like in practice, Kovel (2007: 243) follows the above diagnosis and describes a society ‘…in which production is carried out by freely associated labour and with consciously eco-centric means and ends’. Implying a societal regard for environmental thresholds and limits, he notes that markets will be ‘hemmed in’ and made to function ‘…according to eco-centric ethics rather than profiteering’ (ibid). This poses a challenge to those consensus-based regulatory approaches which see no conflict between private corporate and public social interests (see Section 3.1.4). Indeed, Kovel (ibid) goes on to argue that use value and quality would be ‘…valorized over exchange value and quantity’, with an economy ‘…embedded within society rather than, as under capitalism, standing over it’ (ibid). Foster (2009: 7) speaks similarly of the need for deep structural change:

*…there is little real prospect for the needed global ecological revolution unless these attempts to revolutionise social relations in the struggle for a just and sustainable society, now emerging in the periphery, are somehow mirrored in movements for ecological and social revolution in the advanced capitalist world. It is only through fundamental change at the centre of the system, from which the pressure on the planet principally emanates, that there is any genuine possibility of avoiding ultimate ecological destruction.*

Treadmill theorists are similarly predisposed to brevity when forwarding solutions. Gould et al (2004: 305) suggest that a more sustainable political-economic system ‘…would entail the state’s substantial control over ecosystems without regard to issues of profitability and wages/employment’. A characteristic of eco-socialism more generally, the field tends to give little theoretical attention to the institutional forms and principles needed to guarantee the sustainable outcomes of which they speak. Indeed, little detail is provided on how the fundamental role of the state in maintaining the capitalist mode of production is to be overcome (see Poulantzas, 2014 [1978]; Lasslett, 2014; see also Halsey, 2004), beyond revolutionary praxis. This ultimate focus on awaiting some revolutionary point in time when social and ecological values will be prioritised over those pertaining to capital is more than a little utopian in the context of global capitalism. Indeed, it was the lack of a proletarian revolution following World War 2 that caused Bookchin to spurn Trotskyism (Biehl, 2015), laying the foundations for his work on eco-socialism’s anarchist sub-field (see Hay, 2002). Furthermore, when the state is invoked as a way of controlling markets there is an overestimation as to the extent to which regulatory agencies are impervious to the influence of interests pertaining to capital (see Tombs and Whyte, 2009). By virtue of this lack of attention being directed towards solutions attainable within existing institutional parameters, the choice posited by eco-socialist philosophy appears stark; between rapid structural change brought about by revolutionary praxis or ecosystem failure, much like Foster’s (2009: 7) stark warning above.

Despite this, O’Connor (1996: 205), working within the same philosophical tradition, notes how the ‘loose’, ‘flexible’ and historically contingent fit between the forces and relations of production opens up opportunities for different social movements to force concessions from interests pertaining to capital. It is in this space where the importance of participation by non-elite groups in environmental decision making comes to the fore. While differences exist amongst eco-socialists as to the extent to which production processes can be ‘greened’ without breaching environmental thresholds, the primary role of non-elite participants in environmental decision-making is broadly agreed upon across the literature. Indeed, this is the key determining factor in achieving the ecologically sustainable future sought. Taking treadmill theories as the point of departure, Section 3.1.3 clearly denotes their fundamental role in forcing concessions from the triad of state, labour and capital in the process of decelerating production to within ecologically sustainable limits. However, much like ‘strong’ ecological modernisation (see Section 3.2.1), maintaining a focus on structural change has, according to Gould et al (2008: 560), stymied use of the treadmill theories in more orthodox scholarship:

*[m]ost “reasonable” scholars have taken revolutionary or even macrostructural change to the political economy off the table, as either highly unlikely or impossible. They may be correct…As non-structural solutions fail, however, the value of treadmill theory, with all of its unpleasant implications and difficult challenges, may slowly emerge as compelling.*

Despite this aversion amongst the orthodoxy, the subtle but implied distinction between ‘revolutionary…change’ and its ‘macrostructural’ counterpart raises the possibility of working towards the ‘structural reform’ spoken of by Gorz (1968: 8). Defined as ‘…a decentralisation of decision-making power, a restriction on the powers of state or capital, an extension of popular power’, such change has the potential to instil the fundamental structural alterations needed, but within the context of existing avenues for democratic participation in environmental decision-making. Echoing Burkett’s (2005: 130) contention that ‘[s]ustainable development needs to be seen as development in, against, and beyond capitalism’, and in recognising the role of environmentally-minded groups in pressuring the state to act against the interests of corporate entities (ibid; see also Section 3.1.4), increased participation by non-elites in decision-making processes is, under eco-socialism, fundamental to the pursuit of a sustainable human-nature relationship. This is particularly pertinent in the context of the more localised land-based needs of indigenous peoples. As such, if eco-socialist philosophy was to be mapped onto Connolly’s (2007) model of ‘sustainable development’ above (see Section 3.2), its ‘strong’ and ‘weak’ variations correspond to the extent to which socio-environmental interests are prioritised over those deemed more economic.

## 3.3 The Regulatory Process in Focus: Irregularity of Form, Consistency of Function

Following on from the preceding sections, explaining the environmental victimisation of indigenous peoples in the oil sands demands attention be focused on the provincial regulatory process governing oil sands growth. This is justified on several grounds. First, considering that ‘producer decisions are influenced by the regulations imposed by the state’ (Gould et al, 2004: 302), and that ‘…regulation is the manifest empirical link between apparently distinct and separate state and corporate sectors’ (Tombs and Whyte, 2009: 107), directing the analytical lens towards the regulatory process responsible for managing the expansion of oil sands production is the logical point of progression. Second, this regulatory mechanism has permitted rapid expansion of the industry since the mid-1990s, meaning that the cumulative environmental additions and withdrawals outlined in Chapter 2 immediately originate in the approvals issued through this process. Third, the process is mandated to pursue ‘sustainable development’ through its regulatory review and approval functions (see Chapter 3.3.2). Fourth, the transparency of the hearing panel documents, which are initiated when stakeholders or First Nations refuse to withdraw their concerns about a proposed project (see Section 3.4.1), affords access to the detailed deliberations made in pursuit of ‘sustainable development’. Finally, the regulatory process contains aspects that can be conceived of as both ‘catalyst’ and ‘control’ for environmental victimisation, as it not only operationalises government policy, but also functions as a forum through which First Nations can have their concerns heard and acted upon.

The regulatory process itself can be separated into three key stages; 'planning', 'approval' and 'oversight' (see Figure 2). Although Lambrecht (2013) conceptualises this slightly differently, according to whether the process is being perceived from a corporate or government standpoint, such refinement is unnecessary here due to the agencies of the Government of Alberta forming primary focus. The ‘planning’ stage refers to the process by which a corporation designs a project, consults with First Nations over how environmental effects detrimental to their Treaty rights may be mitigated, and submits an application for said project, which includes an environmental impact assessment, to the provincial energy regulator for review. Should any outstanding concerns remain amongst First Nations, or other directly and adversely affected stakeholders, a quasi-judicial hearing may be called. This is the transition to the ‘approval’ stage. Here, various forms of evidenced argument are presented to a quasi-judicial regulatory panel (hereafter referred to as a hearing panel) in a formal setting, enabling the energy regulator to make an informed decision on whether or not to approve a project. Should approval be granted, the process shifts to the final regulatory stage; that of ‘oversight’. This phase refers to the mechanisms by which state and corporate agencies attempt to mitigate the environmental effects of the project while in operation.

#### Figure 2) Government Regulatory Model for Oil Sands Project Development

**Planning Stage**

Consultation and decision on its adequacy

**Approval Stage**

Quasi-judicial review of project applications

**Oversight Stage**

Monitoring & management

of environmental effects

**Provincial Government Oil Sands Policy and Strategy**

Adapted from Lambrecht (2013: 6)

To ensure the boundaries of this project are kept within manageable limits, and to direct attention towards First Nation consultation at the ‘planning’ stage and the measures deployed in pursuit of ‘sustainable development’ at the ‘approval’ stage, the latter phase of ‘oversight’ will be excluded from the inquiry. This is largely because the mechanisms operating at this stage share space with the precursor ‘approval’ phase, as they are still referred to in the process of pursuing ‘sustainable’ expansion. Put another way, independent analysis of the ‘oversight’ phase risks unnecessary duplication, obscuring the way in which the very presence of monitoring mechanisms plays a fundamental role in sanctioning industrial growth in the first instance. The analytical lens will instead be trained upon the policy and strategy context in which the regulatory process sits. Echoing Spangenberg’s (2010: 561) call to examine the ‘driving forces’ and ‘pressures’ for industrial growth enshrined in such documents, the content of which exerts influence upon the regulatory process, this will draw attention to the priorities underpinning ‘sustainable development’ objectives and the advocated measures for its acquisition, as directed by the provincial government.

As noted in Chapter 1, rapid oil sands development began in the mid-1990s, meaning that the agencies and legislative frameworks involved at each stage have changed over this 20-year period. This time frame has seen three different regulatory agencies made responsible for sanctioning oil sands expansion at the ‘approval’ stage, and under equally varying pieces of legislation. While complicated, such alterations are unproblematic because, as Lambrecht (2013) makes clear, these are characteristics of ‘form’ rather than ‘function’, with the latter being used to reference ‘…stages of project decision-making without guaranteeing either a specific process or a particular decision’ (ibid: 5). The subsequent sections draw out these differences in greater detail, with respect to both the ‘planning’ and ‘approval’ stages of the regulatory process, before highlighting the consistencies that run through each. Indeed, despite the various changes in ‘form’ there are fundamental aspects of each stage that have remained constant over this twenty-year period, allowing for the key elements of the process to be crystallised in preparation analysis and evaluation.

### 3.3.1 The ‘Planning’ Stage and the Duty to Consult and Accommodate

Lambrecht (2013: 7) considers the ‘planning’ stage of the regulatory process to encompass environmental assessments and regulatory review, using these terms interchangeably ‘…as they are seen as processes that…[are] intended to inform decision-making’. This views the regulatory process through a prism of functionality, interpreting the ‘planning’ stage broadly so that it can include activities which ‘…inform a government decision whether to “approve” [a] project, and to identify appropriate conditions of approval if any’ (ibid). The ‘planning’ stage therefore references consultation with First Nations on applications for individual oil sands projects. Indeed, since the 2005 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) [2005] 3 SCR 388* (hereafter *Mikisew)* decision at the SCC, oil sands projects within the remit of a Treaty area cannot be sanctioned at the ‘approval’ stage before the proponent has consulted with First Nations beforehand. This also requires a government agency to decide on the adequacy of this consultation. Between 2005 and 2013 responsibility for this determination stood uneasily between the Land Use Secretariat (LUS) and the Energy Resources Conservation Board (ERCB), with neither the ERCB nor the hearing panels ever directly addressing the issue (Passelac-Ross and Buss, 2011: 45). However, creation of the ACO in 2013 saw it imbued with the sole responsibility for ‘upholding the honour of the Crown’ with respect to First Nation consultation, effectively removing responsibility from the ERCB and LUS (Government of Alberta, 2013a: 3). The ACO is thus the most recent government agency tasked with making decisions on the adequacy of proponent consultation.

The Crown duty to consult with First Nations emerges from a number of judgments issued by the SCC, with the duty evolving in detail at the issuance of each. Building on the *Guerin v. The Queen [1984] 2 SCR 335* (hereafter *Guerin*) decision, which affirmed the government’s fiduciary duty to First Nations, the *R. v. Sparrow [1990] 1 SCR 1075* (hereafter *Sparrow*) judgment set a precedent obligating the Crown to consult with First Nations when it sought to justify demonstrated infringements of their rights as enshrined in Section 35 of the Canadian Constitution Act (Government of Canada, 1982). This was established as part of the ‘Sparrow Test’; dual criteria which not only determine whether a right has been infringed upon, but also whether said infringement can be justified. If the former can be determined, the test proceeds to the second part of the justification which includes, *inter alia*, ‘…whether the aboriginal group in question has been consulted…’ (ibid). While clearly a protective measure, this does not mean First Nations’ rights are infallible, as the judgment states:

*Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right under s.35(1).*

*Sparrow [1990: 1078]*

Nevertheless, this decision established the Crown duty to consult with First Nations, being referenced by a second seminal judgement in the form of the *Haida Nation v. British Columbia (Minister of Forests)* *[2004] 3 SCR 511* (hereafter *Haida*). Here the duty to consult is, similar to *Sparrow*, grounded in the ‘honour of the Crown’, arising from the historical assertion of sovereignty ‘…over an Aboriginal people and *de facto* control of land and resources that were formerly in control of that people’ (ibid: para 32). This introduces the obligation outlined in *Mitchell v. M. N. R.* *[2001] SCC 33* (hereafter *Mitchell*)to ‘…treat aboriginal peoples fairly and honourably, and to protect them from exploitation’ (ibid: para 9). Importantly, it also establishes a process of reconciliation which ‘…begins with the assertion of sovereignty and continues beyond formal claims resolution…’ (*Haida*, para 32). As the SCC within this decision viewed treaties as a means ‘…to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by Section 35 of the Constitution Act 1982’ (ibid, para 20), the Court concluded that this process of reconciliation ‘…implies a duty to consult and, if appropriate, accommodate’ (ibid, para 32).

Although *Haida* limited the application of the duty to consult to instances where claim to Aboriginal Title or rights was yet to be established, the *Mikisew* judgment extended the duty to a Treaty context. This expanded its application towards those parts of Canada subject to Treaty agreements; a decision particularly relevant to Alberta which is wholly covered by Treaties 6, 7 and 8 (see Appendix II). In such cases the duty to consult is anchored to the language of the Treaty in question and, with regard to *Mikisew,* it was the language of Treaty No. 8. Upon signing this Treaty in 1899, the Mikisew Cree were among the First Nations which 'surrendered' their title to 840,000 square kilometres of land. This was in exchange for reserve land and the right to continue hunting, fishing and trapping on said 'surrendered' land. Leaving aside fundamental and lingering questions concerning the legitimacy and accuracy of the agreements within Treaty No. 8 (see Fumoleau, 2004), the text contains a ‘lands taken up provision’ which stipulates restrictions on these rights and establishes conditions in which they may be infringed upon:

*And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*

(Government of Alberta, 1899)

As outlined in *Mikisew*, the Crown had intended to build a winter road through the First Nation’s Peace Point Reserve, with their decision being informed by public comment only, and not consultation with the First Nation. Referring directly to the Treaty text, and acknowledging the stated agreement that surrendered lands ‘from time to time’ would be ‘taken up’, the Supreme Court noted the absence of detail by which this process is supposed to occur. Deciding that ‘the Crown was and is expected to manage the change honourably’ (*Mikisew*, para 31), the SCC filled this procedural gap with the duty to consult and accommodate.

The trigger for this duty to consult was set at a low threshold in *Haida* (para 35), where the Court found it to arise when ‘…the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it’. Building on this, *Mikisew* (para 34) stated that, in a Treaty context, government is presumed to be aware of the presence of any rights, thereby shifting the trigger from determining the potential existence of a right to determining the ‘…degree to which conduct contemplated…would adversely affect those rights’. Low threshold aside, the duty has a ‘variable content…once triggered’ (ibid). This means that the extent and character of any consultation is dependent on either the strength of the claim to title or rights, or the seriousness of the harm that may result from the proposed activity. *Haida* (paras 43 - 44) clarified this further, stating that:

*…where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor…the only duty on the Crown may be to give notice, disclosure information, and discuss any issues raised in response to the notice…At the other end…deep consultation, aimed at finding a satisfactory interim solution, may be required…[which]…may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.*

In the case of Treaties, the specific agreements reached within their text have a bearing on the depth of consultation required. This is determined by a range of factors, including the clarity of promises made under the particular Treaty; the seriousness of impact resulting from proposed Crown actions; the history of dealings between the two parties; and whether the Treaty provides a framework to manage foreseen changes in land use (*Mikisew*, para 63). Importantly, the adequacy of this consultation is determined by what the Court refers to as the ‘informational’ and ‘response’ components of the duty (ibid: para 64). This ultimately renders government responsible for not only providing Aboriginal peoples with the relevant information in a timely way, to allow for the expression of interests and concerns, but also for ensuring that their representations are seriously considered and, if possible, integrated into the proposed plan of action (ibid).

This obligation, to conduct a recursive process of consultation which can effect change in the original plans, brings attention to the duty to accommodate, or what Laidlaw and Passelac-Ross (2014:7) refer to as ‘…the substantive component of the duty to consult’. However, while *Mikisew* (para: 54) notes that ‘…consultation that excludes from its outset any form of accommodation would be meaningless’, the process of consultation ‘…does not give Aboriginal groups a veto over what can be done with the land’ (*Haida*, para 48). Instead, the Court found that consultation invokes the need for ‘[b]alance and compromise…’ between competing interests in order to ‘move further along the path of reconciliation…’ (ibid: para 50). The applicability of this view is limited when considered in the context of already-established Treaty rights. As Laidlaw and Passelac-Ross (2014: 8) make clear, the *Haida* judgement referred only to situations in which Aboriginal claims were asserted but as yet unproven, stating that, actually, the substantive rights conferred by Treaty ‘…requires a higher duty of accommodation on part of the Crown than in a pre-proof context’. As the Court acknowledged in *Mikisew* (para 48):

*If the time comes that in the case of a particular Treaty 8 First Nation, “no meaningful right to hunt” remains over its traditional territories, the significance of the oral promise that “the same means of earning a livelihood would continue after the treaty as existed before it” would clearly be in question, and a potential action for treaty infringement, including the demand for a Sparrow justification, would be a legitimate First Nation response.*

This recognition leads Laidlaw and Passelac-Ross (2014: 8) to conclude that, in a Treaty context, consultation and accommodation should be framed by the principles of the *Sparrow* test. As a necessary corollary, the Crown’s obligation to protect the rights conferred therein would expand, as would the range and ‘depth’ of consulting and accommodating measures. Ultimately, this is because ‘…only demonstrably compelling and substantial objectives can trump Treaty rights’ (ibid). Sparked by the *Mikisew* judgment, and in an attempt to ensure that its agencies operated in accordance with these cases, the Government of Alberta published its first policy on First Nation consultation in 2005 and released a later one in 2013.

### 3.3.2 The ‘Approval’ Stage and the Content of the ‘Public Interest Test’

Following consultation with First Nations and engagement with public stakeholders at the ‘planning’ stage, there is further opportunity for non-elite participation in decision-making at the subsequent ‘approval’ phase of the regulatory process. This references the stage at which public hearings are called by the energy regulator, being triggered by a First Nation or interested party submitting a ‘statement of concern’ about a particular project. Indeed, these concerns may have been carried over from the previous ‘planning’ phase if a proponent failed to sufficiently mitigate those originally raised by a First Nation or stakeholder. These hearings allow for the energy regulator to judge an application ‘…on a case-by-case basis, taking into account the specific facts and circumstances of each application in addition to any statements of concern received’ (AER, 2016). There are issues around whom the energy regulator permits into these hearings, which is based on an increasingly narrow determination of whether parties are ‘directly and adversely affected’ (see Fluker, 2015; Lucas, 2002). This has made participation ‘…subject to an exclusionary process of filtration, in which potential opponents of development are defined as illegitimate participants’ (Bowness and Hudson, 2013: 71). While this can be an issue for First Nations, they have participated in the majority of the hearings held on the largest of existing oil sands projects. As such, it is the means by which these concerns have been dealt with once inside the hearings that is of primary concern in this study.

Within the ‘approval’ stage of the regulatory process, the overarching body in charge of regulating oil sands expansion through public hearings is the provincial energy regulator. As a government agency, it has undergone a number of changes over the last twenty years, much like those responsible for determining the ‘adequacy’ of consultation at the ‘planning’ stage of the process (see Section 3.3.1). Although the regulation of energy resources dates back to 1932, with the creation of the Turner Valley Conservation Board, of initial focus here is the Alberta Energy and Utilities Board (AEUB), which entered into being in February 15th 1995 under the Alberta Energy and Utilities Board Act (Government of Alberta, 2016c). This merged the previous functions of the ERCB and the Public Utilities Board (PUB) into a single entity. According to Doern and Gattinger (2003: 136), ‘[t]he lion’s share of the AEUB mandate originates from the ERCB, which had regulatory authority over virtually all aspects of energy resource development’. This holds significance because, as Low (2009a: 3) notes, ‘[t]he overarching policy objective for the ERCB has always been the orderly development – with the emphasis on development – of the province’s petroleum resources’. Indeed, the purpose of the merger was to ‘provide a more streamlined and efficient regulatory process’ (Government of Alberta, 2016c).

In 2008, the Alberta Utilities and Commission Act split the AEUB into the Alberta Utilities Commission (AUC) and the ERCB. The former undertook the responsibilities of the PUB while the latter regulated fossil fuel development and pipelines unrelated to gas utilities (Low, 2009a). This created a single body with a consolidated mandate to ‘…promote efficiency in Alberta’s energy regulatory system…’, and to ensure that it ‘…can effectively manage growth pressures and provide all Albertans with a robust regulatory authority...that can make timely decisions to capitalize on opportunities that are in the public interest’ (Alberta Ministry of Energy, quoted in Low, 2009b: 32). Between 2008 and 2013 the ERCB approved the Total E&P Josylin North project (ERCB, 2011), also being involved in the approval process for the expansion of Shell’s Jackpine mine in 2013. However, before this could be completed the energy regulator underwent another substantive change. This resulted from a number of provincial government reports on improving competitiveness, particularly in the natural resources sectors. Indeed, the Regulatory Enhancement Taskforce was established in 2010 with the purpose of providing guidance towards this goal. One of the six recommendations made to government in its final report was to ‘[e]stablish a single regulatory body with unified responsibility for policy assurance (regulatory delivery) of upstream oil and gas development activities’ (Government of Alberta, 2011b: 14). This led to the creation of the AER in 2012, under the Responsible Energy Development Act (REDA) of the same year (Government of Alberta, 2012b).

The AER replaced the ERCB in 2013, taking over all its regulatory functions whilst heralding ‘…a new governance structure that will achieve the benefits of strong corporate oversight and independent adjudication of energy applications throughout the hearing process’ (AER, 2013a). Entirely funded by industry (AER, 2014a: 4), the AER is ‘…responsible for all projects from application to reclamation’, turning it into a ‘one-stop shop’ by also giving it jurisdiction over the mineral and surface right disposition, water permit and investigatory responsibilities previously maintained by the Ministry of Environment and Sustainable Resource Development (ESRD) (Canadian Association of Petroleum Landmen, 2013: 1). While the consultation responsibilities of the ESRD were moved instead to the ACO (see Section 3.2.1), the AER was essentially made responsible ‘…for all projects from application to reclamation’ (ibid). As these changes began during Shell’s application for expansion of its Jackpine Mine the eventual public hearing was conducted by the AER and, as such, considered the requirements outlined under both the ERCA and its replacement, the REDA (see AER, 2013b). This was done according to the ‘transitional provisions’ outlined under Section 83 (2) of the latter legislation, noting that ‘…any approval issued or any order, declaration made or issued by the former Board before coming into force of this section continues to have effect…until it expires or is amended or terminated…’ (Government of Alberta, 2012b: 37). Alongside the continuity of staffing seen between the regulatory agencies (see AER, 2014b), this demonstrates additional continuity amongst some of the key legislative features of public hearings across the entirety of large-scale, open-pit oil sands approvals over the past two decades.

Despite these organisational changes the structure of the regulatory process has remained consistent, as has the ‘public interest test’ deployed by the regulatory panels within public hearings. Between 1995 and 2000, one of the AEUB’s ‘primary roles’ was to ‘…adjudicate and regulate energy developments and utility rates in the public interest’ (Alberta Ministry of Energy, 1999: 22). At this point direction was provided by the subsequently amended Oil Sands Conservation Act Regulation 76/88, with its requirement to ‘…ensure orderly, efficient and economical development in the public interest of the oil sands resources of Alberta’ (Government of Alberta, 2000a: Sec. 3(a)). Between 2000 and 2008, before the AEUB was replaced by the ERCB, the primary piece of legislation governing hearing panel decisions was the Energy Resources Conservation Act (ERCA) (Government of Alberta, 2000b). This continued to direct panel decision-making processes towards the ‘public interest’:

*Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.*

(ibid: Sec. 3)

The period of 2008 and 2012 saw this same piece of legislation govern the ERCB at the hearings, despite there being no definition of ‘public interest’ or ‘the public’ in either the ERCA (ibid) or the Alberta Interpretation Act (Government of Alberta, 2000c). Despite this, the phrase ‘public interest’ is deployed throughout other legislation administered by the ERCB, including the Oil Sands Conservation Act (Government of Alberta, 2000a: Sec. 3(b)) and the Pipeline Act (Government of Alberta, 2000e: Sec. 4(a)). This was the case until 2012, when the REDA replaced the ERCA, leading to the concurrent replacement of the ERCB by the AER. This was a noteworthy modification because the REDA also removed the ‘public interest’ mandate from the regulatory hearing panels. However, as this is a relatively recent development, all the open-pit mines in the oil sands have been approved under the justificatory rubric of the ‘public interest’.

Due to its role in the expansion of the large oil sands mines, and its apparently mercurial quality, use of the ‘public interest test’ within the ‘approval’ stage has attracted a small degree of scholarly attention. Writing in 2008, just after the AEUB split into the ERCB and the AUC, Hierlmeir’s (2008: 4) analysis of hearing decision documents leads her to the conclusion that the public interest has ‘become shorthand’ and ‘replac[ed] the reasoning for decisions’. Observing that ‘[i]f the public interest was mentioned, it was often as a brief comment which justified approval of a project’ (ibid), Hierlmeir (ibid: 5) goes on to conclude, that ‘some may argue’ operator acquisition of mineral rights prior to the hearings generates an economic interpretation of the ‘public interest’. Three years later Low (2011) conducted a larger study aimed at identifying how the hearing panels both interpret the ‘public interest’ and address those concerns seen as encompassed by its remit. In noting that the hearing panels tend to ‘...presume that Albertans as a whole are interested in having the province’s energy resources developed without interpretation to reap the attendant economic benefits’ (ibid: 29), Low describes a situation in which ‘public interest’ determinations are contingent on those issues submitted within statements of concern by intervening parties.

While providing important information on the flexibility built into the ‘approval’ stage of the regulatory process, this literature is largely concerned with distilling the meaning of the ‘public interest’ as interpreted by the hearing panels and in accordance with occasionally competing legislative requirements (see Low: 2011: 29). As such, comparably little attention is given to the way in which prioritisation of economic interests may be the routine manifestation of a broader, institutionalised environmental philosophy which is blind to the tensions between industrialisation and conservation (see Section 3.2). A response to this is made possible by the parity between the primary legislation governing hearing panel deliberations and the concept of ‘sustainable development’ outlined above (see Section 3.2). Taking the ERCA as the point of departure, the considerations underpinning the ‘public interest’ mandate are present in its requirement to ‘…give consideration to whether the project is in the public interest, *having regard to the social and economic effects of the project and the effects of the project on the environment’* (Government of Alberta, 2000b: Sec. 3, emphasis added). The implied need to balance this trio of factors is also visible in the latest mandate granted by the REDA, despite much being written on its apparent removal of the ‘public interest test’ from its text (see Nikiforuk, 2015). As stated in the Section 3 of the REDA General Regulation:

*For the purposes of section 15 of the Act, where the Regulator is to consider an application or to conduct a regulatory appeal, reconsideration or inquiry in respect of an energy resource activity under an energy resource enactment, the Regulator shall consider*

1. *the social and economic effects of the energy resource activity,*
2. *the effects of the energy resource activity on the environment,*
3. *the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located.*

(Government of Alberta, 2012b: Sec. 3)

Although this latest legislation adds a fourth factor for consideration, landowners, to the deliberation process, the essential requirements remain the same. As such, since 2000, oil sands projects have been approved within a hearing process that seeks to balance social, economic and environmental factors in pursuit of a ‘public interest’ determination; the trio of factors central to the concept of ‘sustainable development’ (see Chapter 3.2). This consistency, across hearing panel deliberations and overarching oil sands policies, provides a point upon which the analytical lens can be directed to examine the environmental philosophy cutting across institutional-organisational forms, to permit oil sands expansion at the 'approval' stage of the regulatory process.

## 3.4 Conclusion

Despite the limitations outlined in Section 3.1, existing explanations for the environmental harm detailed in Chapter 2 have provided detailed insight into the multiple and varied state and corporate, political and economic, factors operating to precipitate its production and reproduction. However, it has also raised a number of areas in which further research is needed. The most substantial gap is that pertaining to the regulatory process governing industrial expansion over the fifteen years in which contemporary oil sands production has been sanctioned. While existing studies focus at length on a myriad of outcomes pursued by political and economic elites at the national and international levels, very few explain how these same forces operate both upon and within the structure of the provincial regulatory process itself. In this sense, there is a need to adopt an approach sensitive to active contextualisation, where attention is given to the effect these broader characteristics may have upon the regulatory process whilst being simultaneously open to unforeseen and unexpected influences. Existing research has also highlighted the need to account for the fundamental role played by First Nations within this regulatory process, and the way in which their substantive and procedural rights appear to have been overlooked during oil sands expansion. The lack of dedicated attention given to the role of First Nations within this process must be remedied if a full appraisal of the situation is to be achieved.

This study aims to address these existing limitations by evaluating the regulatory process outlined in Section 3.3 through the prism of ‘sustainable development’ drawn out in Section 3.2. The fundamental tension drawn out in the latter, between an eco-philosophy that pursues accelerated industrialisation through techno-scientific efficiencies and another that advocates its deceleration via ‘non-elite’ participation, mirrors the two operational stages of the regulatory process. Indeed, the ‘planning’ stage represents the point at which ‘non-elites’ may exert control over the push for industrialisation, while the subsequent ‘approval’ stage provides insight into how social, economic and environmental considerations have been weighed in the process of its repeated sanctioning. While this entails a degree of simplification, it provides a suitable lens through which to analyse the regulatory process, the form of ‘sustainable development’ it has been tasked with pursuing, and the extent to which First Nations have been able to influence those oil sands projects that have passed through its stages. As such, this research will aim to establish the environmental philosophy underpinning provincial policies and strategies for the ‘sustainable development’ of the oil sands before examining whether, if at all, this is being operationalised by the regulatory process in its issuance of approvals. This will provide detail on the ‘driving forces’ and ‘justifications’ for economic growth spoken of by Spangenberg (2010: 561), and explain the environmental philosophy underpinning the 'sustainable development’ advocated in policy and that realised in practice. Similarly, the research will establish how the duty to consult and accommodate First Nations has been actualised within the regulatory process, and identify the factors acting within it to produce and reproduce these interpretations.

# 4. Methodology

This chapter outlines the research questions and sub-questions that this study sought to answer in response to the issues discussed in Chapters 2 and 3. It also details the specific methodology used to provide these answers. These elements are presented in sequence. Section 4.1 builds on the existing research gaps that were consolidated in Chapter 3.1.6, outlining the specific research question and sub-questions that emerged in accordance with the information outlined in Chapters 2 and 3. Section 4.2 details the ontological and epistemological assumptions that underpin the methodology, explaining their direct relevance to this study and its concern with the meso and micro levels of the regulatory process. This is followed by Section 4.3, where the choice to build the research into an ‘intrinsic’ case study design informed by a ‘multi-methods’ approach is justified. Accompanying this is an explanation focusing on the suitability of an ‘adaptive’, as opposed to the more traditional inductive or deductive, approach to theoretical development. Section 4.4 outlines the sampling method used, whereas Section 4.5 discusses the more practical issues faced when attempting to gain access to participants involved with the regulatory process. The multiple approaches adopted to both collect and analyse data are detailed in Section 4.6, with the chapter ending with an examination of the ethical issues encountered during the fieldwork in Section 4.7. This latter section also gives consideration to the questions surrounding the conduct of ‘outsider’ research with indigenous peoples. Taken together this chapter details the methodological underpinnings of the five chapters that follow, beginning with the research questions and sub-questions to which answers were being sought.

## 4.1 Research Questions

To recap Chapter 3.1.6, while existing explanations of indigenous environmental victimisation in the oil sands have made important contributions, the body of literature is limited in its ability to explain how environmentally harmful patterns of economic production have been prioritised over the land-based cultural interests of First Nations. To address this, language adapted from the state-corporate crime literature was used to direct attention towards two specific spheres of activity (see Chapter 3.1.6). First, the term ‘catalysts for harm’ was used to reference institutionalised pressures to expand the oil sands industry in both policy and the ‘approval' stage of the regulatory process. Secondly, ‘mechanisms for control’ denoted the similarly institutionalised ways in which the legal duty to consult and accommodate with First Nations were actualised at the ‘planning’ stage, and served to interrupt or modify the proposed expansion. With regard to the former of these categories, existing literature focuses disproportionately on national and international political and economic pressures, giving little detail on provincial government attempts at ‘sustainable development’, or the way in which such attempts are operationalised by supposedly independent regulatory panels in their pursuit of a ‘public interest’ determination (see Chapter 3.3.2). Indeed, the regulatory process governing expansion is effectively absent within existing accounts (see Chapter 3.1.6). With regard to the latter ‘control’ stage, existing literature tends to characterise First Nations solely as victims, thereby overlooking their role as key participants in the regulatory process. This ignores their legal duty to be consulted on proposed oil sands projects and have their specific concerns accommodated (see Chapter 3.3.1). By extension, there is an absence of information on how this duty to consult and accommodate, which is supposed to prevent adverse impacts coming to the more substantive features of First Nation Treaty rights (see Chapter 3.3.2), has been interpreted by regulatory personnel tasked with its actualisation. Relatedly, there is little information on why such an interpretation is being deployed. With the aim of addressing these existing limitations, four sub-questions underpin the central research question. These are as follows:

*Central Research Question:*

How, and to what extent, does the regulatory process governing oil sands expansion prioritise economic production over the land-based cultural interests of First Nations?

*Sub Questions:*

1. What environmental philosophy is underpinning provincial strategies for the ‘sustainable development’ of Alberta's oil sands resource?
2. To what extent is this environmental philosophy being operationalised by the regulatory process in the pursuit of ‘sustainable development’?
3. How has the duty to consult and accommodate been actualised within the regulatory process to permit operationalisation of this environmental philosophy?
4. What influences are being exerted within the regulatory process to produce this actualisation?

The first two sub-questions correspond to the ‘catalyst’ category. Sub-question one directs attention to the type of environmental philosophy underpinning provincial government pressures to pursue ‘sustainable development’ in the oil sands, thus providing detail on the overarching instruction provided by the policy and strategy context in which the regulatory process is situated. Sub-question two is concerned with drawing out the way in which these overarching imperatives are operationalised at the ‘approval’ stage, providing information on how environmental concerns are being ‘balanced’ against social and economic benefits by the hearing panels in pursuit of a ‘public interest’ decision. This provides the most visible account of how oil sands projects have been repeatedly sanctioned by regulatory agencies over the years, despite increasing levels of indigenous and public opposition warning of their detrimental consequences. Sub-questions three and four correspond to the category of ‘control’, directing attention to how and why the duty to consult and accommodate has been unable to interrupt the directing relationship between government policy and the hearings at the ‘approval’ stage, and thus protect the Treaty rights of First Nations in the process. More specifically, sub-question three is concerned with ‘how’ this legal protection has been actualised, whereas sub-question four asks ‘why’ this is so. Taken together, these four sub-questions have produced a detailed account of the situation in the oil sands, and the way in which indigenous environmental victimisation has been produced and reproduced over time by a regulatory process that, on the surface, is tasked with both ‘sustainable development’ and the protection of Treaty rights. Attention will now be directed to the specific methods used to address these questions.

## 4.2 Ontological and Epistemological Positions

The ontology of social constructionism and the epistemology of interpretivism broadly inform this inquiry. Under the former, ‘…social phenomena and categories are not only produced through social interaction but…they are in a constant state of revision’ (Bryman, 2008: 19). Outlining its defining features, Burr (2003: pp. 2-5) describes a number of ontological characteristics, including a ‘critical stance toward taken-for-granted knowledge’, ‘historical and cultural specificity’, a recognition that ‘knowledge is sustained by social processes’, and that ‘knowledge and social action go together’. As such, social constructionism can be summarised as:

*…the view that all knowledge, and therefore all meaningful reality as such, is contingent upon human practices, being constructed in and out of interaction between human beings and their world, and developed and transmitted within an essentially social context.*

(Crotty, 1998: 42)

Such a position challenges the idea that categories exist as realities external to individuals, acknowledging instead that people play an active role in their construction and reconstruction over time. To take ‘government agency’ as an example of such a category, focusing on the way in which its formal properties produce order through rules and regulations tends to obscure the degree to which these are actively negotiated by its personnel, assuming instead that order is instilled through the rigid and authoritarian imposition of such properties. In this scenario, constructionists would likely give attention to how order within an organisation is sustained through interpretation and mediation of rules by personnel over time, and not assume its injection by higher levels of government onto effective automata at the more operational levels of the bureaucracy (see Strauss et al, 1963). Indeed, it is for this reason that the ontology of constructionism corresponds with the epistemology of interpretivism, where the positivist inclination to separate subject and object is avoided by proceeding from the basis that social reality is not distinct from an individual’s knowledge of it (Cohen and Crabtree, 2006). As such, it is the interaction between individuals, and the meanings they assign to various interpretations of social phenomena, that become the targets for inquiry (Grix, 2010).

With this in mind, a core aspect of this research centres on the way in which regulatory personnel interpret and operationalise institutional instructions at each stage of the process, thereby facilitating the prioritisation of economic production over the land-based cultural interests of First Nations. As noted in Chapter 3.3, this directs the analytical lens towards the more meso-organisational and micro-individual aspects of the regulatory process, addressing the tendency in existing literature to concentrate overwhelmingly on more macro-level influences (see Chapter 3.1). With regard to the ‘planning’ stage, the investigation focuses on regulatory interpretation and actualisation of the duty to consult and accommodate as handed down by the SCC (see Chapter 3.3.1). In particular, it seeks to identify not only the way in which this has been actualised, but to understand the influences exerted upon the regulatory personnel acting to operationalise this specific interpretation. Indeed, this stage acts as a key juncture at which the Treaty rights of First Nations have the potential to be protected, so an examination of how it is overcome in the process of ensuring an expansive pattern of production forms a necessary component to the explanation. With regard to the ‘approval’ stage of the process, inquiry is directed towards the way in which hearing panel personnel deliberate over the legislative requirement to balance social, economic and environmental interests when deciding whether a proposed oil sands project is in the ‘public interest’ (see Chapter 3.3.2). More specifically, this stage seeks to understand how First Nation concerns pertaining to environmental issues are addressed as part of this requirement to ‘balance’ interests, providing detail on the specific form of ‘sustainable development’ being operationally advocated and clarifying the environmental philosophy underpinning its pursuit.

Ultimately, key features of the regulatory process are constructed by those with the responsibility for their operationalisation, and it is on this basis that the ontology of social constructionism and the epistemology of interpretivism broadly inform the methodology for this study. As Bailey (2007: 53) explains, the intepretivist paradigm ‘…focuses on social relationships, as well as the mechanisms and processes through which members in a setting navigate and create their social worlds’, seeking to ask ‘…what kinds of things people do, how they do them, what purpose activities serve, and what they mean to participants’. Whether concentrating on consultation and accommodation at the level of ‘planning’, or the balancing of social, economic and environmental interests at the level of ‘approval’, a rich understanding of how economic production is prioritised cannot be achieved unless it is acknowledged that each stage requires regulatory personnel to both interpret and act upon the relevant government guidance within an institutional setting. Corresponding with Bailey’s (ibid) above questions, and in light of the lack of existing literature on this area (see Chapter 3.1.6), attention needed to be directed at not only the ‘what’ is happening within each stage, but also ‘why’. It is for this reason that research sub-questions one, two and three are primarily concerned with the former of these points of inquiry, while four is tasked with the latter (see Section 4.1). Considering also that the text-based, interpersonal nature of these stages is characterised not by quantitative, statistical data, but its qualitative counterpart, then these ontological and epistemological positions also correspond with the medium through which the meanings inherent to each stage are presented, constructed and reconstructed.

## 4.3 Research Strategy and Design

The research strategy was tailored towards the collection of both primary and secondary qualitative data, using a mixed methods approach embedded within a case study research design. Considering the types of questions outlined in Section 4.1, the case study research design is particularly suited to their address. As Yin (2003: pp.9-10) notes, this approach should be considered when the focus is on answering ‘how’ and ‘why’ questions, and when contextual conditions surrounding a phenomenon are relevant to the analysis. More specifically, an ‘intrinsic’ case study research design was used. The alternative, ‘instrumental’ design was avoided because of its emphasis on illustrating an issue or theory as opposed to understanding a case in and of itself (see Chapter 3.1.3). Its ‘collective’ counterpart was also avoided because of its overriding focus on ‘…obtain[ing] generalisations pertaining to a population of cases’ (Stake, 2005: 448). In contrast, an ‘intrinsic’ design is not intended to build theory generalisable to a plurality of cases, at least not in the first instance, but to ‘…strive to capture the richness and complexity of the case’ (Grandy, 2010: 500). In this sense, ‘intrinsic’ designs are better suited to a specific type of generalisation not prioritised by its ‘instrumental’ or ‘collective’ counterparts, as Stake (2000: 23) explains:

*Often…the situation is one in which there is a need for generalization about that particular case or generalization to a similar case rather than generalization to a population of cases. Then the demands for typicality and representativeness yield to needs of assurance that the target case is properly described.*

Considering the geographical specificity of the indigenous environmental victimisation examined in Chapter 2, and the similarly fixed nature of the oil sands industry involved in its production and reproduction, then the suitability for using an ‘intrinsic’ case study design to research this specific situation in and of itself is quite clear. This is particularly so when also considering the lack of existing meso-organisational and micro-individual data on the regulatory process permitting expansion of the industry (see Section 4.1; Chapter 3.1.6). Ultimately, as Baxter and Jack (2008: 5) note, an intrinsic case study design ‘…is not undertaken primarily because the case represents other cases, or because it illustrates a particular trait or problem, but because in all its particularity and ordinariness, the case itself is of interest’.

In this context, a case study research design is not unusual. It is recognised more generally as being ideally suited to situations requiring investigation of ‘…contemporary phenomena within its real-life context, especially when the boundaries between phenomena and context are not clearly evident’ (Yin, 2003: 13). Furthermore, its focus on a singular case in point is deemed the most appropriate for comprehensive examinations into distinctive and complex phenomena such as this (Baxter and Jack, 2008). Indeed, the intrinsic case study design is almost ubiquitous in research involving state and corporate elites (see Kramer, 1992; Matthews and Kauzlarich, 2000; Mullins and Rothe, 2007; Smandych and Kueneman, 2010), providing the ‘optimal method for researching situations that are culturally or politically sensitive and where access to data sources are limited’ (Reed and Padskocimaite, 2012: 10). This is a key consideration as powerful groups are likely to ‘conceal and classify documents that implicate wrongdoing’ (Matthews and Kauzlarich, 2000: 282) and, as is the case in the oil sands, use misinformation to divert attention away from the harms being committed (Smandych and Kueneman, 2010). Such complications further justify the use of this design, as its ‘…unique strength is its ability to deal with a full variety of evidence – documents, artefacts, interviews and observations…’ (Yin, 2003: pp.7-8; see Stake, 1995). As such, the case study design introduces a flexibility needed to not only account for issues surrounding a potential lack of data quality and quantity, but also provides opportunities for support across multiple data sources and methods where desirable, and where the requisite data can be obtained (Johansson, 2003).

While justifying the use of a case study design, along with the focus on a particular case, is important, ‘[t]he limits or boundaries of the case are a defining factor of case study methodology’ (Hyett et al, 2014: 7). Indeed, without such limits there arises the temptation to ‘…cover “everything”…which is impossible to do’ (Yin, 2009: 29). As such, outlining what ‘the case’ actually encompasses is an important way in which to provide the clear methodological descriptions needed for the research to be considered both credible and systematic (Cresswell, 2013). There are a variety of means by which case boundaries can be established, including by participants and geography (Yin, 2014), time and place (Cresswell, 2013), by group, community, settlement, and nation, or by a singular event or sustained process (Miles and Huberman, 1994). The boundaries of this study are primarily determined by procedural considerations, meaning they are tied to the regulatory process governing industrial expansion in the oil sands (see Chapter 3.3). This grants the flexibility to account for the myriad of government agencies, groups and actors involved in its ‘planning’ and ‘approval’ stages, and the influences upon them, whilst anchoring it to the process directly responsible for sanctioning environmentally harmful industrial expansion.

There is also an important temporal boundary, as the focus on regulatory procedure is limited to its activities since 1995. This has been established for three reasons. Firstly, the mid-90s can be seen as the point of inception for the oil sands industry in its contemporary form (see Chapter 1; Chastko, 2007). Prior to this there was a small number of large, government-backed projects, but nothing compared to what followed the period of unprecedented investment of the mid-1990s and beyond. As such, it is the growth during this period, and its concomitant increase in ecological additions and withdrawals, that is most directly associated with the indigenous environmental victimisation explored in Chapter 2. Secondly, 1995 is the point at which the National Task Force on Oil Sands Strategies published its plan to initiate rapid oil sands development using a new royalty regime (see Government of Alberta, 1995). Finally, the mid-1990s forms the initial point at which records of energy regulator deliberations on oil sands project applications are publicly available, anchoring this temporal boundary to that of data availability. As these records demonstrate how hearing panels at the ‘approval’ stage of the regulatory process have responded to First Nation concerns over the past two decades, and how they have sought to balance social, economic and environmental interests in pursuit of ‘public interest’ determinations, then analysis of the records from this initial point onwards provides important data on how all large-scale oil sands projects have been approved over the past twenty years. Furthermore, the duty to consult and accommodate First Nations, which is actualised at the ‘planning’ stage of the regulatory process, was not established until the *Mikisew* decision of 2005 (see Chapter 3.3.1). As such, extending the time frame prior to the mid-1990s, for either of the key stages in the regulatory process, was deemed unnecessary.

The position adopted towards theoretical development within this case study approach was neither ‘deductive’, where empirical data is used to test theory, nor ‘inductive’, where it is generated from the findings. Instead, Layder’s (1998) ‘adaptive’ approach was used to guide the role of theory in the research. Developed as a means of treading a path between the staunchly inductive approach to theory development characterised by grounded theory (see Strauss and Corbin, 1997), and the more deductive reasoning used in positivist work, Layder’s (1998) formulation overcomes the annexing of prior theoretical concepts seen in the former, and the focus on hypothesis-testing emphasised by the latter. As an ‘accretive’ (ibid: 25) position, adaptive reasoning advocates the recursive movement between theories and concepts realised *a priori* and those developed from empirical data. As Layder (ibid: 132) describes it, the approach ‘...both shapes, and is shaped by the empirical data that emerges from research. It allows the dual influence of extant theory (theoretical models) as well as those that unfold from (and are enfolded in) the research’. The present study was conducted according to this guidance. Not only were the research questions directly formulated from the contributions and gaps identified in existing literature (see Section 4.1; see also 3.1.6), tying them to *a priori* concepts and theories associated with ‘sustainable development’, environmental philosophies and Treaty rights, but the data collection and analysis built on this to utilise their inferred content along with notions, concepts and theories previously unheeded. In this way, emerging data was not forced into existing frameworks or schemas beyond the initial direction provided by the literature-informed research questions. Similarly, codes, categories, themes and concepts were formed as the data was collected and analysed, while others were discarded entirely.

One final aspect of adaptive reasoning that has relevance here is its sensitivity to the relationship between agency and structure, and the associations between micro and macro levels of analysis. This is applicable in light of its emphasis on moving recursively between theory derived from primary data and *a priori* conceptualisations, as the majority of existing literature operates at the macro-level of political economy (see Chapter 3.1). In this sense it concentrates on broader structures while obscuring the more organisational and personal dimension inherent to the regulatory process. As Layder (1998: 25) explains, the adaptive approach ‘…centralizes the interconnections between, on the one hand, actors’ meanings, activities and intentions (lifeworld) and, on the other, culture, institutions, power, reproduced practices and social relations (system elements)’. This is well-suited to this particular study as not only is the regulatory process situated within a policy context that channels the Government of Alberta’s political and economic priorities downwards, thus exerting influence, but each stage in the process includes substantive degrees of human interaction and deliberation (see Chapter 3.3). Whether this is at the ‘planning’ stage, between First Nations, industry and Government of Alberta agencies, or between First Nations and hearing panel personnel at the ‘approval stage’, the focus placed by adaptive reasoning ‘…on the multifarious interconnections between human agency, social activities and social organisation (structures and systems)’ is well-suited to a contextualised analysis of this process without overly fetishising the organisational form (ibid: 133).

### 4.3.1 Multi-methods Approach

Within this case study design an integrated ‘multi-method’ approach was adopted, of which there are divergent opinions as to what such a term actually refers to. Many deploy it to reference approaches more generally associated with ‘mixed-methods’ research (see George and Bennett, 2005; Noaks and Wincup, 2004), thus deferring to studies combining quantitative and qualitative methods (see Denscombe, 2010; Bryman, 2006). Others use ‘multi-methods’ interchangeably with ‘mixed-methods’, referring to designs which avoid combining different data types but which bring together multiple methods of *either* a qualitative or quantitative disposition (see Hoffman, 2009; Alexander et al, 2008). In accordance with the qualitative data needed to answer the research questions (see Chapter 4.1), the social constructionist ontology, interpretivist epistemology (see Chapter 4.2), and the qualitative research strategy tied to the adaptive approach to theoretical development, this study uses the term ‘multi-methods’ as deployed by Tashakkori and Teddlie (2003), which references the latter of these meanings. In short, ‘multi-methods’ here denotes integration into the research design of multiple methods aimed at gathering qualitative data.

The term ‘multi-methods’ requires clarification as to exactly what qualitative ‘methods’ are being referenced, and how these ‘multiple methods’ relate to one another. In this study the methods pertain to both the data collection and analysis stages of the study. They include thematic analysis, as applied to policy, strategy and hearing documents, and the transcriptions generated from interviews with those involved in the regulatory process. Section 4.6 contains a more detailed discussion on their specific content, but with regard to the relationship between methods Alexander et al, (2008: 135) note that:

*…words such as ‘triangulating’, ‘integrating’, ‘combining’ and ‘mixing’ are often used interchangeably. This tends to obscure some important differences, particularly between the outcome of using mixed methods and the process by which different data sets are brought together.*

In response to this ambiguity, Moran-Ellis et al (2006: 45) suggest differentiating between ‘combining’ methods and ‘integrating’ methods. The former of these refers to a design in which one method is adjunct to another, with a former instrument improving the depth or quality of the latter ‘…rather than positioned as making an equal contribution to knowledge about the phenomenon‘ (ibid: 51). In contrast, ‘integrating’ methods ‘…requires that different methods (or types of data) are given equal weight and, with respect to operationalisation, oriented to a common goal or research question’ (ibid). As Figure 3 indicates, none of the methods were contingent on the sequential use of a prior instrument, and all made an equal contribution to answering the central research question. Even the dual use of thematic analysis on hearing documents and interview transcripts required to answer sub-research question 2 are not contingent on one another; both answered different facets of the same question. As such, the mixed methods deployed in this study have been ‘integrated’ as opposed to ‘combined’.

#### Figure 3) The Relationship between Multi-methods and the Research Questions

Thematic analysis of policy documents

Central Research Question

Thematic analysis of hearing documents and interviews

Sub- Questions

CRQ

Question 1

Question 2

Question 3

Question 4

Methods for Data Collection and Analysis

Thematic analysis of interview transcripts

While the relationship between methods is here characterised by ‘integration’, as they do not influence the operationalisation of one another but have equal status in answering the central research question, a final feature to consider is whether they are simultaneously or sequentially arranged (see Punch, 2005). This does not denote the point at which the methods are carried out, because under such an interpretation most studies could be described as ‘sequential’. Instead, the terms refer to the way in which the methods have been integrated with one another. In this study, the methods of both data collection and analysis occurred separately, isolated according to the research sub-questions to which they corresponded, before being brought together after their individual completion to provide an answer to the central research question. This is most clearly visible in the split between the findings chapters, 5, 6 and 7, which correspond to the polices and two stages of the regulatory process in focus, and the analysis chapters, 8 and 9, which provide more direct answers to the central research question under the terms of ‘catalysts’ for harm and the mechanisms for its ‘control’ (see also Chapter 4.1). This is not a ‘sequential’ design, as one type of data did not provide the basis for the collection of another (see Mertens, 2005: 292), but parallel, ‘simultaneous’ (Morse, 1991), or ‘concurrent’ (Cresswell, 2003). This was largely because an answer to the central research question could not have been reached without taking all of these individually-analysed findings together and understanding them as a whole (see Section 4.6).

Using this qualitative-specific multi-method approach within a case-study research design is justifiable on a number of grounds. The most immediately visible benefit is that it permits a broader array of data, from a variety of sources, to be collected in pursuit of the detail demanded by an intrinsic case study design than would be permitted if a single method was adopted (Greene et al, 1989). Indeed, such variety is useful for examining ‘…complex phenomena in real-world settings whereby the use of one single method would be unlikely to reveal a complete picture’ (Campbell et al, 2011: 377). More specific justifications can be seen in Greene et al’s (1989) five-fold typology of purposes for ‘mixed-method’ research. Two are particularly relevant to the qualitative ‘multi-method’ approach deployed here. Firstly, it can be seen to equip studies with a ‘complementarity’ (ibid: 258), allowing data to account for ‘…overlapping but also different facets of a phenomenon, yielding an enriched, elaborated understanding of that phenomenon’. Differing to triangulation, which most commonly focuses on improving the validity or credibility of a singular measure or concept through use of quantitative and qualitative methods (Denscombe, 2007: 346), ‘complementarity’ speaks to the ability of multiple methods to provide complex and contextualised information, at different analytical levels, on aspects of the same phenomenon. Considering that the research questions focus attention on the micro-individual and meso-organisational aspects of the research process, whilst retaining a sensitivity to the influence of broader structural and contextual factors upon its operation, then the integration of a ‘multi-methods’ approach into the research design has clear relevance to the study at hand.

Drawing from a second category within Greene et al’s (1989: 260) typology, the qualitative ‘multi-methods’ approach is also justified because it permits what the authors call ‘expansion’. Closely related to ‘complementarity’, ‘expansion’ references the benefits associated with a research design that can ‘…increase the scope of inquiry by selecting the methods most appropriate for multiple inquiry components’ (ibid: 259). As a detailed answer to the central research question could only be provided by addressing the sub-questions, and as each of these sub-questions refers to a different aspect of the research process, the expansionary nature of the ‘multi-method’ approach was deemed most suitable to this particular case. Indeed, in a later paper, which is more ambiguous regarding the combination of data paradigms ‘mixed methods’ is taken to refer to, Greene et al (2001) consider use of multiple methods to elicit greater ‘comprehensiveness’ within research. This is because use of multiple methods is seen to provide ‘…more complete accounts of social phenomena’ (ibid: 30-31), ‘[m]ore insightful understandings’ (ibid), as it can yield findings that are in conflict with one another, and ‘[i]ncreased value consciousness and diversity’ (ibid). This latter characteristic simply references the benefits of including multiple stakeholders, values and interests in a single study. Taken together, these features are advantageous when the collection of ‘rich’ or detailed data is needed to provide a comprehensive account of a particular situation, as required by the ‘intrinsic’ case study research design.

## 4.4 Sampling

While the research design incorporated three broadly consecutive research phases, each relied upon the same technique for ‘…selecting units of analysis…[to] maximise the researcher’s ability to answer research questions…’ (Tashakkori and Teddlie, 2003: 217). Known as ‘purposive sampling’, this form of non-probability sampling ‘…addresses specific purposes related to research questions…[generates samples which] are often selected using the expert judgment of researchers…and focus[es] on the “depth” of information that can be generated…’ (Teddlie and Tashakkori, 2009: pp.174-175). It has parity with a technique known as ‘selective sampling’, which entails ‘…the calculated decision to sample a specific locale according to a preconceived but reasonable initial set of dimensions…which are worked out in advance for a study’ (Glaser, 1978: 37; see also Ritchie et al, 2013). Ultimately, purposive sampling entails the deliberate selection of particular settings, person, documents or events for the information they can provide in response to a set of research questions (Maxwell, 1997).

This form of non-probability sample is highly compatible with intrinsic case studies (see Teddlie and Tashakkori, 2009), largely because such research designs are focused on examining single cases in great detail and have a disregard for making cross-case generalisations (Oliver, 2006). Indeed, non-probability samples are, along with case study designs, a common feature of ‘up-system’ research (Williams, 2012: 10). This is due to the difficulty in gaining access and also because elite groups are intrinsically small, making statistical sampling difficult to justify (ibid). While purposive sampling can be referred to more generally, Teddlie and Tashakkori (2009: 174) provide a four-fold typology of ways in which it is used; ‘[s]ampling to achieve representativeness or comparability’, ‘[s]ampling special or unique cases’, ‘[s]equential sampling’, and a final one focusing on a combination of these techniques. As this research design was loosely characterised by three phases of inquiry, two focusing on government documents and one on interviewing individuals involved in the regulatory process, purposive sampling was here chosen because of its ability to gather data on ‘…special or unique cases’ (ibid). As purposive sampling was manifest slightly differently across the phases of inquiry, the manner in which it was used within each will now be detailed in turn.

As Figure 3 notes, government policy and strategy documents were drawn upon for one of the research stages. These were sampled according to what Flick (2006: 123) terms an ‘*a priori* determination of sample structure’, where criteria for sampling ‘...have been developed independently of the concrete material analysed and before its data collection…’ (ibid). Such a process is common to most forms of purposive sampling, with the slight exception of its sequential sub-type (see below), as the sample is chosen prior to data collection, according to its ability to provide detailed answers to the research questions. That is the primary imperative for this approach to sampling. As such, in accordance with research sub-question one (see Section 4.1), those government policies and strategies directing the ‘sustainable development’ of Alberta’s oil sands resource were focused upon exclusively. Constrained by the 1995 cut-off point established as the temporal case study boundary (see Section 4.3), the final sample consisted of seven policies and strategies (see Table 1). These were specifically determined by the 2012 LARP, in that these are the documents it consistently designated as the ‘key…policies and strategies’ informing all five environmental management frameworks at its core (Government of Alberta, 2015c: 12; 2015d: 13; 2012c: 12; 2012d: 12; 2012e: pp.11-12). Put another way, the seven policies and strategies chosen for analysis are those which have been in place for the entire period in which the contemporary oil sands industry has existed.

While these environmental management frameworks designated other agreements, acts, regulations and authorisations as important, the seven outlined in Table 1 were chosen specifically for their level of detail with regard to the overarching government objectives for the oil sands resource, and the methods by which they are to be achieved. Indeed, while these frameworks refer to ‘policy’ and ‘strategy’ loosely, this study defines them according to their position in relation to government decision making. As such, ‘policy’ refers to those documents outlining broad government aims and objectives towards the oil sands industry, whereas ‘strategy’ refers to those documents detailing the actions designed to achieve these overarching goals.

##### Table 1) Government of Alberta Policies and Strategies Relating to Oil Sands Expansion

|  |  |  |  |
| --- | --- | --- | --- |
| Year Introduced | Year Replaced | Document Title | Designation |
| 1999 | 2008 | Alberta’s Commitment to Sustainable Resource and Environmental Management | Policy |
| 1999 | 2008 | The Regional Sustainable Development Strategy | Strategy |
| 2003 | Ongoing | The Water for Life Strategy | Strategy |
| 2008 | Ongoing | Launching Alberta’s Energy Future | Policy |
| 2008 | Ongoing | Alberta’s Land Use Framework | Strategy |
| 2009 | Ongoing | Responsible Actions | Policy |
| 2012 | Ongoing | Lower Athabasca Regional Plan | Strategy |

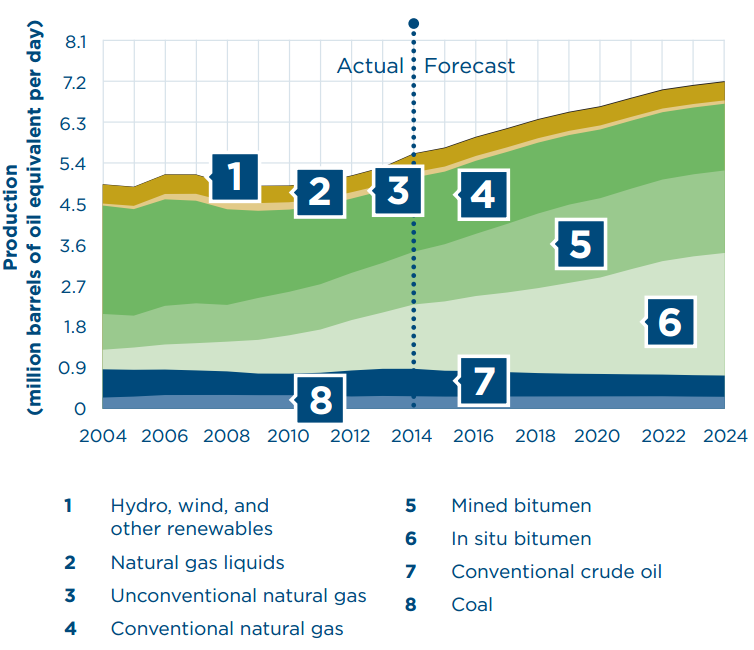
For the research phase focusing on the sanctioning of oil sands expansion at the ‘approval’ stage of the regulatory process, twelve public hearing records for open pit oil sands projects were examined. Sampling here was necessary because, as of the 5th January 2017, the Energy Regulator has issued 123,071 approvals for various project applications, of which 41,438 relate to pipelines, 16,917 to the drilling of wells, and 972 to oil sands projects (see AER, 2016). Many of these 972 are for what is known as ‘in-situ’ projects. These take various forms but the most common operations are known as ‘SAG-D’, which stands for ‘steam assisted gravity drainage’. SAG-D projects involve the drilling of two horizontal wells into an oil sands deposit 4-6 metres above one another. High pressure steam is injected into the uppermost well, heating the bitumen so that gravity causes it to flow into the lower well. This viscous material is then pumped from this second well to the surface. As Appendix IV illustrates, the number of in-situ projects greatly outnumbers their larger, open pit counterparts, which involve the more traditional, large-scale removal of surface land to access the bitumen resource, and are much more localised to those areas where the resource is close to the surface.

On first impression, this would suggest that any final sample of hearing documents should focus on in-situ projects, or at least include them within the sample frame. The central research question does seek to understand how oil sands production has been prioritised over its First Nation cultural counterpart, so it may appear purposeful to include within the sample the many in-situ projects alongside open pit operations. This was avoided here, however, for a number of reasons. First, including in-situ projects on the basis of this reasoning places too much emphasis on the quantity of project types. As Figure 4 demonstrates, despite their smaller number, open pit mines have historically accounted for a greater proportion of bitumen production than in-situ. Secondly, the size of open pit projects means that their operation involves a greater degree of ecological disorganisation (see Chapter 2.1), particularly in the immediate area. As such, the hearings triggered by such risks, and the concomitant social and economic benefits that accompany them, provide a more exemplary record as to how the regulatory panels seek to balance these issues in pursuit of a ‘public interest’ decision (see Chapter 3.3.1).

This is not to say that in-situ projects do not have a substantial effect on the environment, only that on an individual basis they have a relatively small environmental footprint. Indeed, few in-situ operations have been large enough to elicit the concern needed to trigger a public hearing. This raises a third justification for their exclusion, in that the lack of publicly available data restricts the extent to which the sample frame can be expanded to include them. Finally, no existing research has focused on how regulatory panels may respond differently to the varying levels and types of risk and reward posed by in-situ and open pit projects, meaning that their unquestioned inclusion in a sample frame dominated by surface mining operations assumes parity of treatment. As it is beyond the scope of this research to examine the potential for this difference, at least in any detail, this younger sector of the industry has been excluded. In light of these considerations, and recognising the overarching purpose of the research questions (see Section 4.1), the final sample contains all open pit projects, and applications with the purpose of expanding their capacity, approved since 1995 which triggered a public hearing (see Table 2). The geographical location of these sites can be seen in Appendix IV.

As these public hearing documents are of considerable size, a sample was taken from within each, according to the topics being deliberated over. In a similar manner to the other phases of research, the sampling method used was that of purposive sampling. This was done by putting the records into chronological order and pinpointing the location within each of the sections pertaining to water quantity, water quality and the broader category of cumulative environmental effects. These specific areas of focus were chosen because of their centrality to First Nation culture, association with their Treaty rights to hunt, fish and trap on the land, and the importance with which First Nations consider regional cumulative environmental impacts (see Chapters 2.2; 2.3). There is also close parity between water quantity issues and the concept of ‘ecological withdrawals’, water quality issues and ‘ecological additions’, directly mirroring the conceptual foundations of the treadmill theories and, by extension, the calls to examine how economic production is prioritised over its ecological counterpart (see Chapter 3.1.3 and 2.1). The cumulative environmental effects are also central to regulatory activities aimed at making any form of oil sands extraction 'sustainable'.

#### Figure 4) Energy Production Forecast for the Province of Alberta



(AER, 2015a)

*Table 2) Public Hearing Documents for Oil Sands Projects*

|  |  |  |
| --- | --- | --- |
| Year of Approval | Project Title | Project Type |
| 1997 | Steepbank | Open pit/surface mine |
| 1997 | Aurora | Open pit/surface mine |
| 1999 | Millenium | Open pit/surface mine |
| 1999 | Muskeg River | Open pit/surface mine |
| 1999 | Mildred Lake | Expansion of bitumen upgrader |
| 2004 | Horizon | Open pit/surface mine |
| 2004 | Jackpine | Open pit/surface mine |
| 2006 | Steepbank Expansion | Expansion of Steepbank open pit/surface mine and Voyageur bitumen upgrader |
| 2006 | Muskeg River Expansion | Expansion of Muskeg River open pit/surface mine |
| 2007 | Kearl | Open pit/surface mine |
| 2011 | Josylin North | Open pit/surface mine |
| 2013 | Jackpine Expansion | Expansion of Jackpine open pit/surface mine |

The third phase of the research required participation from those involved at each stage of the regulatory process, as conceptualised in Chapter 3.3. The method used to select participants for this phase has been designated as a sub-type of purposive sampling (see Teddlie and Yu, 2007; Patton, 1990). Closely related to ‘snowball sampling’, ‘chain-referral’ sampling was used as it is specifically tailored to locating information-rich key informants (Patton, 2002). Given the difficulty associated with gaining access to powerful institutions (see Williams, 2012; Hertz and Imber, 1995), and considering the need to gather information from actors with knowledge of the regulatory process, such an approach was deemed appropriate for this study. Indeed, its suitability for ‘…identifying policy-makers and specific elites, and understanding networks and processes’ ensures close alignment between the interview sample and the focus of the research questions (Williams, 2012: 17; see also Teddlie and Yu, 2007). Although not fundamentally important, a small nuance should be highlighted. While snowball sampling tends to rely on a series of a referrals to other relevant individuals by an initial respondent (Oliver, 2006), its chain-referral variant expands upon this formula, as Penrod et al (2003: 102) describe:

*Chain referral sampling is defined quite similarly to snow-ball sampling, it relies on a series of participant referrals to others who have experienced the phenomenon of interest; however, multiple networks are strategically accessed to expand the scope of investigation beyond one social network. That is, the chains of referrals (or multiple snowballs) are carefully established and meshed together to form a sample that more closely resembles…the study group.*

In this study, these ‘chains’ tended to be created within government agencies, as participants would reference another member of that agency for potential participation. This was unproblematic in and of itself, as agency personnel are more directly engaged with the regulatory process than many other types of participant. It was some of the more tangentially-related participants, such as those working in a consultative capacity, that were instrumental in establishing links *between* social networks at different stages of the regulatory process. This was largely because their work with industry, government and First Nations required their involvement at each of its stages, exposing them to a broad variety of more directly engaged individuals. They also tended to be older participants, who had worked in government and industry previously but still maintained connections with existing personnel. In this way ‘multiple snowballs’ were initiated and sustained with those involved in different stages of the regulatory process, and at different levels of hierarchy, generating a sample more closely tied to the process as a whole. Using this technique, thirty-three participants were interviewed (see Table 3).

##### Table 3) Participants for Interview

|  |  |  |
| --- | --- | --- |
| Participant Group | Relevant Stage/s of the Regulatory Process | Number of Participants |
| Aboriginal Consultation Office | ‘Planning’ | 3 |
| Land Use Secretariat & Department for Environment and Sustainable Resource Development | ‘Planning’ | 3 |
| Industry | ‘Planning’ & ‘Approval’ | 6 |
| Consultants | ‘Planning’ & ‘Approval’ | 5 |
| First Nations | ‘Planning’ & ‘Approval’ | 7 (from two First Nations) |
| Alberta Energy Regulator | ‘Approval’ | 6 |
| Environmental Research Support | ‘Approval’ | 3 |
|  | Total | 33 |

Some of the participant groups were pre-determined (see Flick, 2006), whereas others emerged as part of the chain referral process. The Aboriginal Consultation Office and Land Use Secretariat fall into the former category as, between 2005 and 2013, both retained responsibility for making a decision on the adequacy of consultation at the ‘planning’ stage of the regulatory process (see Chapter 3.3.1). Indeed, during the data collection period some of the staff from the latter agency were in the process of being transferred to the ACO. First Nations or, more specifically, their industry relations departments, occupy a more integral position in the regulatory process, and were targeted for sampling because their concerns were central to the sub-research questions on consultation. These departments operate as the intermediary between actors engaged throughout the regulatory process and the First Nation communities. The AER was the final agency pre-determined for sampling, largely because of its long-term responsibility for presiding over the ‘approval’ stage of the regulatory process. Gaining access to participants within these groups was given priority, and efforts were made to gather participants from as high in their organisational hierarchies as possible. This is covered in more detail in Section 4.5. The three remaining groups, ‘consultants’, ‘environment research support’ and ‘industry’, emerged as part of the chain-referral process. The first and second of these provide support to industry, government or First Nations throughout the ‘planning’ and ‘approval’ stages, whereas the latter maintains a different role but bears similar relevance to the regulatory process. The inclusion of these actors was unexpected but welcome, providing nuanced information on different aspects of the research process, and proving to be instrumental in establishing ‘chains’ of participants across different stages of the research process.

Before moving onto the issue of access, it is worth responding to Johnston and Sabin’s (2010) urge for caution in the use of snowball sampling. Their essential argument is that its respondent-driven nature can favour those with the largest social network. This, they contend, risks over-representing those with characteristics similar to the referring participant. While these are truisms, introducing into the sample frame the potential for bias and threatening its generalisability to other cases, such criticism is less relevant here due to the nature of the intrinsic case study design. Indeed, as its purpose is not to enable cross-case generalisation (see Section 4.3), but to develop a detailed understanding of the case in focus, this aspect of snowball sampling is actually beneficial to this study. Indeed, it helps to address one of the key threats to the sampling method, which is the potential for inclusion of ‘ineligible’, or irrelevant, participants (see Biernacki and Waldorf, 1981: 151). Referrals by agency personnel largely guarded against this, as they tended to name those with whom they had an established relationship. The issue was also controlled through questioning at the beginning of an interview, to ensure participants had knowledge of the regulatory process and to clarify their role within it. This helped to confirm that those interviewed were able to provide information on the case and, more specifically, the issues raised by the research questions. Additionally, as the participants tended to be employed within public agencies, and some were particularly high profile, their role within the regulatory process could often be clarified by researching their name beforehand. Indeed, searching for this on the agency website, or within publicly available documents pertaining to the regulatory process, provided a relatively straightforward means of ensuring their compatibility with the purpose of the study and its research questions.

## 4.5 Gaining Access

Gaining access to government policy documents and public hearing records for data collection was relatively unproblematic, as these were openly available for download from the internet. By contrast, the stage of research focusing on the interviews was very different, particularly as ‘[a]ccess to powerful people is a distinct problem of up-system research’ (Williams, 2012: 124). This is primarily due to the ability of ‘elites’ to establish barriers, rendering their settings ‘closed’ and activities shielded from scrutiny (Adler and Adler, 2002: 519; see also Hertz and Imber, 1995). However, access issues are further heightened when considering the study in question has a primary concern with the oil industry, requires the participation of indigenous peoples, government and corporate personnel from within a highly conservative Canadian prairie province (see Slowey and Stefanick, 2015), and is to be conducted by a non-indigenous, non-Canadian, Caucasian, English PhD student living almost 4,000 miles away. It was therefore decided that a combination of ‘direct’ (Riedel, 2000: 81), or formal, and subsequently informal, or indirect, techniques would be deployed to not only ‘get in’ but also ‘get on’ (Cassell, 1988: pp.93-94). This, it was planned, would entail the sending of emails to key officials within each stage of the regulatory process, which would have the requisite participant invitation letters attached, as a means of initiating the ‘chains’ of respondents required for the research to proceed. In reality, the process of gaining access unfolded very differently.

The means by which access was actually secured evokes McDowell’s (1998: 2135) observation that its acquisition, while seldom spoken of by researchers, depends ‘[a] great deal…on luck and chance, connections and networks, and the particular circumstances at the time’. In accordance with Odendahl and Shaw’s (2002: 307) observation that, ‘[f]requently, the original or most important contact who leads to a series of introduction may seem to appear almost by chance’, some of the most instrumental contacts made during the fieldwork in Alberta can be traced back to an unexpected meeting at the British Society of Criminology (BSC) in Summer 2014. After presenting a paper on the environmental victimisation of First Nations in and around the oil sands, defining such harm in accordance with the human rights obligations of states and the associated responsibilities of corporations, a Canadian researcher approached me. She offered to act as a sponsor, saying that she knew somebody working in the oil sands who might be able to help with the research. After a few follow-up emails it transpired that the initial contact no longer worked in the area, but instead of terminating communication this person then linked to another; a consultant who recently retired from the industry. Having parity with the category of willing respondents known as ‘outs’ (Dean et al, 1969: 43), who can be described as having lost power but retaining detailed knowledge of a setting, phenomena and its actors, this consultant was a ‘key actor’ in gaining access not only to those involved at each stage of the regulatory process, but also those higher up in the hierarchy of government agencies.

To ensure that the relationship with the sponsor met at the BSC was not closed down, contact was made immediately. Six months of what Adler and Adler (2002: 526) call ‘relational groundwork’ followed, where relationships were cultivated from a distance with individuals relevant to the study at hand. This was all done using email and Skype, where the consultant-gatekeeper would offer names and email addresses of potential participants, or do ‘e-introductions’ over email which could then be followed up on a one-to-one basis by the researcher. This was all very informal and highly time-consuming, particularly as Alberta is around seven hours behind UK time, meaning that Skype calls had to be conducted late at night. Nevertheless, over this six-month period sixteen arrangements were made for face-to-face interviews with regulatory personnel and those from First Nations, to be conducted over a six-week period between January and February 2015. As such, half of the thirty-two interviews eventually conducted were arranged prior to time spent actually in the field. That said, many more invitations to participate were sent out than replies received, even where an e-introduction had been used or a recommendation issued from another participant. Indeed, this aspect of the research was arduous and labour-intensive, requiring repeated communication with receptionists and personal assistants, particularly if being passed from department to department. However, as Cassell (1988: 950) notes:

*Among the characteristics needed to penetrate closed access group are brute persistence and blind compulsivity. One has to keep pushing, and trying, and hoping, and smiling, and pushing some more. For this, the researcher needs a thick skin and a certain imperviousness to rejection.*

Indeed, when replies were received from attempts at drawing participants from particularly difficult-to-access groups, such as the First Nations or higher levels of government agencies, the emotion elicited was a combination of relief and elation. These were, however, anomalies in a much more prevalent pattern of rejection or silence. Participant invitation letters, which provided detail on the purpose of the study, were sent to participants over email three weeks in advance of the interviews. In most of the cases in which less direct means were used to gain access, invitation letters were sent after the more informal phone calls or attached to similarly informal emails, where the purpose of the research was conveyed more briefly. Making use of this incremental approach meant that the potential respondents were not put off by the research in the first instance, and that it still upheld the ethical standards required (see Section 4.8).

The vast majority of interview access was gained in this manner, with the researcher relying on informal networks instead of direct communication. Indeed, formal, ‘cold’ introductions were avoided, unless as a last resort, because of the risk they posed to the research. While useful if there exists a reasonable belief that such techniques will succeed, the closed setting, relatively ‘elite’ participants sought for interview, and the researcher’s status as an ‘outsider’ (see Section 4.7.5), suggested otherwise. Furthermore, there was a real risk that a refusal of access may have had the effect of ‘poisoning the well’ (Riedel, 2000: 81), where a rejection renders subsequent efforts at gaining access more difficult. Indeed, the concern was that other gatekeepers may have to be sought in the event of initial rejection, undermining those who initially refused access and reflecting poorly on the researcher, the study and the University of Sheffield. Formal invitations were only used on a number of occasions, however, and towards the end of the study when all other avenues had been exhausted. This tended to occur when the perceived potential for informal connections amongst already-existing participants was not forthcoming. Ultimately, during the five weeks spent conducting interviews in the field, and for the six months prior to that point, gaining access was never achieved during a singular event, despite the importance of that one meeting at the BSC. It was actively and repeatedly negotiated and renegotiated over this period, as a continuing and ‘…progressive series of negotiations rather than a one-shot agreement’ (Johnson, 1975: 176).

As relying on informal networks was the primary means of gaining access to the requisite pool of participants, this had to be accompanied by the building of effective rapport and ‘field relationships’ (Bailey, 2007: 73). Considering that gaining ‘physical access’ to the research setting and ‘social access’ to potential interview participants were ongoing and iterative processes (Cassell, 1988: 93), being contingent on both the maintenance of existing field relationships and the creation of new ones, the building of rapport was essential for this study. Throughout the social research literature recommendations for achieving this tend to centre on the researcher’s character traits whilst in the field, or what Williams (2012: 126) calls the ‘self-presentation dilemma’. While there is much variation, recommendations tend to focus on the importance of ‘[h]onesty, openness, friendliness, and a willingness to get along…’ (Bailey, 2007: 75), ‘showing genuine interest’ (Miller and Glassner, 2004: 133), ‘[e]stablishing trust and familiarity’ (ibid), and demonstrating a ‘social sensitivity’ (Cassell, 1988: 97). The fieldworker ‘must fit in, if that seems to be called for; not fit in, if it seems appropriate’ (ibid). Williams (2012) even considers the importance of clothing, advertising membership of elite institutions and the communication of sympathy. The issue with such guidelines is that they all convey an uncomfortable degree of manipulation, where the purpose of adopting a particular persona is to extract the greatest degree of data as possible from individual participants. Put another way, these recommendations can tend towards instrumentality and dehumanisation, creating the paradoxical situation in which adopting an ‘honest’, ‘open’ and ‘trusting’ persona is actually a veiled exercise in deploying the opposite.

While these criticisms hold relevance, they are mostly prevalent in those forms of inquiry that rely on the adoption of completely different personas or identities, such as in that found in certain types of covert research. Indeed, individuals routinely rely on multiple identities and personas in the course of navigating the multiplicity of social groups that are encountered throughout the life course. Understood in this context, addressing the ‘self-presentation dilemma’ (Williams, 2012: 126) simply involves exaggerating already-existing traits that are appropriate to the situation at hand. In accordance with Odendahl and Shaw’s (2002: 310) observation that ‘[c]ustoms of friendliness and professional demeanour are much appreciated by elites’, a non-judgmental, open and friendly stance was adopted during the interviews. Efforts were also made to develop a ‘situational sensitivity’ which Cassell (ibid: 96) defines as a sense of ‘…just how far one can go: when one can follow people, and when one should disappear; when one can ask questions, and one should observe in silence; when one can take field notes and when one should do nothing to draw attention to oneself’ (ibid). Such considerations have most relevance to participant observation or ethnographies but are equally relevant in the context of interview techniques. Of course, going to such lengths does increase the risk of identifying too much with the group under investigation and its particular interpretation of reality, but to address this Cassell’s (1988: 99) technique was adopted:

*My own methodological solution to the problem of co-optation is similar to Oscar Wilde’s advice about getting rid of temptation by yielding to it – I am co-opted. During fieldwork, I adopt the perspectives of those I study. They teach me how things are done, how reality is segmented in their world. I am as open and receptive as possible; I take it in, record it in my fieldnotes, and make little conscious attempt to challenge their views. Sometimes, this is a somewhat schizophrenic process: click, I’m in the fieldworker’s non-judgmental recording mode, absorbing ‘their’ perceptions of reality…; click, I’ve returned to my daily taken-for granted perceptions.*

Ultimately, an attempt was made to tread a line between appearing ‘informed’ and ‘naïve’, and ‘sympathetic’ and ‘unsympathetic’ (Williams, 2012: 126). This was made easier by the relatively normative focus of the research study. That said, as the research was conducted in the middle of the Canadian winter, where temperatures reached as low as -40 degrees centigrade (see Section 4.7.3), this undoubtedly, and not undeservedly, gave the impression of naivety. This was, however, used as an icebreaker, and was always disarming when participants commented on it, assisting with the cultivation of rapport and the maintenance of relationships beyond the individual interviews. Indeed, whilst in Alberta several participants made arrangements for lunch, informal meetings were held in cafes, government buildings, corporate headquarters and public spaces, and dinner was had with a number of participants’ friends and families. One of the trips even included a visit to the Canadian Rocky Mountains. Irrespective of the form taken by such activities, my status as a relatively young foreigner spending five weeks alone during a Canadian winter can be seen to have generated a rapport-inducing sympathy, playing a positive role in the level of access gained and ultimately maintained for the duration of the fieldwork.

## 4.6 Data Collection and Analysis

As noted in Section 4.5, the collection of data for the questions focusing on government policy and strategy documents was relatively straightforward, being accessed and downloaded from government websites. The public hearing records were similarly accessed, although the sample of specific data needed from within these documents required their subsequent isolation (see Section 4.4). This was done by chronologically ordering the documents before pinpointing the location within each of the sections pertaining to water quantity, quality and more general cumulative environmental effects. Again, this process of data collection was relatively straightforward. The third stage of the research was, however, different. As noted in Section 4.4 (see also Table 3), thirty-two people formed the final sample of participants for collecting data using the interview method. Thirty of these were conducted in person so as to not forego the ‘important nuances’ of face-to-face contact, such as body language (Fielding and Thomas, 2008: 258). As such, an interview schedule was used to collect the data needed to answer the overarching research questions.

The type of interviews deployed can be broadly typified as ‘semi-structured’ in design, but were more closely affiliated to Patton’s (2002: 349) ‘[g]eneral interview guide approach’, or ‘guided interview’ categorisation. In accordance with this design, topics and issues for discussion were outlined in advance, while the sequence and wording of questions were decided during the course of the interview (ibid). This imbued them with a fairly relaxed and conversational tone, but also ensured that the resulting data was purposeful by linking it to the overarching research questions. The flexibility inherent to this design also allowed interviewees to explain the issues under discussion in their own terms, and deviate, where necessary, from the schedule itself. This enabled the ‘active engagement’ spoken of by Bailey (2007: 103), permitting follow-up questions to be asked ‘…that might end up being as important as any question in the original interview guide’. Furthermore, while the interview schedule outlined both questions and sub-questions, in reality these were very rarely asked in sequence, adhering instead to the tendency in semi-structured interviews to allow ‘[t]he flow of the interview, rather than the order in a guide, determine when and how a question is asked’ (ibid: 100). This allowed the interviewer to ‘…adapt to the scenario and personality at hand, rather than…stick robotlike to an established script’ (Odendahl and Shaw, 2002: 311). Enhancing the conversational nature of the interview and facilitating a more relaxed, personable interaction, this helped to build rapport and improve the detail of participant responses.

The interviews were designed to contribute data in specific response to sub-research questions two, three and four (see Section 4.1). Sub-question two contains an implicit need to understand where the pressure to operate according to a certain environmental philosophy originates. Sub-question three requires data on how regulatory agencies are interpreting and deploying the duty to consult and accommodate during the course of their operations, and the fourth sub-question asks why those within the agencies are actualising this particular interpretation. Such focus required a combination of interview questions equipped to elicit notions of ‘how’ the regulatory process operates, and ‘why’ it does so (see also Section 4.2). To achieve this, ‘free-recall’ elicitation was used to inform the creation of the interview schedule (Johnson and Weller, 2002: pp.500-501), being combined with extensive reliance on open-ended questioning. ‘Free-recall elicitation’ is an interview technique particularly suited to situations in which information is required on a specified set of relations within a particular phenomenon, situation or setting, and from the perspective of the participant. This type of elicitation is called ‘free-recall’ because ‘…informants are asked to recall as much as they can on a topic without being given specific examples’ (ibid: 501), being referred to as a ‘listing’ task because it seeks to avoid responses characterised by a few short answers. This approach was used to garner the perspective of each interviewee on what they considered to be the key sites of tension between government and First Nations throughout the regulatory process, before investigating these individual tensions further using open questioning. Probes were also deployed throughout the interviews, with the various techniques used including periods of silence, enquiring glances and the inquisitive repetition of responses (see Zeisel, 2006).

The analytical technique used at each of the three research stages relied on a specific conceptualisation of thematic analysis as devised by Braun and Clarke (2006). In recognising that ‘thematic analysis’ tends to be loosely defined in social research, particularly by studies practising ‘grounded theory-lite’, which avoid subscribing to the theoretical commitments of the ‘full-fat’ version (ibid: 8), the authors establish a six-stage process by which qualitative data can be analysed in a thematic fashion. This bears similarity to the ‘initial’ and ‘focused’ coding described by Bailey (2007: pp.128-129), or the ‘open’, ‘axial’ and ‘selective’ coding prevalent in grounded theory (see Cohen and Crabtree, 2006). However, it involves additional steps to ensure that the qualitative analysis is conducted systematically instead of projecting the appearance that ‘anything goes’ (Ezzy, 2002: 109). In this particular study the approach adopted towards thematic analysis was neither inductive nor deductive, but ‘adaptive’ (see Section 4.3). In this sense, some of the codes and themes developed from the data had parity with the researcher’s analytic pre-conceptions, particularly those derived from the literature on ‘sustainable development’, environmental philosophy and Treaty rights, but others did not. For instance, the ‘sustainable growth’ objective detailed in Chapter 5.1 is very much an example of the former, whereas the latter is typified by the ‘patriarchal paternalism’ identified in Chapter 7.3. The adaptive approach permitted this flexibility, exhibiting the pragmatism associated with multi-methods research designs (see Teddlie and Tashakkori, 2009), and is well-suited to this case when considering the lack of existing primary research (see Chapter 3.1). The form of analysis pursued was largely ‘semantic’ in nature, due to the requirements of the research questions. This entailed:

*…a progression from description, where the data have simply been organised to show patterns in semantic content, and summarised, to interpretation, where there is an attempt to theorise the significance of the patterns and their broader meanings and implications, often in relation to previous literature.*

(Braun and Clarke, 2006: 13)

This essentially describes the process of describing the themes, which are presented throughout Chapters 5, 6 and 7 in accordance with the stage of the regulatory process to which they pertain, and their analysis in the context of existing literature, which is presented in Chapters 8 and 9. While each body of data was initially collected and thematically analysed separately, the process established by Braun and Clarke (ibid: pp. 16-21) was followed in each instance.

Firstly, an ‘active familiarisation’ was established by repeatedly reading each data set (ibid: 16), searching for patterns and making notes on potential codes. This was relatively straightforward for the policy documents and hearing records, as the totality of each set of data was available from the offset. By comparison, active familiarisation with the interview transcripts could only occur at the speed at which they were incrementally created during the fieldwork. However, as Braun and Clarke (ibid: 17) explain, this in itself is a form of early analysis, precipitating a thorough understanding of each transcript and providing important suggestions for potential future codes and themes. Indeed, while the interview data underwent this initial phase over the period in which it was collected, it did not undergo stage two of the thematic analysis until after the fieldwork was completed. Stage two formed the point at which the initial semantic codes were generated, with some being largely theory-driven, as was the case with the document analysis, and others data-driven, as occurred with some of the interview transcripts. The software program NVivo was used to facilitate the analysis of each dataset from this point onwards, largely because of their unwieldy size and the ease with which existing codes and emerging categories could be viewed, edited, related and subsumed into one another. Nvivo also allowed these documents to be analysed digitally during the course of the fieldwork, overcoming the issues presented by taking physical copies over to Canada.

The third stage of the analysis was mostly done upon return to the UK and focused on developing themes. Consisting of a multiplicity of related codes, these established the basic unit for subsequent, literature-based analysis. A whiteboard was purchased for this task in order to create a visual representation of the relationships between different codes, their relevance to the various aspects of the regulatory process, and clarify their status as ‘complete’ or ‘incomplete’. Indeed, it is at this point where the third and fourth stages merged, with the codes committed to the visual representation also being subject to evaluation (ibid). Patton’s (2003: 11) work on evaluating qualitative data was drawn upon for this task, particularly his concepts of ‘internal homogeneity’ and ‘external heterogeneity’. With the former of these referencing ‘…the extent to which the data that belong in a certain category cohere in a meaningful way’, and the latter concerning ‘…the extent to which differences among categories are clear’ (ibid), these measures were used to identify themes requiring further support, opportunities for integration of those with an overbearing similarity, and the abandonment of those which were inconsistent with the answer emerging in response to the research questions. In accordance with Braun and Clarke’s (2006: 21) advice, this refinement stopped once nothing substantial was being added to the themes. The final two stages were then completed; ‘defining and naming the themes’ (ibid: 22), which involved refining their labels in accordance with their ‘essence’ (ibid), and ‘producing the report’ (ibid: 23). This final stage can be seen in Chapter 5 onwards, which closely adheres to Braun and Clarke’s (ibid) guidance with regard to data presentation:

*Your write-up must provide sufficient evidence of the themes within the data – i.e. enough data extracts to demonstrate the prevalence of the theme. Choose particularly vivid examples, or extracts which capture the essence of the point you are demonstrating, without unnecessary complexity. The extracts should be easily identifiable as an example of the issue. However, your write-up needs to do more than just provide data. Extracts need to be embedded within an analytical narrative that…needs to go beyond description of the data, and make an argument in relation to your research question.*

This process is slightly more demarcated along the lines of ‘findings’, which are presented in Chapters 5, 6 and 7, and ‘analysis’, which is the focus of Chapters 8 and 9, but an attempt has been made to adhere to these requirements and, in doing so, mark the completion of the thematic analysis.

## 4.7 Ethical Considerations

Before any data was collected an application to begin the study was submitted to the University of Sheffield Research Ethics Committee, which permitted commencement of the study without suggesting modification to the proposed methodology. The ethical dimensions considered integral to the study centred around issues of informed consent and the avoidance of deception, privacy, the risk of harm and researcher bias. Each of these will now be examined in turn.

### 4.7.1 Informed Consent/Avoidance of Deception

The principle of informed consent is outlined as one of the ‘fundamental principles of research ethics’ within the University of Sheffield’s (2015) General Principles and Statements on Research Ethics. It requires participant engagement with research to be based on ‘…a voluntary, un-coerced decision, made by a sufficiently competent or autonomous person on the basis of adequate information and deliberation, to accept rather than reject some proposed course of action that will affect her’ (Butler, 1990: 165). In addition, researchers should ‘…make clear that participants have the right to refuse permission or withdraw from involvement in research whenever and for whatever reason they wish’ (BSC, 2006: 3). Although not required for the document analyses, these guidelines were followed for the interviews. As noted in Section 4.5, formal participant invitation letters were attached to each informal introductory email as part of the strategy for gaining access. Appendix V contains an example of this letter. Every one clearly stated that participants ‘…will be anonymised, have the confidentiality of their personal details upheld, and given the opportunity to withdraw at any time’, also containing contact details for the research supervisor (see Appendix V). Each letter also clarified that:

*…your initial response to this letter will not automatically constitute participation; following your reply, the researcher will answer any questions you have and make arrangements for interview, should you wish to take part.*

(ibid)

This was crucial in ensuring that participation was contingent on the voluntary provision of informed consent. Indeed, it was only after making contact, sending this letter, and answering any initial questions asked by the potential participants about the research that an interview was arranged. This worked well as the myriad of participants had many more questions than could be addressed in a letter. Due to its importance, a section on ethics was built into the ‘opening’ of the interview schedule. This reiterated the purpose of the interview, clarified the ethics agreement, provided opportunity for further questions and gave an estimate of the time expected for the interview to take. It is also the point at which two informed consent forms were produced. If their content was agreed upon, and the individual in question consented to participate, each principle within each form was initialled by both participants before being signed at the bottom. One copy was then provided to the participant and one kept for the records. A blank copy of this form can be seen in Appendix VI. On those occasions where a phone interview was conducted, the informed consent form was emailed in advance and the return of a completed copy was requested. Participants gave their verbal consent as they were too busy to fill in the forms, photocopy and send them back. Permission to use a voice recorder was asked as part of the interviews. It was explained that the recordings would be deleted once transcribed and that that their responses would be anonymised. Finally, the ‘transition to end’ phase of the interview schedule reiterated the ethics agreements, thanked the participant for their time, and answered any other questions they had.

The avoidance of deception is associated with informed consent as the latter cannot be given if misleading information has been provided to participants. In short, the latter is contingent on the former. It is for this reason that ‘honesty’ and ‘integrity’ are listed as two ‘researcher obligations’ within the University of Sheffield’s (2015) General Principles and Statements on Research Ethics. However, as Flick (2006: 116) notes, research ‘…is always an intervention in a social system…a disruptive factor…to which it reacts defensively’. This results in a situation where ‘[a] mutual opacity exists between the research project and the social system to be researched’ (ibid). Particularly relevant to up-system inquiry, some scholars refer to the use of ‘shallow cover’ during interviews (Fine and Sandstrom, 1988: 19), or the ‘sin’ of omission (Adler and Adler, 2002: 525), where interviewers are clear about their intentions but vague about the specific purpose of their research. With regard to this particular study, the information given within the invitation letter was quite broad, but this was only for the sake of brevity. Indeed, if participants or potential respondents had any further questions about the research then information was willingly given, with honesty pursued at every opportunity. The study did not set out to condemn the regulatory process or those within it, but to develop a nuanced understanding of how, and to what extent, its normative operation prioritises economic interests over those of First Nations. In and of itself this was a highly visible, taken-for-granted aspect of oil sands development, especially amongst Albertans, largely because the conflict was so public. In short, nothing was hidden because there was nothing to hide.

### 4.7.2 Privacy

Similar to informed consent, the University of Sheffield’s (2015: 1) General Principles and Statements on Research Ethics notes that research participants have the right to confidentiality; ‘…personable information or identifiable data should not be disclosed without participants’ consent’. Privacy is also one of the key participant rights outlined in the BSC’s (2006: 3) Code of Ethics for Researchers. Guaranteed within the participant invitation letters, this was further reiterated as part of the informed consent given, and can be seen throughout the forthcoming chapters. Each participant has been assigned a number instead of a pseudonym, as have the research organisations, companies from which the participants were drawn, and the First Nations spoken to. Indeed, special care has been taken to ensure that specific First Nations cannot be identified in this study, even tangentially. The names of government agencies have been retained because their identities are easily discernible from the stage of the regulatory process being discussed. This is still unproblematic, however, as their size and lack of any further detail continues to ensure the anonymity of participants.

Data protection measures were also used to ensure confidentiality of the personal data collected. The digital transcripts were saved into a password protected file on a memory stick and also uploaded to email. An additional copy was made upon return to the UK and saved onto a separate hard drive. All interview audio files were then deleted once transcribed and anonymised. While in the field, hard copies of the informed consent forms were scanned using a hand scanner and saved into a password protected folder on the USB drive. Hard copies were stored in a locked backpack for the duration of the fieldwork. The ‘lock’ was not a travel padlock, but a steel wire mesh that encased the entire backpack when not in use. This allowed it to be secured to an immovable object and completely prohibited its opening without the key. On return to the UK, the hard copy documents were transferred to a locked cabinet. These measures ensured that participants could not be identified in any part of the research, and that their data would not be accessed by anybody except the lead researcher or supervisors.

### 4.7.3 Risk of Harm

Risk of harm is here interpreted through two lenses; risk to the researcher and risk to participants. The risk of harm coming to the researcher was relatively minimal for the majority of the study, as the analysis of documents was largely undertaken within the UK, on university campus and within working hours. However, the five weeks of fieldwork undertaken in the North of Alberta, Canada, during winter, did heighten the risk of harm coming to the personal safety of the researcher, at least relative to that encountered during the document analysis. This was mitigated using a number of methods. Firstly, a travel schedule was given to the research supervisors in advance, outlining where the researcher would be at various points during the fieldwork (see Appendix VII). Periodic updates were also provided to supervisors via email and Skype throughout this period. Other, more routine, techniques were also deployed, such as making sure interviews were undertaken in public or professional locations, and travelling between locations by walking, using public transport or licensed taxis. Finally, Air BnB was used for accommodation over the five weeks, as hotel rooms would have exceeded the budget provided by the Overseas Fieldwork Grant from the ESRC (see Appendix VIII). Although this raised the risk of harm coming to the researcher, as the rooms were located in other peoples’ property, these were all vetted beforehand, allowing for the accommodation to be chosen according to prior tenets’ feedback and ratings. Indeed, this actually provided detailed insight into the province itself, as it provided the opportunity to stay with locals who had knowledge of the surrounding areas, the oil sands, and the province.

The weather was an additional factor that had to be accounted for. The temperature varies substantially across Alberta, with Calgary being exposed to Chinook Winds by virtue of its proximity to the Rocky Mountains. In essence, these are warming winds that move from the mountain ranges and onto the lowlands, where Calgary is situated. Causing wildly varying temperatures and weather patterns from day to day, these conditions meant that certain days were very warm, with little snow cover, whereas others reached -12 degrees centigrade and experienced over a foot of snowfall. The weather got less erratic but progressively colder, and the snow deeper, the further North travelled. The temperature in Edmonton tended to be around -10 to -20 degrees centigrade, but it was the snowfall that increased the risk of harm during this time. It made moving between interview settings more difficult, decreasing visibility of street signs, buildings and bus stops. When not interviewing people, most of the time was spent in the various public libraries. These tended to stay open until 9pm almost every day. As their facilities would be used until closing time, to finish transcriptions and read books less easily accessible in the UK, the walk back to the accommodation tended to happen late at night. On a number of occasions, the degree of snowfall made this precarious, with the cold, difficulty of access and low visibility compounded by nightfall.

The cold weather also meant that the populations of homeless tended to seek refuge in the public libraries during the day. While this was visible in Calgary it was mostly prevalent in Edmonton, where dozens of homeless people would stay in the warm library during the day but head to the shelters when it closed. In and of itself this was not an issue. Most of those spoken to were very friendly. However, the high concentration of inebriated individuals in one place, coupled with the numerous instances in which the library security guards had to eject various persons throughout the day, which tended to increase tensions amongst those within the library, meant that the risk of harm coming to the researcher was increased. This was addressed by choosing to sit in areas of the library that were out of the way of its main points of access and social spaces. In a related manner, the route back to the accommodation in Edmonton passed a casino and homeless shelter, both of which tended to attract large numbers of inebriated individuals, particularly after dark. Again, while there was never any trouble, largely because such risks were managed by crossing the road or taking an alternative route, all of these characteristics did increase the risk of harm coming to researcher. Ultimately, though, these were fixed characteristics inherent the field in which the study was taking place, making them manageable but largely unavoidable.

After taking Highway 63 Northwards to Fort McMurray, along the oil industry’s transport route known as ‘the Highway of Death’ because of its high frequency and volume of fatalities (see Huffington Post, 2016), the risk of harm stemming from the weather reached a head. On that particular evening the temperature dropped to around -40 degrees centigrade, as visible in the minimum temperature for Quarter 1 of 2014 (see Environment and Climate Change Canada, 2016). While the potential for this was not unexpected by town residents, it was still seen as a particularly cold spell. Indeed, a range of -15 to -25 in Fort McMurray is more likely (ibid). During the time in which it was -40 the researcher was caught outside for three hours, when waiting for a bus and then walking back from the destination stop to the accommodation. Despite wearing a 650-fill power goose down jacket, fleece, merino wool under layer, two hats, two pairs of gloves, insulated walking boots and thermal socks, the cold was palpable. A taxi would have been contacted but the international SIM card being used did not work. Indeed, it was during this walk home that a number of the digits printed on the laptop keyboard became brittle and disintegrated. Compounding the issue of cold, the accommodation that evening was in the converted basement of a house, meaning that its window pane had been removed to prevent damp. As such, that evening was spent sleeping in numerous clothes and under the down jacket. As the next stop was even further North, in Fort Chipewyan (see Appendix IV), more capable clothing was invested in the next day. Again, these were features of the research setting and had to be managed as opposed to avoided.

Reducing the risk of harm coming to individual participants was achieved using a number of methods, each of which intersect with those used to ensure participation was based on informed consent (see Section 4.7.1), and to guarantee privacy (see Section 4.7.2). The personal details of each participant were kept private until their interviews were transcribed, at which point their names were anonymised and the original recordings deleted. Risk of harm was also minimised by ensuring the confidentiality of the resulting transcripts and the signed informed consent forms (see Section 4.7.2).

### 4.7.4 Researcher Bias and Integrity

In exploring the charge of researcher bias, Howard Becker (1967; see also Sim, 2003) considered it to be related to characteristics inherent to the phenomena under investigation. More specifically, under Becker’s terms researcher bias is related to the question of whether or not the case under examination contains hierarchical social relations that can be defined as ‘apolitical’ or ‘political’. The former of these terms is used to reference situations in which conflict and tension are present between groups, but only where this tension ‘…has not become openly political’ (ibid: 240). This is taken to mean that the opposing parties have not been ‘…organised for conflict’ and that ‘no-one is attempt[ing] to alter the shape of the hierarchy’ (ibid: 241). In contrast, a ‘political’ case is one in which the ‘…parties in the hierarchical relationship engage in organised conflict, attempting either to maintain or change existing relations of power and authority’ (ibid). Considering the history of colonialism in Alberta and Canada (see Chapters 1 and 3.1.1), the widespread and explicit opposition of First Nations to unbridled expansion of the oil sands industry (see Chapter 2), and the open conflict between indigenous peoples and the Crown at the SCC (see Chapter 3.3.2), then it is difficult to classify the situation under review as anything but ‘political’.

As this research proceeds from a foundational recognition that the First Nations are experiencing a very specific form of environmental victimisation (see Chapter 2), the charge of bias could be applied because it is ‘sympathetic’ towards one of the groups in open political conflict, to use Becker’s (1967: 246) terminology. Indeed, this is a vulnerability inherent to much social research into ‘political’ cases, being exposed to a situation described by Becker (1967: 244) as ‘double jeopardy’. This is where the findings can be criticised from either, or both, of the groups in tension, as their conflicting definitions of reality come to bear on the position supported by the findings. The criticism thus tends to centre on the research not being ‘balanced’. In a ‘political’ situation this charge is tied to a given view of reality and, more importantly, the position of that view in relation to the ‘hierarchy of credibility’ (ibid). As this is the very issue open to question within such a situation, the legitimacy of judgements made by those in this hierarchy becomes a matter for debate, discussion and argument, as opposed to being taken for granted, as in ‘apolitical’ cases. It is for this reason that Becker (ibid: 245) concluded that, especially in situations of open political conflict, ‘[w]e can never avoid taking sides’ (ibid: 245). He took this mean that:

*…we are left with the question of whether taking sides means that some distortion is introduced into our work so great as to make it useless. Or, less drastically, whether some distortion is introduced that must be taken into account before the results of our work can be used…Our problem is to make sure that, whatever point of view we take, our research meets the standards of good scientific work, that our unavoidable sympathies do not render our results invalid.*

(ibid)

This consideration is related to the maintenance of research ‘integrity’ (Williams, 2012: 128), and the methods deployed to ensure such ‘sympathies’ do not compromise the quality or credibility of conclusions. Indeed, despite recognising the indigenous environmental victimisation experienced by First Nations, and directing the inquiry towards the institutional process responsible, at least in the most immediately perceptible, surface-level sense, efforts were made to ensure that this did not compromise the ‘integrity’ of the research. For instance, to use some of the examples given by Becker (1967: 246), such recognition did not lead to the use of loaded questions during interviews, the manipulation of participants into giving certain answers, or purposeful distortion of the thematic analysis used on the policy documents, hearing records and interview transcripts (see Section 4.6). As such, while 'sympathies' were maintained during the research, care was taken to ensure that they did not encroach upon the research instruments used, at least to the extent consciously possible.

Liebling’s (2001: pp.473, emphasis in original) distinction between *theory*-neutrality and *value*-neutrality also informed attempts at minimising researcher bias. The former of these refers to ‘…our vision of ‘what is’, and something which is impossible to achieve…’, whereas the latter references ‘…our vision of ‘what ought to be’, which it may be possible to suspend to a degree, at least during the research fieldwork process…’ (ibid: pp. 473-474). As noted in Section 4.5, no attempt was ever made to challenge or change the views of participants during the fieldwork, and, relatedly, no attempt was made to distort the findings or analysis to emphasise ‘what ought to be’. To borrow Liebling’s (ibid: 474) phase, the data collection, analysis and write-up stages were conducted, insofar as is possible from a constructivist standpoint, to ‘…let the data speak for itself’. Without a corollary such a claim is impossible; data and its subsequent analysis are always informed by specific choices made by a researcher before, during and after its collection. However, in accordance with Liebling's advice, the analysis is directly informed by the data gathered during the fieldwork phase. This is one of the reasons why there are three findings and two analysis chapters; to not only communicate the findings in detail, but to establish its clear relationship with the literature-informed analysis of its content. While the findings will still elicit criticism from some of the quarters from which participants were drawn, attempts have been made to adhere to the utmost professional standards throughout in order to minimise distortion-inducing researcher bias and ensure a high degree of research integrity.

### 4.7.5 ‘Insider-Outsider’ Research

The extent to which the researcher shares characteristics, roles or experiences, collectively referenced by the term ‘personhood’ (see Savvides et al, 2016: 116), with those participating in a given research study is an important area for consideration. This is particularly so when considering the non-Canadian, non-indigenous personhood of the researcher in this particular study, and its Canadian and indigenous participants. The extent of this similarity or difference, between researcher and respondents, is generally defined as ‘insider’ or ‘outsider’ research. The former refers to situations in which ‘…researchers conduct research with populations of which they are also members…so that the researcher shares an identity, language, and experiential base with the study participants (Dwyer and Buckle, 2009: 58). In contrast, ‘outsider’ studies involve researchers who are personally unfamiliar with the experiences, situations or phenomena under investigation (Wigginton and Setchell, 2016). There are various attempts at overcoming this unrealistically fixed dichotomy, with Banks (1998) offering a four-fold typology, and Adler and Adler (1987) describing three ‘membership roles’ by which qualitative researchers can be characterised. Similarly, Dwyer and Buckle (2009: 58) favour an ‘insider-outsider’ conception where the hyphen between the two operates as ‘…a third space, a space between, a space of paradox, ambiguity, and ambivalence, as well as conjunction and disjunction’. This latter conception is therefore the most flexible, demanding not absolute categorisation but a reflexive recognition of the myriad of ‘insider’ and ‘outsider’ characteristics that may be held by the researcher at any one point:

*Although a researcher’s knowledge is always based on his or her positionality…as qualitative researchers we have an appreciation for the fluidity and multi-layered complexity of human experience. Holding membership in a group does not denote complete sameness within that group. Likewise, not being a member of a group does not denote complete difference.*

(ibid)

This ‘multi-layered complexity’ is visible in the various characteristics maintained by the researcher, rendering the less categorically absolute terms of ‘insiderness’ and ‘outsiderness’ used by Acker (2001: 153) more appropriate here. For instance, ‘outsider’ status was felt most acutely in terms of nationality, and all of the location-specific experiences to which that generally refers, the researcher's status as non-indigenous, which was more specific to First Nation and Metis participants, and lack of professional experience in either the regulatory process or the oil sands industry itself. However, this is not to say that the researcher did not also have ‘insider’ status in some sense, albeit to a much lesser degree. For instance, all of the participants spoke English, many had a university education, a large proportion of were white, and the majority were male. Complicating this issue further, the instances in which these statuses was manifest varied from participant to participant; some of the government agency personnel were Metis and First Nation, and some of those in First Nation government and industry relations departments were non-indigenous Canadian. None of this should detract from the fact that the researcher was far closer to the ‘outsider’ side of the spectrum than its ‘insider’ counterpart; this should be quite clear. Instead, it should bring attention to the tangle of commonalities and differences that accompanied the study, thus establishing the basis from which attempts were made to address the methodological implications associated with what was ultimately a piece of ‘outsider’ research.

While ‘insider’ research is considered preferable to its ‘outsider’ counterpart in a number of instances, it is accompanied by a number of potential pitfalls. While there is no need to outline these in detail here, such problems include developing an ‘over-rapport’ with participants (Miller, 1952, quoted in Cassell, 1988: 99), indicating a researcher’s failure to reconcile the conflict between what Brannick and Coghlan (2007: 70) call ‘loyalty tugs’ and ‘behavioural claims’. The perceived status of the researcher as an ‘insider’ may also elicit assumptions of similarity from participants, depriving their responses of detail that would have been given had the researcher been considered an ‘outsider’ (Dwyer and Buckle, 2009). Indeed, this was encountered during one of the interviews with a member of a First Nation, where, on accounting for the researcher's status as an ‘outsider’, the participant used an analogy that sought to make their response more accessible to a non-indigenous person. This was deployed in an attempt to explain how indigenous peoples view Treaty rights in relation to the land, and the hunting, fishing and trapping practices which occur on it:

*…if you’re going to a grocery store, and you go into a grocery store and you have a large variety of where different products are located on which isles, and which brand you think is better, and what…you think is a favourite brand than another. And it’s kind of a wide comparison but it’s kind of the same thing out on the landscape, in that you have different ways of being able to access those areas, traditional areas, the different species that are on those areas, you have, you know, all those different things, so [the First Nation perspective on Treaty rights] is very much tied with the land.*

(Participant A, First Nation B)

This explanation was important as it helped to clarify the extent to which, and in what ways, the Government of Alberta’s interpretation of Treaty rights differed to that of the First Nations (see Chapter 6). Indeed, while ‘insider’ researchers may have advantages in terms of gaining access and building rapport (see Bailey, 2007), ‘outsider’ researchers may find themselves well-placed to view ‘through’ complex situations (Fay, 1996). Considering the highly political landscape which characterises the oil sands industry, where activists, First Nations, environmental groups, members of the public, corporate entities, and the provincial and federal governments are in open conflict throughout the realms of public relations, law, politics and economics, the view of a researcher less embedded within this myriad of polarised and partisan arguments may be better positioned to not only identify the issues at hand, but also engage with those entrenched in such conflict.

The final aspect of ‘outsider’ research that requires attention is specific to this particular study. As it contained indigenous participants, consideration had to go beyond the issues identified in the more general ‘insider-outsider’ literature, and address those associated with power dynamics common to research within colonial contexts. This is particularly important given the fundamental role of ‘research’ in the historical process of colonisation to which various groups of indigenous peoples have been subjected to over the last four centuries. As Tuhiwai Smith (2012: 1) explains:

*From the vantage point of the colonized…the term ‘research’ is inextricably linked to European imperialism and colonialism. The word itself, ‘research’, is probably one of the dirtiest words in the indigenous world’s vocabulary. When mentioned in many indigenous contexts, it stirs up silence, it conjures up bad memories, it raises a smile that is knowing and distrustful…The ways in which scientific research is implicated in the worst excesses of colonialism remains a powerful remembered history for many of the world’s colonized peoples. It is a history that still offends the deepest sense of our humanity.*

Building on this, Tuhiwai Smith goes on to argue that such research continues in the present, rejecting the term ‘post-colonialism’ because of its implication that ‘…the colonizers have left’ (ibid: 101), and going on to explore the ways in which states and corporations continue to conduct research that marginalises indigenous groups and their perspectives. While Tuhiwai Smith's text is primarily aimed at ‘insider’, indigenous researchers, meaning that the consideration it gives to the role of their non-indigenous, ‘outsider’ counterparts is relatively marginal in comparison, it does highlight the need to carefully consider the position of both indigenous peoples and the researcher in any form of social research.

It should at this point be made clear, if not already so, that the First Nations are not the focus of this study. While their accounts of cultural loss have been drawn upon throughout Chapter 2, in order to evidence claims of indigenous environmental victimisation, the primary concern here is to understand how the regulatory process of the settler-colonial government has continued to prioritise economic production over their interests since the mid-1990s. While this necessitates inclusion of First Nations in the research, and their accounts of the regulatory process itself, it is not tasked with understanding the deeper, more spiritual aspects of indigenous culture. Indeed, as a European researcher, with a different cultural orientation, set of values, conceptualisation of time and space, language and structures of power to indigenous peoples (see Tuhiwai Smith, 2012: pp.44-60), the researcher is not in a position to do so anyway. Instead, this research proceeds from what Regan (2010: 27) calls a ‘colonizer-ally perspective’, which seeks to ‘…learn from rather than about the Other, from an “unfamiliar space of not knowing”’. This, Regan (ibid) contends,

*…seems a particularly appropriate standpoint for a study that focuses on personal and socio-political unsettling of settlers. It is also congruent with a broader Indigenous research agenda that supports decolonisation and self-determination in ways that confront the historical and theoretical foundations of Western research paradigms and practices that privilege objectivity and neutrality over subjectivity and engagement.*

Adopting this position allows the researcher to examine the settler-colonial mechanisms permitting the indigenous environmental victimisation detailed in Chapter 2, providing simultaneous opportunity to understand indigenous criticisms of this apparatus as voiced by involved First Nations themselves. Thus embraced is the ‘…uncomfortable epistemological tension that comes with the realisation that [non-indigenous researchers] can never fully know the Other; nor should they aspire to do so’ (ibid: 26). Knowledge of the ‘…subaltern or subjugated’ is therefore utilised in a manner that ‘…reflect[s] dominant practices and assumptions in which the researcher…is complicit’ (ibid). Of course, an argument could be made that, as a citizen of the United Kingdom (UK) and not Canada, the researcher is not ‘complicit’, but such a stance would be ahistorical, wrongly assuming that the UK’s contemporary wealth can somehow be divorced from its history of empire, indigenous subjugation and slavery. As such, the dual status of the researcher as both ‘outsider’ and non-indigenous can be reconciled with the inclusion of First Nations within this predominantly up-system piece of research, particularly when coupled with the various ethical safeguards outlined in the preceding sections of this sub-section.

## 4.8 Conclusion

This chapter has outlined the methodology used to conduct this research, also providing detail on the means by which its ethical dimensions were addressed. In essence, the study was designed to collect primary and secondary qualitative data from interviewees and government documents within an intrinsic case study research design. The approach to theoretical development was neither inductive nor deductive, as in more traditional social research, but ‘adaptive’ (see Layder, 1998). This permitted the recursive movement between pre-existing theory and primary data as a means for organising and understanding the findings. Braun and Clarke’s (2006) specific procedure for conducting thematic analysis was utilised for this purpose, permitting the iterative movement between data, pre-existent knowledge, codes, categories and concepts in order to provide detailed and credible answers to the posited research questions. While previous chapters have focused on existing literature and research, with Chapter 2 evidencing the indigenous environmental victimisation communicated by First Nations and Chapter 3 the prevailing explanations for such harm, the following chapters present the findings and analysis generated from the methodology detailed above. Chapters 5, 6 and 7 present this in direct relation to the ‘policy’, ‘planning’ and ‘approval’ stages of the regulatory process, respectively, whereas Chapters 8 and 9 conceptualise it under the terms of ‘catalyst’ and ‘control’. This structure is informed by the ‘semantic’ thematic analysis advocated in Section 4.6, presenting the findings and analysis in a manner that broadly corresponds to the sub-research questions and overarching central research question.

# 5. Characteristics of the Policy Context: ‘Sustainable Growth’, Techno-Scientific Mitigation and First Nation Input

As outlined in Chapter 3.3, the regulatory process under investigation consists of three stages; ‘planning’, ‘approval’ and ‘oversight’. While Chapters 6 and 7 present data on the first and second of these, this chapter presents findings from the thematic analysis conducted into the seven overarching policies and strategies published since 1999 governing oil sands extraction (see Chapter 4.4). Taken together these contextualise the decisions and deliberations made within the regulatory process, illustrating the overarching priorities driven by provincial government in its pursuit of ‘sustainable development’ of the oil sands resource. In particular, this chapter establishes the dominant objectives forwarded by these policies along with the purported means for their realisation, describing the imbalance of priorities inherent to the ‘sustainable development’ approach and the fixation with science and technology as providing the means for mitigating environmental impacts. Also outlined in the post-2008 policies is an apparently high degree of support for greater First Nation consultation on individual oil sands projects, in addition to the similarly apparent inclusion of their input into some of the policies themselves. Taken together, these characteristics are largely consistent across the time frame in which the policies and strategies have been issued. In this sense, a prescient statement was made in the earliest policy document analysed, setting the scene for all those to follow; ‘[a] vision should endure. Its implementation may change and vary depending on the demands of a particular time or situation, but the vision should remain constant. This is the case in Alberta’ (Government of Alberta 1999a: 2).

Throughout the policy documents the consistent ‘vision’, or objective, has been a form of ‘sustainable development’ interpreted through the philosophical lens of ecological modernisation. This is a ‘…managerial approach that sees sustainable technology, sustainable consumption, and market-based solutions as providing the answers [to environmental problems]’ (Foster et al, 2010: 19). In Chapter 3.2.1 it was explained that eco-modernist philosophy operates on a spectrum between ‘strong’ and ‘weak’ positions, with each recommending a different set of approaches to environmental issues. This chapter demonstrates that the advocated approach throughout policy and strategy is largely that of the ‘weak’ strand, being visible in the consistent pursuit of economic growth and reliance on techno-scientific means of environmental mitigation. However, ‘strong’ ecological modernisation was also visible in the ‘open’ and ‘democratic’ way government purported to include First Nations in both policy and regulatory practice (see Chapter 3.2.1). Such a combination is not entirely unusual, as ‘…it is essential to note that weak and strong features of EM (ecological modernisation) are not always mutually exclusive binary opposites’ (Christoff, 1996: 491). That said, the sheer extent of the environmental victimisation illustrated in Chapter 2 suggests that the techno-scientific methods of environmental mitigation are not fulfilling the purpose intended. A similar discrepancy is visible when such harm is compared to the consultation claimed to have occurred with First Nations at the level of strategy and operations. Chapters 6 and 7 examine this difference in greater detail. For present purposes, however, this chapter outlines the environmental philosophy underpinning the Government of Alberta’s plans for the ‘sustainable development’ of the oil sands resource.

This chapter is divided into three sections. Each centres on the dominant objective posited in each of the policies analysed; environmentally sustainable economic growth. The first describes the presentation of this objective in greater detail, explaining its positioning within a particularly eco-modernist interpretation of ‘sustainable development’ and its consistent association with the notion of inter-generational justice. The second section explains the dominant means by which these objectives are to be realised at the level of operations; a form of precautionary adaptive management which seeks to mitigate risk through optimistic recourse to techno-scientific innovation. The third and final section explores the purported level of First Nation involvement in the creation and execution of the various policies and strategies. While this was subsumed into broader stakeholder engagement in the documents published prior to the 2005 *Mikisew* decision at the SCC (see Chapter 3.3.1), those released following this decision support the provision of First Nation-specific consultation at the level of both policy and operations. Finally, the chapter summarises the findings in preparation for Chapter 6, where data from interviews with those involved at the ‘planning’ stage of the regulatory process will be presented, illuminating the extent to which a discrepancy exists between First Nation consultation in policy and practice.

## 5.1 The Pursuit of Growth: ‘Sustainable Development’, Inter-generational Justice and the Unquestioned Primacy of Resource-based Economics

### 5.1.1 Alberta's Commitment to Sustainable Resource and Environmental Management, 1999

The first policy of relevance was published in March 1999 and titled ‘Alberta’s Commitment to Sustainable Resource and Environmental Management’ (ACSREM) (Government of Alberta, 1999a). It outlines a ‘vision’ for ‘sustainable development’ which establishes resource extraction as both an unquestioned priority for the province and the dominant means by which provincial societal interests are to be met (ibid: 2). This ‘vision’ is clarified using five points intended to outline its content, providing insight into the environmental philosophy underlying the interpretation of the term. Although emphasising the need to balance multiple interests in the final three of these, the dominant consideration in the first two is of economics. The first point requires government agencies to ensure that ‘[t]he use of Alberta’s natural resources shall be sustainable’; a point which is taken to mean that ‘[n]on-renewable resources shall be managed in a manner to maximize benefits to Albertans’ (ibid: 3). The objective of this is made clear in the second, subsequent point of clarification, where the explicit purpose of such management is to ‘support and promote the Alberta economy’ to ensure ‘…the optimum value for the resource is obtained and there will be a fair return to Albertans’ (ibid). This economic valuation is also framed in more social terms, with the clarification that ‘support[ing] and promot[ing] the Alberta economy’ also encompasses ‘…Alberta’s ability to provide Albertans with health, education and other social and economic benefits, now and in the future’ (ibid). Visible here is a theme which becomes increasingly dominant as new policies are released; that the quality of life enjoyed by existing and future inhabitants of Alberta is premised upon resource extraction. Environmental protection is absent from these initial points of clarification.

The remaining three points place heavy emphasis on integrated resource management, giving broad recognition to the interconnectedness of various aspects within and between both society and environment. In substantiating the policy vision for ‘sustainable development’, the third point focuses entirely on the latter of these, stating that ‘Alberta’s environment shall be protected’ (ibid). This is taken to mean ‘Alberta’s air, land and water shall be protected and maintained for the health and enjoyment of Albertans’, and that ‘[s]pecies diversity shall be protected and maintained’ (ibid). Although this is clearly anthropocentric, directed at ‘Albertans’ generally, the protection encompasses both animate and inanimate aspects of the environment. Recognition of this ecological multiplicity is extended into point four, where ‘sustainable development’ is taken to include managing resources ‘…on an integrated basis’ (ibid). This is further demonstrated in the accompanying explanation of this term, where recognition is given to the need to manage environmental effects in a regional capacity:

*Resources such as trees, minerals, wildlife, water, fish, range, public land and plants, shall be managed in a manner that addresses their interdependence and recognizes that the use of one resource can affect other users and other resources…*

(ibid)

The fifth and final point clarifying the ‘vision’ for ‘sustainable development’ expands on this interrelated view, explaining the need for resource management ‘to provide a range of products and values’ for ‘multiple benefits’ (ibid: 4). When discussing this in direct regard to minerals, which explicitly includes oil (see ibid: 1), again a relationship is established between the flow of revenue from resource extraction and the social aspects of ‘...provid[ing] education, health care and social services’ (ibid: 4). Taken together, this early conceptualisation of ‘sustainable development’ renders social goods contingent on resource extraction. Considering that Alberta has a long history of oil and gas extraction, such a position is not unexpected. Indeed, Treaty 8 was only signed with indigenous peoples to gain access to the resource wealth which lay to the North of the province (Fumoleau, 2004). The conception deployed here can thus be recognised as one which both internalises and continues this historical centrality of non-renewable resource extraction, anchoring its social and economic dimensions to one another for the benefit of some provincial population. Simultaneously, those dimensions pertaining to the environment are made secondary.

The notion of inter-generational justice is also communicated throughout the document, adopting language similar to that used by the Brundtland Commission in their original definition of ‘sustainable development’ (see Chapter 3.2.1). The concept is twice deployed in the foreword provided by the-then Premier Ralph Klein, where resource management is considered to be ‘…for the benefit of Albertans now and in the future’ (Government of Alberta, 1999a: iii), and ‘…for future generations’ (ibid: iv). The concept finds further form within the policy ‘vision’ itself where, as a ‘…leader in ‘sustainable development’, the province is to ensure that the social, environmental and economic benefits of resource management are realised ‘…in the present and future’. (ibid: 2). Similar language is encountered in the second point clarifying the content of the ‘vision’, where it is stated that ‘[n]atural resources will be managed to continue to support Alberta’s ability to provide Albertans with health, education and other social and economic benefits, now and in the future’ (ibid: 3). As the concept is used alongside the notion that resource extraction acts as the foundation for the acquisition of provincial social interests, it has the effect of expanding this universalising, unquestioned interpretation across time, concealing those interests which may disagree or diverge from this position in both the present and future.

### 5.1.2 Regional Sustainable Development Strategy, 1999

The subsequent Regional Sustainable Development Strategy (RSDS) was published in 1999 (Alberta Environment, 1999), three months after the ACSREM document. In operation for 9 years, until it was replaced with the 2008 Provincial Energy Strategy (see Section 5.1.4), this strategic document informed eight of the twelve hearing decisions on large-scale oil sands projects analysed in Chapter 6. Tasked with providing operational direction for ACSREM’s ‘vision’, the RSDS was introduced ‘…on anticipation of further oil sands resource development in northern Alberta’ (ibid: 1). Despite spending a considerable portion of the first two pages reiterating the text communicated in the previous ACSREM policy, the document goes on to place a greater emphasis on the economic growth of the oil sands in particular. Indeed, it is here posited as a primary strategic target for the province and anchored to the concept of inter-generational justice:

*The eventual development of most of the surface mineable oil sands…will be guided by the need to maximise the benefits for future generations, and the requirements to maintain the quality of the environment.*

(ibid: 6)

With the policy continuing to deploy the assumption that extraction of oil sands is in the best interest of ‘future generations’, a modification is reflected in a subtle change to its interpretation of ‘sustainable development’. Whereas the previous ACSREM document adopts a more conciliatory position with regard to the conceptual centrality of economic growth, in the sense of there being ‘…a need to balance opportunities for growth with the need to preserve and maintain our rich environment for future generations’ (Government of Alberta, 1999a: 1), the RSDS views ‘sustainable development’ as ‘…based on integrating environmental protection with economic growth and resource use, and making full use of the available management tools and resources’ (Alberta Environment, 1999: 4). Whereas the former suggests that possibilities for economic growth may be avoided to protect the environment, the latter suggests that environmental protection is actually contingent on such growth. The term ‘sustainable growth’ would therefore be a more appropriate descriptor for the objectives of this strategy, belying the particularly ‘weak’ form of ecological modernisation to which the concept is aligned (see Chapter 3.2.1).

### 5.1.3 Water for Life: Alberta's Strategy for Sustainability, 2003

By 2003, ‘significant pressures’ on Alberta’s water resources forced the government to introduce its Water for Life policy (Government of Alberta, 2003: 5). Labelled as a ‘strategy for sustainability’, the document makes province-wide recommendations about ‘…managing Alberta’s water needs, maintaining the province’s economic prosperity, and addressing environmental concerns’ (ibid); the social, economic and environmental dimensions commonly associated with ‘sustainable development’ (see Chapter 3.2). In accordance with these priorities, the policy provides the following ‘commitments’:

*Albertans will be assured their drinking water is safe; Albertans will be assured that the province’s aquatic ecosystems are maintained and protected; Albertans will be assured that water is managed effectively to support sustainable economic development.*

(ibid: 7)

In order to guide and measure progress on their attainment, specific short, medium and long-term outcomes are established for each, all of which centre around three key ‘solutions’; developing knowledge and research, creating partnerships, and conserving water.

The first ‘solution’, on the need to ‘invest in knowledge and research’, is premised on a perceived inadequacy in provincial understanding of water-related issues. Considering there to be a ‘lack of sufficient information and knowledge to make effective decisions for the future’, the logical solution to ‘invest in knowledge and research’ is proposed (ibid: 13). This is coupled with the second ‘solution’, where there is a recognised ‘need for regionally based solutions developed in collaboration with stakeholders and the public’ (ibid, 19). Again, the proposed ‘solution’ is not unreasonable, in that a ‘partnership approach to watershed management’ is viewed as the most appropriate response to issues surrounding water use. Taken together, this combination of information gathering and public participation suggests that environmental thresholds or stakeholder input may substantially influence the decision-making process; a position echoing the 'democratic pragmatism' of Dryzek (2013; Chapter 3.1.5), and eco-socialism's vision for 'non-elites' (see Chapter 3.2.2). However, such influences are only permitted because neither of these suggested ‘solutions’ are made in response to the material consequences of production; the first responds to a knowledge deficit and the second to the regional variability in aquatic ecosystems. It is only in the third ‘solution’, where ‘water conservation’ is the suggested response to there being ‘more demand for water than is available’ (Government of Alberta, 2003: 22), that the dominant consideration of continued economic growth becomes explicit, as do the restrictions on any opportunities for non-elite influence:

*At present, the limit of available water has been reached in a number of watersheds, is being approached in others and, as growth in the economy and population continues, will be reached in Alberta’s remaining watersheds. The solution to this looming problem comes through a combination of both improving our ability to capture and store water during high flow seasons or periods where possible and feasible, as well as improving water use practices through significant conservation efforts.*

(ibid: 21)

This ‘solution’ most clearly demonstrates the continued interpretation of ‘sustainable development’ as ‘sustainable growth’, as viewed through the lens of ‘weak’ ecological modernisation; a feature consistent with the RSDS before it. Economic growth is here unquestioned, viewed as a predetermined outcome alongside its inevitable challenge to environmental thresholds. As such, mitigating the risks associated with there being ‘more demand for water than is available’ is not by managing the scale and rate of growth in production (ibid: 22), which would tackle the acknowledged problem of industrial demand, but by improving the efficiencies upon which growth is based. In this sense, the solutions to growth are to be found in further growth. Importantly, due to their ancillary relationship with this dominant issue, the two other proposed ‘solutions’ are pulled into the same space by this subtle yet dominant aspect of the policy. The need to ‘invest in knowledge and research’ (ibid: 13), develop a ‘partnership approach to watershed management’ (ibid: 19), and conserve water (ibid: 22), become services purposed with remedying the consequences of growth. This ‘strategy for sustainability’ as a whole is therefore firmly rooted in the philosophy of ‘weak’ ecological modernisation, where it is the management of continued, unbridled and unquestioned growth that is the established purpose of ‘sustainable development’.

### 5.1.4 Launching Alberta's Energy Future: Provincial Energy Strategy, 2008

The next policy of relevance, the provincial energy strategy Launching Alberta’s Energy Future, was not released until 2008. Here, the term ‘sustainable development’ is referenced only once, with ‘sustainable prosperity’ being used instead to describe the goal of Alberta’s updated ‘Energy Vision’ (Government of Alberta, 2008a: 19). Interpreted alongside the concept of inter-generational justice, this approach is seen to ‘…pave the way to sustained wealth creation, while safeguarding our environment and our social advantages for future generations of Albertans’ (ibid). Even at this overarching level of the policy it is clear that such a vision is premised on market-orientated solutions reminiscent of ecological modernisation. In explaining how ‘sustainable prosperity’ is to be achieved, an approach of ‘enlightened self-interest’ is advocated, which it suggests ‘…will allow us (Alberta) to move beyond viewing the challenges as the costs of continuing our growth’ (ibid). Leaving aside the continued intent to pursue economic growth, visible here is a continuation of a theme seen in previous documents; an aversion to solutions which challenge the perceived symbiotic relationship between growth and environmental protection. The presence of ecological modernisation within this notion of ‘sustainable prosperity’ is further reflected in the mantra detailed in the paragraph explaining the term, where it is stated that ‘[u]ltimately, the market will still decide’ (ibid). As outlined in the document, ‘[t]his is the path that allows Alberta to not only respond to “issues” but take full advantage of the opportunities’ (ibid); an approach indicative of the ‘win-win’ scenario inherent to the concept of ‘sustainable growth’ under ecological modernisation (see Chapter 3.2.1).

This philosophical dominance of eco-modernisation feeds into the six ‘Critical Assertions’ taken to represent the ‘fundamental guideposts’, providing a less abstracted direction for this ‘sustainable prosperity’ ‘vision’. There are a number of assumptions underpinning all of these assertions, the most dominant of which is the continued and unquestionable primacy of resource extraction as the basis for economic growth. This is most prominent in the first and second assertions, where ‘[t]he development of clean hydrocarbons is essential to Alberta’s energy future’, and ‘[o]ngoing development of Alberta’s energy resources will be a platform for continued economic growth and success’, respectively (ibid: 20). The underpinning message, that economic growth based on resource extraction is a priority for the province, takes on additional justificatory characteristics in the text accompanying these assertions:

*The world’s fossil fuel supply remains plentiful, but in a carbon-constrained world we must find methods to develop and consume fossil fuels in an environmentally responsible way, and this must be Alberta’s responsibility and focus. Alternative and renewable energy sources will play a growing role in Alberta’s energy future, but they cannot match the importance to Alberta of “clean” fossil fuels.*

(ibid)

*Alberta’s energy future is also about revenues, value-added activity and sustainable jobs for Albertans and Canadians. An important benefit of the energy strategy is that it will lead to a future of long-term prosperity, continuing to drive job and wealth creation across Canada and providing value to Albertans as resource owners.*

(ibid)

Notwithstanding the continued and unquestioned pursuit of economic growth premised on resource extraction, the policy here presents a dual justification for such a goal; its positive contribution to levels of national and provincial employment and the unexplained inadequacy of alternative renewable sources. Again, social goods are anchored to non-renewable resource extraction, which, apparently, cannot be substituted for by renewable alternatives.

These overarching ‘critical assertions’ within the ‘sustainable prosperity’ vision are given more operational form via the three explicit outcomes of the policy; ‘[c]lean energy production, [w]ise energy use, and [s]ustained economic prosperity’ (ibid). Throughout each of these the presence of ‘weak’ ecological modernisation is visible in their communicated pursuit of a growth in productive output. In the explanation for the first outcome, ‘clean energy production’, it is recognised that ‘[b]y 2030, the world is expected to be consuming more than 50% more energy than it consumes today’ (ibid: 23). In response, the ‘key question for Alberta’ centres on meeting this demand by lessening the environmental impact of subsequent production and consumption as opposed to reducing production itself; ‘how can we begin to produce and consume fossil fuels in a far cleaner way?’ (ibid). Such a question is met with a recognition that the various methods for lessening the carbon impact of fossil fuel production, including gasification processes and carbon capture, ‘…are expensive and yet to be fully validated’ (ibid). However, such issues are assuaged by recourse to a form of techno-scientific optimism, where ‘Alberta must apply its innovative talents to advancing and employing these means’ (ibid).

This ‘sustainable growth’ approach, where expansion of production can be mitigated by ‘greening’ consumption, continues to be mirrored in the second and third policy outcomes of ‘wise energy use’ and ‘sustained economic prosperity’ (ibid: pp.25-28). Suggesting a reduction in per-capita consumption as a means of limiting harmful emissions, the second outcome is entirely focused on consumption patterns. However, it is important to make clear that this is not advocating a concurrent reduction in production, which would indicate a break with ‘weak’ ecological modernisation. Instead, the policy is fixated on modifying consumption patterns so as to maintain production output in order to ensure continued economic growth:

*Energy that companies and individuals do not consume is energy that can be upgraded or sold to further benefit Alberta. So “saving” energy not only reduces heating or lighting costs, but offers the potential to create more wealth for Albertans.*

(ibid: 25)

The underpinning primacy of economic growth contained within this justification is confirmed in the third and final policy outcome, ‘sustained economic prosperity’. Here, among the ‘…number of steps to derive greater wealth over the longer term and in a more sustainable way through its energy industry’ (ibid: 27), an expected and desired increase in energy production is communicated. Indeed, the policy goes on to recommend pursuing such prosperity by ‘optimizing the recovery of our energy resources’ (ibid). Importantly, this includes ‘…tapping more of what we are currently leaving in the ground…and reaching our oil sands resource potential…[and] broadening the markets for our energy resources’ (ibid). This desire to increase production is coupled with an expectation that it will occur, forming the basis for a plan to send a greater range of bitumen products to market. The given purpose of this is to create ‘long-term jobs’ and increase tax revenues ‘on top of the royalties the province already receives from bitumen’ (ibid). As is later noted, ‘…the demand for Alberta’s bitumen will grow, and so too will prices. Meeting that demand can, in turn, increase the royalty value the province receives from bitumen’ (ibid: 28). As communicated in precursor policies, the notion of social goods being derived from both employment and non-renewable royalties continues to be used as justification for expanding bitumen production.

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### 5.1.5 Land-use Framework, 2008

Published in the same year, 2008, the province-wide Land-use Framework (LUF) was introduced as the operational means of implementing the Provincial Energy Strategy, much like the RSDS providing operational direction for the ACSREM policy (see Sections 5.1.1 and 5.1.2). Having the express goal of ‘manag[ing] public and private lands and natural resources to achieve Alberta’s long-term economic, environmental and social goals’ (Government of Alberta, 2008b: 7), it continues to communicate the three core elements inherent to ‘sustainable development’. Indeed, this concept is recognised as part of the LUF’s ‘vision’, ‘desired outcomes’ and ‘guiding principles’, all of which are intended to ‘guide and inspire’ Alberta’s ‘collective journey’ in pursuit of the overarching policy goal (ibid: 15). With respect to the ‘vision’ to which the LUF is contributing, it ‘…confirms the principles of sustainability and inter-generational responsibilities’ (ibid), echoing previous policies in its use of the characteristics inherent to the Brudntland Commission’s early definition of ‘sustainable development’ (see Chapter 3.2). Similarly, to ‘translate…vision into reality’ the LUF identifies three outcomes, which any attempt to implement its central tenets ‘…must contribute…to’, ‘…directly or indirectly…’ (ibid). Again, these mirror the conceptual social, economic and environmental triad within ‘sustainable development’, being posited as the pursuit of a ‘[h]ealthy economy supported by our land and natural resources’, ‘[h]ealthy ecosystems and environment’, and ‘[p]eople-friendly communities with ample recreational and cultural opportunities’ (ibid). Finally, ten ‘guiding principles’ are outlined, which have the intended purpose of aligning practical decisions ‘…with our vision and desired outcomes’ (ibid).

The first and foremost of these ‘guiding principles’ is ‘[s]ustainable [d]evelopment’, which is again explained using terms provided by the Brundtland Commission; ‘[d]evelopment which meets the needs of the present without compromising the ability of future generations to meet their own needs’ (ibid: 16). The first page of the executive summary clarifies just how far this is to be interpreted through the lens of ‘weak’ ecological modernisation:

*The purpose of the Land-use Framework is to manage growth, not stop it, and to sustain our growing economy, but balance this with Albertans’ social and environmental goals. This is what the Land-use Framework is about – smart growth.*

(ibid: 2)

This is expanded on further in the LUF, where it is noted that the ‘…Government of Alberta rejects the simplistic view that to save the environment we must stop development’ (ibid: 6). Although it would be more accurate to replace the term ‘development’ with ‘growth’, as with the majority of the documents, the message is clear; the interpretation of ‘sustainable development’ in this policy is incompatible with positions advocating a stable or decreasing rate of production. The presence of ecological modernisation thus continues here, too. This is particularly important as the values, outcomes and principles contained within this LUF operate as the basis for the 2012 LARP (ibid: 3; see Section 5.1.7), the localised manifestation which specifically directs activity in the oil sands area.

### 5.1.6 Responsible Actions: A Plan for Alberta's Oil Sands, 2009

With the explicit purpose of ‘build[ing] on the vision outlined in the Provincial Energy Strategy’ of 2008 (Government of Alberta, 2009a: 5), Responsible Actions: A Plan for Alberta’s Oil Sands was subsequently published in 2009. As the name implies, this more specific policy targeted the oil sands region in particular. Continuing the drive to increase production visible in its precursor policies, the ‘sustained growth’ of the oil sands industry is explicitly advocated in the first paragraph of the introduction (ibid: 4). Going on to note the ‘…significant role Alberta’s oil sands reserves will play in meeting the world’s demand for energy’ (ibid), after recognising that ‘…demand for oil is expected to continue to rise’ (ibid: 2), a growth in production is clearly not an objective that this policy sets out to oppose. Indeed, the associated and continued interpretation of ‘sustainable development’ as ‘sustainable growth’ is recognisable in the introductory text:

*The Government of Alberta’s long-term vision for the oil sands is that development occurs responsibly, sustains growth for industry and the province over the long term, and is done in a manner that enhances Albertans’ quality of life…[This policy] provides a platform to balance development with environmental protection, social responsibility, and economic success. It outlines a strategic approach to responsible development of the oil sands resource.*

(ibid: 4)

This pursuit of ‘sustainable growth’ is repeated in the ‘guiding principles’, which provide the ‘…foundation for the development of this strategic plan and…the basis for implementation’ (ibid: 9). Based on ‘[h]ealthy environment and communities’, ‘[c]ollaboration’, ‘[b]alanced growth’ and ‘[p]ublic interest and accountability’, it is the latter two that most reflect the dominance of growth and influence of ecological modernisation. Indeed, the former of this coupling includes ‘[m]aximising long-term value and benefits from Alberta’s oil sands while considering the economic, environmental, and social factors of development’ (ibid). Here, the central interest is in increasing the exchange value obtained from the oil sands resource, with social, economic and environmental factors being recognised as peripheral considerations. This principle also aims to ‘[b]uild on our strengths in developing our energy resources, and further increase our competitiveness within integrated North American and global markets’ (ibid). Recognising that this document deploys ‘development’ interchangeably with ‘growth’, it is clear that expansion of production is a central pillar in the direction provided to oil sands management. The philosophy of ecological modernisation is also seen under the heading ‘[p]ublic interest and accountability’, which is explained as ‘[s]upport[ing] the effectiveness of the free market through clear and sound government policy and economically efficient regulatory structures…’ (ibid).

The policy goes on to translate these four guiding principles into three policy outcomes, which are ‘…aligned with the three broad outcomes of the *Provincial Energy Strategy*’ (ibid: 10, emphasis in original). These include ‘optimized economic growth’, ‘reduced environmental footprint’, and ‘increased quality of life for Albertans today and in the future’ (ibid). The contradiction between the first and second of these outcomes is a further indication of ‘weak’ ecological modernisation, as it sees no conflict between growth and environmental protection (see Chapter 3.2.1). Moreover, as seen in previous policies, the focus on ‘quality of life for Albertans’ emphasises the relationship between provincial ‘social goods’ and resource extraction, meaning that although the social, economic and environmental considerations continue to be presented as a triad of equal interests, the environment is implicitly positioned as a lesser consideration. Again, when taken together, these features indicate a policy objective is being interpreted through the lens of ‘weak’ ecological modernisation (see Chapter 3.2.1).

### 5.1.7 Lower Athabasca Regional Plan, 2012

The most recent policy developed to guide expansion in the oil sands is the 2012 LARP (Government of Alberta, 2012a). Despite being introduced as part of the Government of Alberta’s commitment to manage cumulative environmental effects (ibid: 3), it continues to interpret ‘sustainable development’ as ‘sustainable growth’. This is immediately visible in the introduction, where the stated purpose of the LARP is to ‘…set the stage for robust growth, vibrant communities and a healthy environment within the region over the next 50 years’ (ibid: 2). This focus on growth is also reflected in its outcomes, which are ‘…consistent with and support the province-wide outcomes set out in the Land-use Framework’ (ibid: 24). Indeed, the first outcome for the region is that ‘[t]he economic potential of the oil sands resource is optimized’ (ibid: 37), with the strategies deployed to ensure its success including ‘[c]ontinue[d] implementation of the Alberta Provincial Energy Strategy and Responsible Actions: A plan for Alberta’s Oil Sands…’ (ibid: 37). Outlined as the third objective of this outcome, it is made clear that polices need to be ‘…developed that promote new investments in energy, mineral and coal development’, with its accompanying explanation noting that ‘[g]rowth of all energy sub-sectors is crucial for the regional and provincial economy’ (ibid: 41). Taken together, the focus on expanding production is still present, even here, in the plan introduced to tackle the specific issue of cumulative environmental effects emerging from the now-substantial oil sands industry.

Throughout the documents the philosophical lens through which each of the policy objectives has been passed is that of ‘weak’ ecological modernisation. Creating a space in which the conflict between economic growth and environmental protection is nullified, largely because realisation of the latter is rendered contingent on the former, the term ‘sustainable development’, and its associated conceptual faculties, has been deployed in place of the term ‘sustainable growth’, which would be more accurate. With resource extraction posited as a fundamental priority for the Government of Alberta, and repeatedly presented as a key means by which the provincial population at-large maintain their quality of life, ‘sustainable development’ is here anchored by default to the extraction and exchange of non-renewable resources more generally, and of the oil sands in particular. This is an unquestioned aspect of each policy document, representing, in part, the historical prominence of the oil industry in Alberta. However, when this is coupled with the concurrent pursuit of a growth in the enterprise, for the very purpose of providing province-wide ‘social goods’, not only is ‘sustainable development’ tied to an industry which is, by its very nature, unsustainable, but an assumption is being made that incremental resource extraction is in the universalised interests of the provincial population. Indeed, when this position is associated with the notion of inter-generational justice, as visible throughout the documents, it has the effect of expanding the universalising assumption onto the broad ‘publics’ of the future. As a consequence, the provincial social ‘goods’ and ‘interests’ are premised on ever-expanding resource extraction, while the more situated and localised environmental concerns of First Nations become lost amongst its implications.

## 5.2 The Facilitation of Growth: The Principle Role of Science and Technology in the Mitigation of Environmental Risks

### 5.2.1 Regional Sustainable Development Strategy, 1999

The ACSREM policy, published in 1999, contains no mention of the role for science and technology in ensuring environmental protection. However, it does make extensive reference to the need for ‘integrated’ forms of planning in ‘[a]ll provincial initiatives with significant implications for resource and environmental management…’ (Government of Alberta, 1999a: 5). As this is the underpinning direction document for the subsequent RSDS, this approach is visible throughout both policies. However, owed to the more operational nature of the RSDS, it contains greater clarity on how such management is to be deployed:

*The purpose for the creation of a Regional Sustainable Development Strategy (RSDS) for the Athabasca Oil Sands is to ensure implementation of adaptive management approaches that address regional cumulative environmental effects, environmental thresholds, appropriate monitoring techniques, resource management approaches, knowledge gaps and research to fill gaps. In order to protect the environment, the RSDS will become a management tool that keeps pace with new information, science and technology.*

(Alberta Environment, 1999: 39)

Having the purpose of reducing uncertainty and concern over time via systematic monitoring and knowledge production, scientific and technological advances have a key role in this strategy.

The techno-scientific orientation of the ACSREM policy is mirrored in one of the four principles upon which the subsequent RSDS is based, which states that ‘[l]earning will continue’. This is taken to mean that the ‘…management strategy will be modified based on the new information, needs or goals that are required to ensure sustainable development will be realised’ (ibid: 5). This is advocating a form of adaptive management, which Williams (2011: 1347) defines as ‘…a learning-based process involving the fundamental features of learning (the accretion of understanding through time) and adaptation (the adjustment of management through time based on this learning)’. The process is facilitated by the accretion of data using various scientific instruments, with technological management being used in the subsequent 'adaptation'. Considering that these techno-scientific solutions are tasked with facilitating the ultimate policy aim of ‘sustainable growth’, and that such ‘fixes’ are equated with the precautionary principle and eco-modernisation (see Hajer, 1995; Chapter 3.2.1), largely because technology and science operate as the medium through which ecological issues are addressed, the philosophy underpinning the objectives for ‘sustainable growth’ is also present in the techniques deployed to achieve them.

The role of adaptive management within the RSDS is further communicated throughout its ‘focus’, which is explained as ‘…address[ing] the need to balance resource development and environmental protection’ (Alberta Environment, 1999: 5). Here it is stated that the environmental management framework must be built on ‘…a strong foundation of environmental information and science to assist in making decisions…’, ‘…a method to identify priority regional environmental issues’, and a means to ‘…organize the science and monitoring work that is needed to understand these issues’ (ibid: 5). Through consultation with various stakeholders, including Aboriginal communities, this management system is directed at ‘only 72’ issues of environmental concern (ibid: 11). Subsequently grouped into 14 themes, these issues are categorised according to their ‘urgency’ and ‘gaps’. The former of these is ‘…based on the combination of timing, risk and uncertainty for each issue’, and the latter on ‘…identifying the information and systems needed to manage each issue’ (ibid: 11-12). Echoing the ‘adaptive management’ visible in the underlying principles of the RSDS (ibid: 16), these 14 themes of concern are grouped according to their priority so that various agencies and organisations can develop solutions. In adopting this approach, the document communicates an awareness of the uncertainty present and a need to gather more data on potential environmental impacts. Together this signifies an apparent precaution with regard to the environmental issues expected to arise through continued growth, particularly as no fewer than eight organisations, including the Cumulative Environmental Effects Management Partnership and the Regional Aquatics Monitoring Program (RAMP), are tasked with providing the monitoring information for their resolution. As such, the RSDS, and to a lesser extent its precursor ACSREM document, relies on a form of precautionary managerial optimism, where it is assumed that the expected environmental effects of industrial growth can and will be mitigated by recourse to advances in science and technology.

### 5.2.2 Water for Life: Alberta's Strategy for Sustainability, 2003

The subsequent 2003 Water for Life policy contains extensive reference to a need for greater scientific understanding of the impacts to aquatic ecosystems and water supplies. This is not specifically targeted at oil sands expansion, but refers to the direction to be taken by the province more generally. Nevertheless, as outlined in Section 5.1.3, the three ‘key directions’ for this policy, which enable it to achieve the goals of ‘[h]ealthy aquatic ecosystems’ and ‘[r]eliable, quality water supplies for a sustainable economy’ (Government of Alberta, 2003: 7), are ‘[k]nowledge and research’, ‘[p]artnerships’, and ‘[w]ater conservation’ (ibid: 9); all of which are relevant to the water use of the oil sands industry. The first of these ‘directions’ is described as having its basis in science, requiring continued modification in response to new data and the subsequent communication of information to sections of the public:

*This commitment to knowledge and research has three main elements – scientific knowledge of Alberta’s water resources; an understanding of emerging water issues and opportunities; and ensuring all Albertans are aware of water issues and have the knowledge and tools necessary to make effective management decisions.*

(ibid: 11)

Although the second ‘key direction’, ‘partnerships’, is primarily concerned with stakeholder engagement (see Section 5.3.3), the third, ‘water conservation’, advocates the related aspect of ecological modernisation; economic solutions (see Chapter 3). In accordance with its approach to managing the consequences of growth instead of viewing it as a fundamental issue, one of the four short-term solutions intended to achieve this ‘direction’ requires government to produce an evaluation which will ‘…make recommendations on the merit of economic instruments to meet water conservation and productivity objectives’ (Government of Alberta, 2003: 21). This prioritisation of economic measures is also visible in one of the two medium-term actions, requiring agencies to ‘[i]mplement economic instruments as necessary to meet water conservation and productivity objectives’ (ibid: 22). Indeed, even the more explicitly conservation-orientated actions are tied to economic outcomes, with the only remaining medium-term aim being to ‘[p]repare water conservation and productivity plans for all water using sectors’. The only long-term solution is to ‘[e]stablish an on-going monitoring program to ensure all sectors are achieving water conservation and productivity objectives’ (ibid: 22). Taken together, these water conservation solutions are premised on a rationality deeply rooted in the techno-centric managerialism advocated by ecological modernisation.

### 5.2.3 Launching Alberta's Energy Future: Provincial Energy Strategy, 2008

By 2008, with the introduction of the provincial energy strategy, Launching Alberta’s Energy Future (Government of Alberta, 2008a), the focus on technology becomes more extensive and explicit with regard to its role in environmental protection. In the foreword provided by the Minister of Energy, the desire for Alberta to be ‘…recognized as…an energy technology champion’ is established in only the second paragraph, which is followed closely in the third by the statement that ‘[c]lean energy production will be achieved through the application of energy technology leadership…’ (ibid: 2). With regard to the bitumen industry in particular, environmental pressures are recognised as ‘…critical issues that must be addressed in the years to come by industry, government and the research and technology sector’ (ibid: 9), demonstrating the additional presence of rational elitism within the policy (see Chapter 3.2.1). Here technology is more explicitly granted the dual role of not only protecting the environment but also increasing efficiencies of production; a fundamental relationship within the philosophy of ecological modernisation:

*Innovation in the energy sector is most apparent when near-term benefits can be achieved through incremental change. The timeframe demanded for payback is not consistent with some of the high risk, long-term innovations we must develop to solve our energy challenges. We must move the results of our research through technology development and commercialization to full-scale commercial deployment in order to see our energy research investments pay economic and social dividends…We need technology more than ever today to keep our energy industry competitive and sustainable.*

(ibid: 16)

This conservation-efficiency duality is further enshrined within two of the policy’s ‘critical assertions’, which provide the ‘fundamental guideposts’ for its vision for ‘sustainable development’ (see Section 7.1). In assertion four, it is stated that ‘Alberta will invest in energy infrastructure, including policy development and energy research’, having the aim of ‘…promot[ing] and ensur[ing] the development of new technologies that increase efficiency and reduce environmental impact’ (ibid). Similarly, assertion five suggests that ‘Government will encourage energy efficiency and conservation at all levels’, recognising that ‘[e]nergy resources should be consumed with an emphasis on efficiency, conservation and wise use’ (ibid: 21). As such, there is a continuing tendency to perceive the technology needed to protect the environment as identical to that which can increase rates of production and growth; a relationship rooted firmly in ‘weak’ eco-modernist philosophy (see Chapter 3.2.1).

The means by which environmental thresholds are to be overcome whilst increasing production is also visible in this provincial energy policy; ‘decoupling’ (see Chapter 3.2.1). Aiming to delink economic development from environmental deterioration, this process is targeted at ‘…reducing the amount of resources such as water or fossil fuels used to produce economic growth’ (United Nations Environment Programme, 2011: xi; see also Chapter 3.2.1). The term 'decoupling' is here mentioned explicitly for the first time:

*There is real hope that a combination of wise energy use and appropriate technology development can begin to decouple emissions from energy consumption. In other words, we can begin to create a world where the carbon associated with our living patterns is captured and sequestered, or not even produced in the first place.*

(Government of Alberta, 2008a: 25)

Without detailing how fossil fuels are to be decoupled from emissions, the policy then goes on to outline a number of technological and managerial ‘levers’ through which the three central outcomes are to be achieved. Importantly, these continue to mirror the central tenets of eco-modernist philosophy, where environmental protection becomes synonymous with economic growth if the relationship between the two is mediated using science and technology (see Chapter 3.2).

Of the seven levers, the three focusing on ‘Addressing Environmental Footprint’, ‘Change Energy Consumption Behaviour’, and ‘Innovate’ hold the most relevance to the oil sands (ibid: 31). The remaining four are applicable but hold a more general focus. Of the three, the first continues to advocate a managerial approach to environmental protection, where the LARP is confidently presented as containing a ‘…series of comprehensive targets, outcomes and actions that have been set for the region to protect the air, land and water’ (ibid: 32). These, it is suggested, are ‘…specifically designed to address environmental and growth pressures from the pace of development in the region…’ (ibid). As will be seen in Chapters 6, 7 and 8, the optimism with which this has been presented is, at the very least, misplaced. The rest this ‘lever’ ‘…deals with the development and deployment of technologies aimed at minimizing the environmental footprint of energy’ (ibid). One of the two priorities for the second of these three 'levers', ‘Change Energy Consumption Behaviour’, is titled ‘Carbon Charges’. It is here where the influence of ecological modernisation can be seen in relation to the ‘cap and trade’ mechanism for controlling emissions. This unilaterally places an upper limit on the amount of pollution an economy can emit each year:

*Alberta is wary of the “cap and trade” mechanisms being advocated by others. Their requirements would be onerous and targeted disproportionately at energy producing jurisdictions…*

(ibid: 39)

This aversion demonstrates a broader reluctance to deviate away from compliance-based modes of regulation, which tend to rely on negotiation between public and private bodies to develop regulatory standards (see Chapter 3.1.4). Not only is the disproportionate influence exerted by a ‘cap and trade’ mechanism on emissions-producing jurisdictions deemed unfair, as if this is both unreasonable and not its fundamental purpose, but its subsequent demand for a carbon pricing mechanism that ‘*must* *be* market-based’, ‘*must not* redistribute wealth from Alberta’, and ‘*must not* impede our competitiveness’, clearly illustrates the Government of Alberta’s aversion to regulation which may risk decelerating production (Government of Alberta, 2008a: 39, emphasis added). Instead, a fluid approach is preferred which ‘…can evolve as needs evolve, and it should be time-limited, with its purpose and impact periodically reviewed’ (ibid). This is essentially referencing adaptive management, with the information on this ‘lever’ finishing with the statement ‘Alberta’s energy future relies heavily on technology’, and the final ‘lever’, ‘Innovate’, only embodying the managerial and techno-centric ethic further. Consistent with previous policies, and when coupled with the techno-scientific solutions posited in other areas of this provincial energy strategy, the philosophy underpinning acquisition of the ‘sustainable development’ objective here continues to be ‘weak’ ecological modernisation.

### 5.2.4 Land-use Framework, 2008

The subsequent 2008 LUF continues to advocate use of techno-scientific adaptive management with specific regard to cumulative environmental effects. Of its seven ‘Strategies’, ‘Strategy 3’ states that ‘[c]umulative effects management will be used at the regional level to manage the impacts of development on land, water and air’ (Government of Alberta, 2008b: 3). Despite its interchangeable use of ‘development’ with ‘growth’ (see Section 5.1), recognition of which would contradict its statement that ‘[o]ur watersheds, airsheds and landscapes have a finite carrying capacity’ were it not for the philosophy of ecological modernisation operating at its base (Government of Alberta, 2008b: 3), visible here is a techno-scientific managerial optimism with respect to all dimensions of ecological disorganisation. However, the optimism is expressed in a rather confused manner. This is largely because the principle of growth so central to the philosophy of ecological modernisation comes into conflict with recognition of cumulative breaches to environmental thresholds:

*Cumulative effects cannot be managed as an “add-on” to existing management approaches; nor is it about shutting down development. It is about anticipating future pressures and establishing limits; not limits on new economic development, but limits on the effects of this development on the air, land, water and biodiversity of the affected region. Within these limits, industry would be encouraged to innovate in order to maximize economic opportunity.*

(ibid)

Appearing as an attempt to acknowledge the existence of environmental thresholds while at the same time assuaging concerns surrounding the security of any potential future investments in the region, the managerialism deployed appears conflicted, despite the final sentence placing it firmly within the context of ecological modernisation. Indeed, the potential danger posed to industrial growth by such system of management is real, in terms of it being sensitive to, and requiring productive operations that are in accordance with, environmental ‘limits’. As such, this threat is tempered by a ‘…final caveat…’; ‘[c]umulative effects management is an emerging practice, an art not a science. Accordingly, it should be used pragmatically not dogmatically’ (ibid). The managerialism takes on a scientific and technological dimension when coupled with ‘Strategy Six’, where the purpose of the LUF is to ‘[e]stablish an information, monitoring and knowledge system to contribute to continuous improvement of land-use planning and decision-making’ (ibid: 4).

### 5.2.5 Responsible Actions: A Plan for Alberta's Oil Sands, 2008

The subsequent 2009 policy, Responsible Actions (Government of Alberta, 2009a), was targeted at the oil sands in particular, and advocates further use of adaptive management premised on advances in science and technology. Within the six ‘strategies’ designed to implement its ‘vision’ for ‘sustainable development’, the first, to ‘[d]evelop Alberta’s oil sands in an environmentally responsible way’ (ibid: 17), references the previous LUF as the means by which cumulative effects will be managed (ibid: 18). With the targets outlined in the Water for Life policy also referenced (ibid), techno-scientific adaptive management practices are operationalised by proxy. Building on this, ‘Strategy Six’ aims to ‘Maximize research innovation to further support sustainable development and unlock the deposit’s potential’ (ibid: 33), imbuing such practices with the techno-centric conservation-efficiency duality made explicit in the overarching provincial energy strategy, Launching Alberta’s Energy Future (see Section 5.2.3). As noted in the accompanying explanation, this strategy is intended to:

*...increase long-term and stable investments in research, promote world-class innovation, leverage technology to address development of the resource, and proactively address environmental challenges.*

(ibid)

The three ‘goals’ and ten ‘objectives’ which further operationalise this approach are similarly focused on pursuing adaptive management based on science and technology. This is visible in the variously referenced need to ‘[e]valuate current research structures and mechanisms to identify gaps and optimize an integrated, efficient, and coordinated approach to oil sands development’ (ibid: 34), ‘[p]rovide incentives for technology acquisition, development and implementation related to oil sands extraction and processing while minimizing air, water and land impacts’ (ibid), and ‘[f]acilitate long-term and responsive investment in a balanced research and innovation portfolio’ (ibid: 35). Although this policy is far more detailed than those previous, with regard to the way it seeks to pursue research-based management to fulfil both efficiency and conservation goals, the essential characteristics, of an adaptive approach to management premised on a techno-scientific optimism, remain unchanged.

### 5.2.6 Lower Athabasca Regional Plan, 2012

As part of its seven ‘Strategic Directions’, the final and most recent document, the 2012 LARP, ensures continuation of the techno-scientific approach seen previously. It even begins with the guarantee to ‘…continue implementation of…The Alberta Provincial Energy Strategy and Responsible Actions: A Plan for Alberta’s Oil Sands’ (Government of Alberta, 2012a: 25). These ‘Strategic Directions’ include various management-orientated goals, including ‘improving integration of industrial activities’, to ‘…better co-ordinate industrial activities…reduce land disturbance of the productive forest land base…and reduce environmental impacts…(ibid); the ‘strengthening [of] infrastructure planning’, to ‘…attract and retain skilled workers [which] will be essential to enable the region’s future economic growth…’ (ibid: 31); and ‘managing air, water and biodiversity, and minimizing land disturbance’ through the use of ‘management frameworks’. This latter strategy is particularly important, not only because of its relevance to environmental protection, but also because its explanation acknowledges the existence of ecological thresholds and describes the response should they be encountered:

*These frameworks are intended to provide context within which decisions about future activities and management of existing activities should occur. The management frameworks do this by confirming regional objectives and establishing ambient environmental limits and triggers. Limits in these frameworks are intended to be clear boundaries in the system not to be exceeded. Triggers are to be used as warning signals to allow for evaluation, adjustment and innovation on an ongoing basis.*

(ibid: 27)

Displayed here is an apparent contradiction between the overarching goal of ‘sustainable growth’ and the strategic recognition of ‘…clear boundaries in the system not to be exceeded’, much like the rather confused explanation of cumulative effects management found in the overarching 2008 LUF (see Section 5.2.4). Indeed, recourse to ‘adaptive’ and ‘innovative’ mitigation measures, in the space between social awareness of a material limit and the material limit itself, is indicative of ecological modernisation’s ‘win-win’ philosophy.

The only other environment-orientated ‘strategy’ within the LARP is that targeted at ‘creating new conservation areas’. Posited as a ‘…significant aspect of the LARP’ by virtue of ‘…the balance it strikes between development and conservation in the region’, (Government of Alberta, 2012a: 29), this strategy states that ‘[n]o new oil sands, metallic and industrial minerals or coal tenure will be sold in conservation areas designated under the LARP’ (ibid: 30). With ‘[a]pproximately 16 percent of the region’s land base…to be managed as new conservation areas’ (ibid: 29), this appears to be a largely precautionary, environment-orientated measure. Indeed, as these must be ‘[a]reas that support aboriginal traditional uses…representative of the biological diversity of the area…[and] of sufficient size (i.e., roughly 4000-5000 square kilometres)’, according to the key criteria for their creation (ibid: 30), the conservation areas appear to be a rare instance where interests pertaining to the environment are prioritised over those relating to economics. This said, operationalisation of this policy goal in practice suggests a very different reality (see Chapter 7.5).

The means of facilitating the ‘sustainable growth’ advocated by the policy objectives consistently takes the form of an adaptive managerialism premised on expected future advances in technology and science. Communicated using the business-orientated language of markets, innovation and competition, this approach is the supposed method by which pursuit of economic growth can continue alongside environmental protection. Indeed, the conservation-efficiency duality, which underpins the idea that economic growth can be ‘decoupled’ from its material inputs and outputs, is a cornerstone of ecological modernisation (see Chapter 3.2.1). The techno-scientific optimism accompanying this narrative is portrayed with more certainty in the earlier documents, where industrial expansion and economic growth are seen as complementary because adaptive management premised on technological innovation is still understood to be effective. This begins to break down, however, as the material ecological consequences of industrial expansion are gradually realised; a pattern evidenced by the confused and contradictory messages present in later policies. Yet, despite this, the objective of ‘sustainable growth’ is constant across the policies, as is repeated recourse to techno-scientific methods of environmental mitigation. As indicated by the characteristics presented in Chapter 3.2.1, these are the hallmarks of a particularly 'weak' strand of eco-modernist philosophy.

## 5.3 The Legitimation of Growth: Aboriginal Groups as Stakeholders and Participants in Environmental Decision Making

### 5.3.1 Alberta's Commitment to Sustainable Resource and Environment Management, 1999

The early 1999 ACSREM document supports the participation of non-elites in the decision-making process, subsuming such input into a broader category of ‘public interest’ (Government of Alberta, 1999a: 6). The document does not mention First Nations specifically, or even Aboriginal groups more broadly. This is likely because it was published prior to the 2005 *Mikisew* decision and the first Government of Alberta policy on First Nation consultation (see Chapter 3.3.1). Nevertheless, the need for ‘[e]ffective [d]ecision [m]aking’ within environmental management is based on the notion that ‘[d]ecisions should be made after consultation with Albertans, giving particular attention to people and industry that are directly affected by the decision’ (Government of Alberta, 1999a: 5). Explaining that ‘[r]esource and environmental management decisions shall include consultation’ (ibid), the document presents an interpretation of the ‘public interest’ that goes beyond the more specific and environmental interests of First Nations:

*Resource and environmental management decisions shall include consultation...[That includes] [e]nsuring decisions on resource and environmental management are taken in a provincial context, considering broad public interest, and involve input from those communities and industries that will be most directly affected by them. A role for provincial and national interests through consultation must also be provided.*

(ibid: 6)

As this consultation is subsumed under a broader heading explanation stating that ‘[i]nterests must be balanced. Projects must be assessed. Disputes must be resolved’ (ibid: 5), the advocated conception of ‘public interest’ appears weighted against the more localised environmental, cultural and Treaty concerns of First Nations. This is particularly visible when coupled with the assumed and unquestioned pursuit of resource-based economic growth seen throughout the documents (see Sections 5.1 and 5.2), being situated as a basis for the acquisition of provincial social interests and concurrently demonstrating a pre-determined weighting inherent to the pursuit of such ‘balance’.

### 5.3.2 Regional Sustainable Development Strategy, 1999

There is more recognition of the specific needs of First Nations and Aboriginal communities in the subsequent 1999 RSDS document (see Alberta Environment, 1999), where a greater degree of non-elite participation is exhibited. Here First Nations are specifically recognised as not only contributing to the creation of the policy, but are also viewed as a necessary stakeholder in its execution. With regard to the former, First Nations and Aboriginal groups are hailed as providing ‘…an essential voice in developing the strategy, which includes recognition of their existing rights and uses in the region’ (ibid: 4). Subsequently mentioned as part of the strategic focus of the document, they are guaranteed a form of intergenerational justice specific to their hunting, fishing and trapping rights:

*First Nations and Aboriginal communities requirements for a traditional lifestyle - Land, plants and animals will continue to be available to support a traditional lifestyle for current and future generations.*

(ibid: 6)

Although mention of Aboriginal peoples only occurs once more in the policy, with regard to their input in creating the 72 environmental issues to be addressed by the RSDS, reference is also made to ‘regional stakeholders’ throughout, of which they are one. In this sense their role in the execution of this strategy finds greater articulation within its founding ‘Principles’, where environmental ‘[s]tewardship will be shared’ (ibid: 5). Going on to note that ‘[i]n all cases, resource users and other regional stakeholders will continue to share in strong environmental stewardship of the land and resources’, the medium through which such participation is to be realised is made clear:

*Regional stakeholders will contribute their time, expertise and knowledge, and take part in multi-stakeholder initiatives. In turn, this gives them a greater voice in resource and environmental management in the region.*

(ibid: 5)

During the period this document was active, between 1999 and 2008, the primary multi-stakeholder initiatives for addressing regional environmental issues associated with the oil sands were the Cumulative Environmental Effects Management Partnership and the Regional Aquatics Monitoring Programme (RAMP). The former of these later became the Cumulative Environmental Effects Monitoring Initiative (CEEM) and subsequently the Cumulative Environmental Management Association (CEMA). There are therefore two forms of First Nation participation being communicated here; participation in the creation of the strategy itself, and participation in the multi-stakeholder mechanisms deployed to achieve these protections. This is despite Aboriginal interests being broadly subsumed under the more generic rubric of ‘regional stakeholders’. As such, the policy displays characteristics associated with ‘strong’ ecological modernisation, exhibiting ‘deliberative democratic’ and ‘open’ decision-making with respect to the participation and involvement of ‘non-elites’ (Christoff, 1996: 490; see also, Gibbs, 1998; Chapter 3.2.1).

### 5.3.3 Water for Life: Alberta's Strategy for Sustainability, 2003

The subsequent 2003 strategy, Water for Life (see Government of Alberta, 2003), exhibits similar characteristics to the RSDS. Making no specific reference to First Nations, again likely due to its publication prior to the 2005 *Mikisew* decision, the policy makes clear that stakeholder input led to its creation and that their continued participation will be central to its effective execution. The product of three phases of public consultation between November 2001 and June 2002, this policy outlines nine ‘principles’ that emerged from the process. These underpin the strategy as a whole, forming a basis for the ‘key directions’ required to achieve the three policy goals of a ‘[s]afe, secure drinking water supply’, ‘[h]ealthy aquatic ecosystems’, and ‘[r]eliable, quality water supplies for a sustainable economy’ (ibid: 7). Stakeholder influence on the subsequent realisation of these goals is directly visible in the second ‘key direction’ of ‘partnerships’. This has the purpose of ensuring that ‘[c]itizens and stakeholders will have opportunities to actively participate in watershed management on a provincial, regional and community basis’ (ibid: 14). In between the creation of a provincial water advisory council at the macro level, and watershed stewardship groups at the local level, the policy establishes intermediary watershed planning and advisory councils which emerge directly from the consultation process:

*Throughout the public consultation, Albertans expressed a strong interest in having a significant role in managing Alberta’s water resource, and in directly influencing policy and legislation development, tracking and reporting on the condition of watersheds and influencing change within watersheds. To accomplish this, a number of Watershed Planning and Advisory Councils will be established to involve communities and stakeholders in watershed management.*

(ibid: 15)

Although these councils ‘…will not have a direct reporting relationship to the Provincial Water Advisory Council’ (ibid: 15-16), they still demonstrate a clear attempt to inject provision for public participation into the water strategy. Of course, Sections 5.1 and 5.2 have noted the limits to such non-elite participation, in that it is unable to challenge the dominant objective of economic growth, or the notion of decoupling inherent to the mechanisms for its realisation, but it is present nonetheless.

### 5.3.4 Launching Alberta's Energy Future: Provincial Energy Strategy, 2008

Within the 2008 provincial energy strategy, Launching Alberta’s Energy Future (see Government of Alberta, 2008a), the ideas of consultation and public participation are notable by their absence. Instead, with specific regard to the environmental issues resulting from oil sands extraction, it states that ‘…critical issues…must be addressed in the years to come by industry, government and the research and technology sector’ (ibid: 9). No mention is made of either stakeholders or First Nations having a role in decision-making.

### 5.3.5 Land-use Framework, 2008

The technocratic approach to decision-making is apparently absent from the subsequent 2008 LUF, where ‘[t]he ideas and opinions of Albertans have played a vital role in developing the framework’ (Government of Alberta, 2008b: 8). Indeed, from this point on there is explicit reference to First Nations in all of the policies of relevance, largely due to the provincial policy on consultation published in response to the *2005* *Mikisew* decision (see Chapter 3.3.1). Between May 2006 and October 2008 there were five separate stages of consultation involving numerous stakeholder, First Nations and Aboriginal groups (Government of Alberta, 2008b: 8). This signals a departure from the more general participation of ‘stakeholders’ communicated in previous documents to a more specific process of consultation with individual First Nations. The result was a compilation of seven desired areas for improvement in land management, of which the most relevant here is ‘[i]ncreased consultation with First Nations and Metis communities, stakeholders and the public to ensure a fair opportunity to influence new policies and decisions’ (ibid). Building on this, the seventh and final strategy of the LUF is to pursue ‘[i]nclusion of aboriginal peoples in land-use planning’ (ibid: 4), where its recognition of First Nation hunting, fishing and trapping rights is clearly articulated alongside the then-recently established duty to consult:

*The provincial government will strive for a meaningful balance that respects the constitutionally protected rights of aboriginal communities and the interests of all Albertans. The Government of Alberta will continue to meet Alberta’s legal duty to consult aboriginal communities whose constitutionally protected rights, under section 35 of the Constitution Act, 1982 (Canada), are potentially adversely impacted by development. Aboriginal peoples will be encouraged to participate in the development of land-use plans.*

(ibid)

The explanation accompanying this strategy goes on to note that ‘…First Nation and Metis communities that hold constitutionally protected rights are uniquely positioned to inform land-use planning’ (ibid: 41), again demonstrating a change compared to their lack of specific mention in earlier policies. However, despite this, the LUF only reiterates the dominance of the 2005 First Nation Consultation Policy on Land Management and Resource Development, which First Nations actually rejected when it was initially released (see Section 6.2):

*To support meaningful consultation in the province, Cabinet approved The Government of Alberta’s First Nations Consultation Policy on Land Management and Resource Development in 2005. This policy is a key step towards engaging First Nations in land management decision-making. Ongoing review and monitoring of the policy with the intent of changing and improving it will ensure that it meets the needs of Albertans, First Nations and industry.*

(ibid: 41)

In this sense, the LUF does not attempt to add anything not already present in the original consultation policy. This is despite consultation on its content resulting in First Nation requests for ‘increased consultation…to ensure a fair opportunity to influence new policies and decisions’ (ibid: 4). Nevertheless, the LUF still expresses an interest in consulting First Nations on land use plans, which includes the LARP, advocating a form of ‘non-elite’ participation that echoes the democratic participation of ‘strong’ ecological modernisation and, to a lesser extent, eco-socialism (see Chapter 3.2.2).

### 5.3.6 Responsible Actions: A Plan for Alberta's Oil Sands, 2009

The subsequent 2009 policy, Responsible Actions: A Plan for Alberta’s Oil Sands (Government of Alberta, 2009a), builds on the results of three extensive stakeholder consultations published in 2007. The most relevant of these for present purposes is that titled ‘Oil Sands Consultations: Aboriginal Consultation Final Report’ (Government of Alberta, 2007b). In this document sixty one recommendations are forwarded by First Nations, twenty two of which relate to environmental protection and seventeen to consultation (ibid: pp.9-11). Even the six pertaining to ‘First Nation Rights and Interests’ are directly related to the procedural duty to consult or the Treaty rights to hunt, fish and trap on the land (ibid: 10). Building on this input, ‘Strategy 4’ of the six outlined in the 2009 policy document states that ‘[w]e will strengthen our proactive approach to Aboriginal consultation with a view to reconciling interests’ (Government of Alberta, 2009: 11). However, immediately visible in the first sentence of the explanation given for ‘Strategy 4’ is the unquestioned and effectively unilateral prioritisation of ‘sustainable growth’ for Aboriginal communities:

*Building relationships and sharing knowledge and experiences through dialogue will enable Aboriginal communities, industry, government, and other stakeholders to make informed decisions that will further support sustainable growth in their communities.*

(ibid: 29)

Although this underpinning expansionary assumption clearly defines the boundaries of any dialogue, it does suggest the possibility to at least displace production. Indeed, the goals established as the markers by which effective dialogue can be said to have been achieved appear to seek greater First Nation involvement, aiming to ‘[p]romote clarity and consistency in consultation processes…’ and ‘[e]nhance collaborative government-to-government relationships’ (ibid: 30). Within these two goals seven objectives are outlined which aim to improve various aspects of consultation with regard to oil sands development, five of which aim to improve the procedural dimension of this process (ibid). Although coloured by the underpinning expansionary assumption, this desire to deepen First Nation participation in the decision-making process is a feature inherent to the more ‘open’ and ‘democratic’ aspects of ‘strong’ ecological modernisation (see Chapter 3.2.1).

### 5.3.7 Lower Athabasca Regional Plan, 2012

The final document of relevance, the 2012 LARP (see Government of Alberta, 2012a), is one of the seven land-use plans translating the 2008 LUF into strategic directions for the more operational levels of government. Having its primary jurisdiction over the oil sands area in particular, the document was devised following what appears to be the most extensive consultation with First Nations, and other stakeholder groups, seen in any of the policies. As noted by the Government of Alberta (2016e), the LARP ‘…is a product of more than three years of consultations with Albertans, First Nations and experts on social, economic and environmental issues’. This is communicated on the first page of text:

*Contributions from the Lower Athabasca Regional Advisory Council, First Nations and Metis communities, stakeholders, municipalities and the public have informed the development of the Lower Athabasca Regional Plan. The development of the LARP used a three-phase consultation process which gathered: input on the region’s issues; feedback on the advice from the Lower Athabasca Regional Advisory Council; and feedback on the Government of Alberta’s draft Lower Athabasca Integrated Regional Plan.*

(Government of Alberta, 2012a: 2)

In a similar manner to other policies, First Nations are seen here as integral to the creation of the LARP. Indeed, one of the seven regional outcomes for the policy is dedicated to the ‘[i]nclusion of aboriginal peoples in land-use planning’ (ibid: 37), the objective of which is made clear further in the document:

*To encourage aboriginal peoples’ participation in land-use planning and input to decision-making in recognition of the cultural and economic importance of land use to those aboriginal communities with constitutionally protected rights. This will provide both aboriginal communities and the Government of Alberta with a basis for better addressing current and potential land-use conflicts, in a manner supportive of aboriginal traditional uses, such as the exercise of treaty rights.*

(ibid: 63)

In the explanation of this outcome it is affirmed that ‘…the Alberta government will look for opportunities to engage these communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning in this region’ (ibid: 34). This continues to echo the ‘strong’ ecological modernisation seen throughout the more recent documents, where First Nations are involved in both the creation and subsequent execution of the policies and strategies as an independent group of stakeholders with specific rights.

## 5.4 Conclusion

This chapter has demonstrated that, over almost two decades, the environment and energy policies relating to oil sands development exhibit some fundamental and largely unchanged characteristics associated with the philosophy of ecological modernisation. Across the spectrum of policies examined three features are particularly visible. First, and most fundamentally, the primary objective being pursued is ‘sustainable growth’. Although couched in the language of ‘sustainable development’, where balance and compromise is sought between the three social, economic and environmental considerations, it is quite clear that economic growth takes precedent over these other interests, being positioned in opposition to the thresholds invoked by the environmental dimension and as the basis for acquisition of the social dimension. This is tied to the unquestioned and omnipresent idea that such provincially-beneficial economic growth must be based on resource extraction. When coupled with the repeated deployment of inter-generational justice under these terms, the suitability of such an approach is universalised across space, ignoring dissenting opinions, and time, assuming parity with the interests of future generations. Both aspects of this assumed consensus appears at odds with the more situated existence associated with the traditional cultural practices of the First Nations in the region (see Chapters 2.2; 2.3).

The dominance and consistency with which ‘sustainable growth’ is pursued throughout the policies pulls the other two features, techno-scientific managerialism and First Nation participation in decision-making, in line with its purpose. Facilitating this dominant objective, the various forms of adaptive management premised on techno-scientific advances are consistent with eco-modernist philosophy, with the lack of attention given to the issue of growth in and of itself situating this towards the ‘weak’ side of the spectrum (see Chapter 3.2.1). As made clear, the documents consider the solutions to environmental issues to be rooted in further economic growth. Although the optimism with which this is pursued is more clearly articulated in the earlier policies, where the material ecological consequences of expansion are yet to be fully realised, the tools of science and technology common to eco-modernist philosophy are consistently deployed as the means by which ‘sustainable growth’ is to be achieved. The role of First Nations in the decision-making process appears to be similarly bound by this particular and dominant consideration. However, there is a shift in the policy and strategy documents following the 2005 *Mikisew* decision, where First Nations are increasingly recognised as an independent group of stakeholders with specific rights and needs. As such, their participation in the creation and execution of policies from 2008 onwards is more specific and extensive than that in precursor policies. Indeed, such participation is more closely associated with ‘strong’ ecological modernisation (see Chapter 3.2.1), making it appear at odds with the ‘weak’ form exhibited by the concurrent pursuit of ‘sustainable growth’ and regular recourse to techno-scientific mitigation. The following two chapters provide detail on how these overarching policy objectives have been operationalised in sanctioning material expansion of the oil sands industry, clarifying the form of eco-modernist philosophy deployed and demonstrating how this has been possible when faced with increasingly vocal First Nation opposition.

# 6. Issues at the ‘Planning’ Stage of the Regulatory Process: Systematic Marginalisation of First Nation Input and the Justifications Offered by Regulatory Personnel

Chapter 5 demonstrated how the policy context in which the regulatory process sits is defined largely by eco-modernist philosophy. ‘Sustainable growth’ of the oil sands industry has been the dominant objective since at least 1999, with its promise of ‘green’ industrialisation being facilitated by techno-scientific advances aimed at ‘decoupling’ production from its environmental consequences. However, Chapter 5 also illustrated that policies and strategies, or at least those published following the 2005 *Mikisew* decision, tended to suggest that their content had been devised through extensive processes of consultation with First Nations. Even those prior to the *Mikisew* decision painted a picture in which non-elite stakeholders had been engaged with in order to reach the given policy position. As a feature of ‘strong’ eco-modernist philosophy, this sat uneasily with those of its ‘weak’ counterpart, which were visible in both the growth objective and techno-scientific means for rendering it ‘sustainable’ (see Chapters 5.3.1; 5.3.2; 5.3.3). This chapter is the first of two that provides insight into the disparity between these policy claims and their operationalisation, which are given form through the regulatory process. While this chapter explores the reality of consultation at the 'planning' stage, Chapter 7 explores that pertaining to techno-scientific mitigation of ‘sustainable growth’ at the ‘approval’ stage.

As outlined in Chapter 3.3, the regulatory process consists of three stages; that of ‘planning’, ‘approval’ and ‘oversight’. Here, the interview findings relating to the initial ‘planning’ phase will be presented, which includes three key clusters of process-specific tension surrounding consultation, all of which are premised on an underpinning provincial, paternalistic justification which serves to legitimate decisions made during this phase of the process. The first key area of conflict is outlined in Section 6.1 and actually sits outside of the regulatory process while intersecting heavily with it. This centres on the extent to which First Nations were consulted on the LARP; a strategic tool which is supposed to inform the regulatory process to ensure that development does not exceed environmental thresholds (see also Chapter 5.1.7). Section 6.2 describes the second area of conflict, which focuses on the delegation of consultation responsibilities to individual proponents following the disposition of land leases. The final area of concern is with regard to the Government of Alberta’s narrow interpretation of Treaty rights relative to that maintained by First Nations. Although this ‘planning’ phase of the regulatory process could encompass other, more specific sub-stages, focus on these three in particular has been dictated by the dominant themes present within the interview data. Finally, Section 6.3 describes the role of the underpinning paternalistic justifications for decisions pertaining to expansion, along with the associated tension between the Government of Alberta and the SCC. The chapter finishes by summarising the findings in preparation for Chapter 7, where data from the ‘approval stage’ of the regulatory process will be presented a similar manner.

## 6.1 The Marginalisation of First Nation Voices and Primacy of Economics in the Lower Athabasca Regional Plan

As explained in Chapter 3.2, First Nations are not absolutely opposed to the oil sands industry, but support its existence in accordance with the capacity of the surrounding environment to withstand the changes it incurs. As Participant A from First Nation B explained, ‘[our First Nation] are in no way against economic development, it’s very supportive, but we don’t want to hurt anybody. We don’t want to kill the economy, but we also want to have a viable ecosystem that can hold true in a certain time’. Participant C from Industry, who was also member of a First Nation, echoed this position but from a different angle, rhetorically asking ‘how are we (First Nations) going to survive if industry leaves?’. One of the most recent ways in which the Government of Alberta has attempted to achieve the balance implicit to such comments is via the implementation of Land Use Plans, which map out the more strategic direction and rate of oil sands development on a macro scale prior to the submission of any individual applications. It essentially outlines what can and cannot be done on the land. The specific framework governing the oil sands region is the 2012 LARP, which is supposed to inform the regulatory process to ensure development does not breach environmental thresholds on a cumulative scale. Before 2012 no land use plan existed to guide industrial expansion in the oil sands, with the LARP being introduced following increased recognition of the detrimental environmental effects of collective industrial activity in northern Alberta.

In development since 2008, the LARP is a significant undertaking, involving engagement with a variety of public and private interest groups. Indeed, following its conception many First Nations were consulted on its content by the LUS, including those interviewed. First Nation 2 in particular was ‘heavily involved’, meeting with this secretariat ‘every month for about three years’ prior to its finalisation (Participant A, First Nation 2). As a result of this process, six dominant requests were made by aboriginal peoples more broadly; that they be given greater influence in land use planning processes; explicit recognition within the LARP of their constitutional rights; inclusion of traditional ecological knowledge in land use monitoring and management decisions; a request to slow the pace of extraction until a better understanding of the current ecological impact is achieved; development of cumulative effects management thresholds; and provision of economic development opportunities for aboriginal communities (Government of Alberta, 2013b). Despite this, the First Nations considered the consultation process to have been superficial, with the final plan being characterised instead by the exclusion of their input. According to Participant A from First Nation 2, there is a difference here between rhetoric and reality:

*There’s a lot of good merit, and good ideas and good principles, behind what they are trying to establish. World class environmental monitoring? Absolutely. Multi-stakeholder engagement, real consultation, land management, economic prosperity for the province? All of those require us to get supportive, but it’s just unfortunate that [how] it’s being spoken about [and] how it’s being delivered are actually very different.*

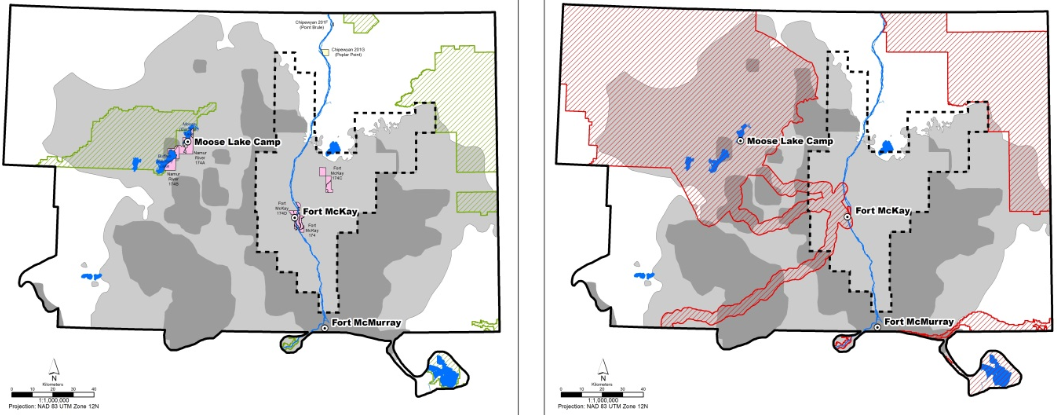
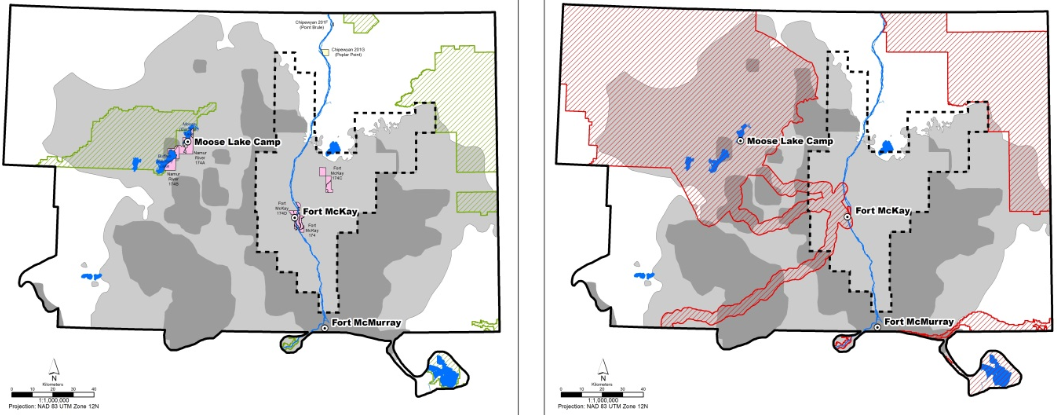
Both First Nations stated that the primary factor undermining this narrative was the economic prerogative of the LARP, noting that such an emphasis has been achieved by marginalising their voices. In effect, the growth objective established the parameters of consultation even before the process began, serving to narrow the opportunities available for the concessions needed to develop a plan that found agreement amongst the various stakeholders.

One of the key sites of criticism discussed by First Nations was the omission of their input on conservation areas; parcels of land where development would be prohibited but which could continue on adjacent areas. Indeed, this is an example of First Nations conceding that some industrialisation would be of benefit, and demonstrates an attempt to balance their own traditional, land-based practices with the need for wage labour (see also Chapter 3.1.3). As such, during consultation evidence-based recommendations were submitted as to the location of these areas, their size, proximity to communities on traditional territories, and suitability for supporting the surrounding ecosystem to ensure the continuation of activities tied to Treaty rights. However, the result of this costly and time-consuming exercise was the almost complete exclusion of First Nation considerations, which were subordinated to the economic value of oil sand deposits; ‘…the major driver for deciding conservation areas, that had to be considered at the table with Alberta, was location of resources’ (Participant A, First Nation 2). The primacy of economic reasoning underpinning such decisions was confirmed by Participant B from the LUS:

*…if you look at the leases that have been sold by the Department of Energy on that landscape, then you look at the regional plan and the conservation areas that have been set out…it probably doesn’t take a rocket scientist to figure out where the conserved land was in relation to the economic driver, right?*

Figure 5 clearly supports this view, with the map indicating in red the conservation areas requested by a First Nation during consultation on the LARP, and in green those that were ultimately approved. The areas in grey denote recoverable oil sands deposit. Although initially appearing that some minor concessions were made here by the provincial government, this is incorrect. The green area marked ‘1’ is the Birch Mountains Provincial Park and those marked ‘2’ form the Marguerite River Provincial Park, both of which were established in 2000 under the Provincial Parks Act, creation of which had nothing to do with consultation on the LARP (Griffiths et al, 2001: 7; Department of Environment, 2000; see also Government of Alberta, 2012a: pp.92-93).

#### Figure 5) Requested Conservation Areas vs. Granted Conservation Areas



**1**

**2**

**2**

(Nishi et al, 2013: pp. 50-51)

The extent of this rejection of input appeared to depend on which First Nation was being consulted, or, more specifically, which part of the landscape they inhabited. As Participant A from the LUS noted, ‘…it depends on where you are in the Lower Athabasca’, ‘closer up to where [the northern First Nations are] there’s quite a few conservation areas’. This is true, as the Kazan and Richardson Wildland Parks were introduced into the northernmost area of the LARP following consultation with First Nations (see Government of Alberta, 2012a: pp.92-93). For instance, in relation to a request by the ACFN to ‘[e]stablish…Conservation Areas totalling at least 40% of the total area (including waters) of each of the three ACFN homeland zones’ (ACFN, 2010: 20), which are illustrated by the deep red areas of the map in Appendix IX, there is substantial overlap between two of these three ‘zones’ and the newly introduced Richardson Wildland Park (see Government of Alberta 2012a: pp.92-93). By contrast, the third ‘zone’, ‘Poplar Point Homeland’ (see Appendix IX), was entirely omitted from the final version of the land use plan. Considered in relation to the oil sands deposit, its creation would eliminate opportunities for resource extraction; the boundaries of the Richardson Wildland Park have been positioned so far north that they do not impede such activity. Ultimately, although the Government of Alberta have established some conservation areas following consultation with First Nations, these are entirely subordinated to a preconception of the oil sands as the dominant source of value in the region (see Chapter 5.1). With the unwavering commitment to the realisation of this value being made visible in the placement of these protected spaces, it would be mistaken to speak of the Government of Alberta making concessions.

While it is quite clear that First Nation concerns have been excluded from the part of the land use plan dealing with conservation areas, it is important to note where the overriding decisions pertaining to the exclusion of their input are being made. Without this particular consideration, it could be interpreted that the operational staff of the LUS were responsible for limiting implementation of First Nation requests, which is not wholly true. Ultimate responsibility lies much higher in the chain of decision-making. As Participant A from the LUS explained:

*…the government didn’t do as much as maybe was being recommended [by the Land Use Secretariat following consultation with First Nations] because the best thing we can do, and other government agencies can do, is put recommendations forward showing pros and cons. But one of the disadvantages is that when it goes out of our process into the Assistant Deputy Minister level, or to the Deputy Minister level, because they have committees some Deputies might say ‘well, no, we’re not supporting of that’, and if enough Deputies agree with it, it’s gone. So it…might be toned down, or the strong recommendation is not to go that way.*

Such tension, between the economic prerogatives of government officials and the operational dynamics within the semi-autonomous departments over which they preside, was considered problematic by many participants. Indeed, despite attempts at finding viable areas for balance and compromise with First Nations, the process of passing recommendations upwards constrained any possibility of achieving a more co-operative, concessionary approach. It served to impose the overarching priorities of government at a point beyond which further consultation could occur, retracting any possibility for compromise and rendering the mediation process ineffective relative to its potential. The material consequences of this were discussed by participants from the LUS in direct relation to the conservation area requests submitted by a First Nation:

*…where it looked like from our perspective, us being more neutral, that there was more potential…not huge, don’t get me [wrong], but I think we could have done a little more over in that area, because there seemed to be some land that was vacant. You know, [it] wasn’t a lot, maybe a 6-8km zone around their reserve, but it would have given them a little bit of buffer. But it was deemed to be potential oil sands, and so those departments on the economic side ruled the day and it didn’t go through.*

(Participant A, LUS)

This official opposition to non-economic interests is in alignment with the LARP and its associated documents, which continue the emphasis on ‘sustainable growth’ seen in its precursor policies and strategies (see Chapter 5.1). The LARP’s Terms of Reference clearly state that ‘…regional plans are designed to integrate and achieve – not hinder – the Government of Alberta’s environmental, economic and social objectives over the long term’ (Government of Alberta, 2009b: 3). Indeed, one of the key purposes of the LARP is to ensure that ‘[o]pportunities for the responsible exploration, development and extraction of energy, mineral and coal resources are maintained’ (Government of Alberta, 2012a: 41), also noting that the management intent of conservation areas is ‘…not considered compatible…’ with the land disturbance associated with these activities (ibid: 30). Ultimately, official opposition to the creation of conservation areas on potential deposits of bitumen has its basis in levels of government much higher than those actually engaged in the consultation process, and it is the primacy of economic growth at these levels that restricts the opportunities available for a more conciliatory approach at the operational level, where consultation is carried out.

Mirroring comments made by Participant F from First Nation 1, that ‘[t]he government want to go full steam ahead, but First Nations are asking them to do it in stages’, this implicit congruence, between the official desire to exploit oil sand deposits and the associated tendency to veto recommendations which may inhibit or slow down acquisition of this goal, is further illuminated by comparison with the consultation that occurred on the South Saskatchewan Regional Plan (see Government of Alberta, 2014a). This was developed after the LARP, for the geographical area south of the oil sands deposit. As Participant A from the LUS noted,

*…we think our South Saskatchewan Plan is a better plan because more was heard and approved. I think there were opportunities in the Lower Athabasca where we could have maybe done something, and that’s just strictly from my understanding of what was out there, and some of those opportunities have been lost. It doesn’t mean that there isn’t some still left, but it all depends; if the government says ‘well, we’re willing to slow down some of the mineable stuff because you’re really in marginal stuff’, then that could really change the equation.*

(Participant A, LUS)

This not only reflects the variable depth of consultation and accommodation conducted with First Nations throughout Alberta, but also further demonstrates a direct association between such variability and the economic value of the land on which First Nations hold their traditional territories. Indeed, the consequences of this were recognised by the same participant, in his belief that ‘we have done a pretty good job consulting and engaging [as the Land Use Secretariat]’, but ‘[w]here the Government of Alberta may not meet a test of, say, the Supreme Court…is how did we accommodate that information, that desire to have these lands set aside’ (Participant A, LUS). This mirrors the findings presented in Section 6.3 and analysed in Chapter 9, but it is quite clear here that, although consultation on the LARP appeared to be extensive, the subsequent accommodation of First Nation input on conservation areas was absent because it was subordinated to the economic primacy of the oil sands as a potential revenue stream.

One frequently suggested way of overcoming this impasse was through the co-management of resources; an approach which sees government share decision-making power over a specific area with other relevant stakeholders (see OECD, 2001). This would allow multiple interested parties, and not only the Government of Alberta, to direct oil sands industrialisation at the more strategic level. However, the First Nations noted that ‘government have declined. [Their] argument is ‘if we do it for you we’d have to do it for all First Nations’’ (Participant A, First Nation 1). Although this was followed by the comment ‘[w]ell, so what? That shouldn’t make a difference’ (ibid), industry participants disagreed with such an argument, asserting that ‘…the worry is if each company had to do a separate agreement on each project, with a separate First Nation, you’re going to end up with a dog’s breakfast of a development’ (Participant A, Industry). Members of the LUS were more sympathetic. Indeed, their efforts to move toward some of the ideas within a co-management model have been blocked by the higher, more political officials in the past, with the difficulties encountered being described as tied to context:

*I’ve put in proposals. I’ve sent position papers up to say, you know, if the Minister, if the NRTA and all those other things prohibit us from handing over decision making could we make some sort of advisory system beneath, where the Minister could still hold onto the ultimate decision making power, but we could enhance the consultation process, or sort of enhance the deliberation to make…the collaborative recommendation. If I submitted that four years ago…I’d get laughed out of government. But now I’ve got a Premier who’s hinting around those five First Nations in the Lower Athabasca Region that he wants to set [up] a, what he’s calling an ‘issues table’ with them. So I went up with the premier back in November to meet with those Chiefs and he sat down with them and he said ‘listen, the way we’re doing business isn’t working…we end up in Court all the time, this isn’t a way to continue working together’. He said that it’s his priority to set up an issue table with them to start to work on some things like co-management. He actually said the word and I almost fell off my chair.*

(Participant B, LUS)

*I think we could make some headway if government…if we were open to having discussions we traditionally have not been willing to enter into. Things like co-management…or something akin to revenue sharing. Right now, in our current market, that discussion would be very difficult to even broach, let alone possibly heading into an election.*

(Participant A, ACO)

The fundamental element shared by these two perspectives is not simply the influence of context in inhibiting achievement of more effective consultation arrangements, although it could be broadly subsumed under such a heading. Instead, a far more specific characteristic is demonstrated; an aversion to regulatory change which could instil systemic uncertainty into the process governing industrial operation and expansion. Indeed, the specific references made to the problematic nature of court cases in the first quote, and the political-economic constraints imposed by the recent fall in the price of conventional crude in the second, suggest that giving greater decision-making power to First Nations, through the introduction of co-management in particular, would risk compounding the economic consequences of such issues by introducing into the regulatory system another potential barrier to expansion. Indeed, one participant, who had spent three decades in government prior to undertaking his present research-orientated role, regarded Treaties and their associated rules surrounding land access to be one of ‘[t]he big impediments to the growth of our economy’ (Participant A, Research Organisation 1). Such a position echoes the reality that ‘[w]ith oil and gas, time is of the essence. Time is money, so to speak’ (Participant A, ESRD). As co-management introduces another layer into the regulatory framework, and one which concurrently produces not only time delays but also the possibility of project relocation or even veto, it is clear why such an aversion exists, particularly in a policy context in which growth of the oil sands industry is the primary objective (see Chapter 5.1).

Despite government reluctance, Participant B from the LUS noted that political support did seem to be ‘edging that way’, in the direction of an overarching strategy more closely aligned to the principles of co-management. Alienated from other evidence, such a shift seems to signal a sudden and uncharacteristic benevolence on behalf of the provincial government. This, however, is misplaced, particularly in light of Canada’s historical record on dealing with First Nations. Indeed, the real reason for this change of approach was described by Participant D from the Energy Regulator:

*…it’s all court cases…this is what you’ll find out about Canada. They’ll (government) say we want to negotiate, we prefer to negotiate than litigate, but any changes that have come to First Nations have come through litigation, have been through litigation, and I don’t think it’s going to change for a while yet.*

The consequences of such trials were visible in almost every interview, where discussions touched upon the influence of the then-recent case of *Tsilhqot’in Nation v. British Columbia [2014] 2 SCR 257* (hereafter *Tsilhqot’in*). A landmark decision by the Supreme Court, the Tsilhqot’in First Nation was granted Aboriginal Title to 680 square miles of the land on which it had historically occupied. Despite this applying to the non-treaty context of British Columbia, and it having an unlikely or immediate influence on Alberta due to the province’s coverage by numbered treaties, there was definite concern on behalf of industry and government surrounding the successes of this First Nation, and others, at the Supreme Court. As noted by Participant A from the Consultants:

*…my advice to companies, and when I worked for one, they said ‘well we got better lawyers than the Aboriginals’, and I said ‘you know what? You have a choice between going to court and going to work. They’ll win…you don’t stand a chance in the courts. Literally, the evidence is almost overwhelmingly in favour of indigenous interests.*

Understood in this context, the political consideration given to principles of co-management can be viewed as a means by which government and industry are able to retain overarching decision making power while simultaneously placating First Nations, redirecting them away from the court system and any decisions which would force a change in government behaviour. Indeed, to address many of the concerns surrounding cumulative environmental impacts, an effective co-management system would need to provide opportunity for the ‘sterilisation’, or non-development, of bitumen. The unlikelihood of such an approach is reflected in a comment made by Participant B from the LUS, in discussing the request by a First Nation for a ‘buffer zone’ around their village:

*We would have to go to those three or four companies and say to them ‘here’s 20 million dollars for the lease that you bought from us five years ago. Sorry, you’re out of luck, we’ve sterilised the resource underneath the ground and we’ve sterilised the land’. That’s a huge, huge policy decision. That’s a huge decision for the government to have to make, right? To say, you know, to the lobby group ‘oh, by the way, those four companies that were going to make a billion dollars out of a SAGD* (Steam Assisted Gravity Drainage) *operation, they’re out of business because a First Nation pushed us to build an oasis for them’. That’s a huge precedent, it’s a huge decision.*

Considering this, the primacy given to the oil deposits within the development of the LARP (see Chapter 5.1), and the reluctance attached to regulatory alterations which may inhibit industrial expansion and operation, none of the evidence suggests that government would pursue a co-management model for reasons other than to avoid further challenges and opposition to expansion, particularly through the courts.

Throughout the process of developing the LARP it is clear that First Nations have been heard but not listened to, consulted but not accommodated. Their input was omitted from the final inventory of conservation areas because of its incompatibility with the predetermined purpose of the plan, and any movement towards a more conciliatory approach suggested by those involved with its administration have been similarly side-lined by actors higher in the government hierarchy. Indeed, it would appear that only the coercive authority of the SCC can force change to the contrary, the threat of which has stimulated government reception to the more open-ended approach of resource co-management. That said, a number of participants were sceptical about how much power would be delegated if co-management were to become a reality. Indeed, the label encompasses a broad spectrum of approaches, each of which delegates a different range and proportion of powers to First Nations (see Doyle, 2015). Considering the aversion even to regulatory modifications which may introduce time delays into the scheme of oil sands development, it is not unreasonable to imagine that if a government-advocated approach were to be introduced then it would be constrained along similar lines. Nevertheless, the space which has opened up as a result of First Nation successes at the Supreme Court appears to have created opportunities for change at this level, however slight, which were absent before. As such, recourse to the courts is clearly a site of vulnerability for government and industry.

The disregarding of First Nation voices at the strategic level of the LARP also brings to the fore a discrepancy with the extensive consultation purported to have occurred during its creation (see Chapter 5.3). With this representing the only characteristics associated with ‘strong’ ecological modernisation, the ‘weak’ strain of the philosophy not only underpins the objectives for ‘sustainable development,’ but also the consultation that occurred on the latest strategy for its acquisition. Ultimately, with the LARP sitting above the regulatory process, equipped to provide information on thresholds where necessary and inform direction of development on the landscape, the marginalisation underpinning its creation, and the manner in which its default position is one advocating industrial expansion (see also Chapter 5.1), is not least because of the challenge non-elite participation would pose to extractive activities across the entire oil sands deposit.

## 6.2 The Marginalisation of First Nation Voices in Operations, and the Consequences of Abstracting Treaty Rights from Material Reality

As outlined in Chapter 3.3.1, the disposition of land leases is the first stage in the regulatory process governing individual project approvals. This was also the earliest point in the process at which the First Nations directed criticism, noting that government agencies dispose of these leases without consulting on their potential impact to Treaty rights beforehand (Participant 1 and 2, First Nation A). This was reiterated by Participant B from the LUS, who also clarified the rationale behind Alberta’s approach:

*In some jurisdictions in Canada, at the issuance of a lease stage, there’s actually consultation with a First Nation…because in their mind that’s the watermark for when the land becomes taken up. We say no, we’re not going to consult at the lease phase because the company might walk away from the lease, they might not actually do anything with the land; we’re not sure it’s taken up until the company proposes an activity.*

(Participant B, LUS)

Such a justification recognises that the conversion of land ‘parcels’ into ‘producing leases’ is not automatic, and that subsequent development largely depends on the success of exploration following the purchase. However, this also obscures the extent to which the land disposition process encourages oil sands development from the offset. Chapter 9 presents an examination of this in more detail, essentially validating the criticisms levelled by First Nations at the lack of consultation on land disposition.

Following the process of granting land leases, First Nation concerns centred on the delegation of consultation responsibility to industry proponents. As highlighted in Chapter 2, a key contention maintained by First Nations is with regard to the cumulative environmental impact of oil sands development on the exercise of their Treaty rights. With the Crown passing the majority of initial consultation responsibilities to industry prior to project approval (see Chapter 3.3.1), justifications for this delegation were based on the purported expertise held by companies themselves. As one government participant noted, ‘[a] lot is delegated to industry because in order to mitigate impacts they’re in the best position to do so’ (Participant C, ACO). Participants from within industry agreed, adding that ‘…companies are doing all the legwork…that’s accurate, for sure’ (Participant A, Industry). However, the point at which this consultation mechanism encounters the concerns held by First Nations produces an obvious and systemic tension:

*First Nations cannot broach issues to do with cumulative effects at the point of consultation with industry, and government delegates all of that to industry. They can only do it, and deal with issues like project emissions, on a project-by-project basis.*

(Participant A, First Nation 1)

As such, the very first point at which industry is required to consult with First Nations exposes a markedly limited capacity to address and accommodate their most fundamental of environmental concerns. This is exacerbated by a ‘nuance’ referred to by Participant B of the LUS; that First Nations are not simply concerned about cumulative environmental effects, but about how such effects may impact the exercise of specific Treaty rights. It therefore follows that not only are individual companies unable to view even the first stage of harm, the cumulative ecological disorganisation, they are also blind to the compounded and cumulative socio-cultural disorganisation which results from its materialisation. Speaking of those instances where concerns surrounding cumulative effects are raised with proponents, Participant A from Industry explained that, in business, “[a] lot of the time it’s described as a provincial matter”. This was made in reference to the lack of both capacity and perceived responsibility for industry to address such concerns, being directly related to the limitations inherent to the overarching LUF which is supposed to inform such deliberation (see Section 6.1).

Even when consultation focuses on mitigating environmental impacts at the relatively limited project level, the amount delegated to individual proponents raises questions surrounding consistency and depth. Broadly accepted across the spectrum of groups interviewed, the picture painted is one of an irregularity of quality; of an industry characterised by variation in the extent to which individual corporations conduct consultation to a level above the minimum standard advocated by the ACO. Considering that the industry contains almost 50 companies directly engaged in extractive operations (Oil Sands Review, 2015), this is a cause for concern. As Participant A from Industry described it, ‘…we can take our consultation process, we can slow it down, we can work with the people, but then there might be twenty other companies that are not’. This variability is reflected in the differences between individual companies, mirroring a similarly inconsistent adherence to wider, more environmental, regulatory standards:

*…there are companies that you have great respect for and you may not have to go and look at them frequently because they’re really good. And there are others that you just, boy, they’re, I use the word ‘edge’, they’re ‘edge companies’. They’ll do exactly what they have to up to the law, but they won’t go any further than that. And some of them are very big players; it’s just their business philosophy.*

(Participant A, LUS)

A number of participants noted that the recent drop in oil prices would likely cause a rolling back of consultation practices which were willingly deployed over and above the standard required, linking such variability to the primacy of economics in corporate decision making. As Participant A from the LUS explained,

*When you talk to CEO’s and Vice Presidents and Presidents, you know, informally, and not putting stuff down in writing, a lot of them will say ‘we’re willing to do anything we can to get that social license…but the bottom line is still the dollar. We can’t lose, we can’t go out of business. I can’t do everything and then all of a sudden I’m out of business because it’s just too costly’.*

This view was shared by Participant B from the Consultants, who added that ‘…industry’s not going to do stuff that typically government doesn’t ask them to’. Taken together, it was broadly recognised that the quality of consultation was related to both individual business philosophies and suitability of economic context, where the extent of the former can be seen to fluctuate in accordance with variations in the latter.

Despite this reflecting the reality of oil sands development, where ‘…good players and bad players and those that fall in between’ exist throughout the industry (Participant A, First Nation 2), the final decision pertaining to the adequacy of proponent consultation lies with the ACO (see Section 3.3.1). As such, this agency also drew criticism from First Nations who considered it to ‘…only work at industry’s side...’, arguing that ‘[t]hey basically see consultation as information, or giving information to First Nations and receiving some in return. Consultation is a minimal process’ (Participant B, First Nation 1). The source of this criticism focused on the inability of the ACO to request that companies account for cumulative effects during consultation. Members of the agency acknowledged this, noting that ‘[t]he problem is that the concerns dealt with by the ACO are specific to the process’ and, as this is ‘a narrow process’, issues surrounding cumulative environmental effects ‘are more appropriately addressed elsewhere’ (Participant C, ACO). It is important to recognise that this ‘elsewhere’ is a reference to the LARP (see Section 6.1). In light of this, the fundamental issue with regard to delegation is not only that industry lacks consistency, although this is certainly problematic, but that the basic standard of consultation expected by the ACO is considered inadequate by First Nations. Indeed, they characterised the ACO as being ‘very administrative’ (Participant A, First Nation 2), facilitating a process that is blind to detrimental cumulative environmental and Treaty impacts outside of those caused by isolated projects:

*…it seems…to set out a process which is flawed, and which has systemic discrimination, where you can never actually demonstrate impact because the Alberta government is collecting information that’s based on trying to understand impacts based on a site within a box, within where the activity is going to occur by the company. Nothing outside of that box…it seems to me that it’s creating a system that…[is] very difficult to wade through and actually have a good discussion about what those impacts could be.*

(Participant A, First Nation 2)

This criticism was tied to the provincial government’s narrow interpretation of Treaty rights. Outlined in its 2005 and 2013 policies on consultation (see Government of Alberta, 2005; 2013a), this interpretation underpins the ACO’s minimum standard of consultation by setting out the content of said rights in light of SCC judgments (see Chapter 3.3.1). The basic divergence of these views was summarised by Participant C within the ACO, where ‘…First Nations believe Treaty rights is to a broad suite of things, whereas Alberta believes the right only extends to hunt, fish and trap for food…’. Participant A from First Nation 2 expanded on this with direct regard to oil sands developments, demonstrating not only the differences in interpretation but also the potential implications of such divergence:

*Alberta states that the Aboriginal and Treaty rights to fish, hunt and trap is not pegged to any site-specific location. So it’s more about the right to hunt as opposed to the right to hunt on that little plot over there, or that plot over there…or the plot across the river. Those are not protected, but it’s about your ability and right to do it somewhere out on the landscape. And recently I got a letter from the Aboriginal Consultation Office that reaffirmed also that not only is it not site-specific, but your right to hunt is not species-specific. And so a good question would be, what does that mean? Because they’ve not actually said that in writing before. What that would mean to me is that Alberta is looking at protecting First Nations’ rights to hunt, fish and trap on the landscape, but not guarantee any specific location, and not guaranteeing that there’ll be a certain species or abundance of a certain quality in a certain area. So that, of course, is a direct opposite interpretation about how First Nations view it, because…our interpretation of Aboriginal Treaty rights are to all parts of the land…So that interpretation is really at the opposite ends of the scale of how you look at what a* (Treaty) *right is.*

In divorcing Treaty rights from the material quality and quantity of resources which underpin their execution, the Government of Alberta has adopted a relatively diluted interpretation of their content. This enables fewer environmental and Treaty impact factors to be taken into account during consultation, narrowing issues open to discussion and permitting decisions on adequacy of consultation to be determined at a point much earlier in the regulatory process than First Nations consider appropriate. As such, the ACO not only oversees a narrow consultation process governed by a project-by-project approach to understanding impacts, but deploys a distinctly abstracted interpretation of Treaty rights that further dilutes the breadth and depth of issues on which First Nations are consulted.

Although the ACO attracted considerable criticism, their approach is dictated by the 2013 policy on consultation. Despite a broad range of participants recognising the narrow interpretation of Treaty rights to be rooted in this policy, referencing its assumed parity with case law in justification, this was frequently accompanied by concurrent recognition that the policy was finalised without adequate integration of First Nation input. Indeed, engagement with First Nations on both the 2005 and 2013 policies bear similarity to the consultation process deployed in development of the LARP, in that they both excluded substantial proportions of indigenous input:

*So,* *we came out with our first policy in 2005, we came out with our next policy in 2013. The first one didn’t work, wasn’t supported by First Nations, so we kind of scratched our head; okay what did we get wrong? We asked them, let’s talk about that. [They said] ‘Well, you didn’t engage us the way we wanted to be engaged’. So, in 2008 we went into a policy review that took years, and we engaged one to one with each community, but it was the same model. Go out and look for it, seek input, and then bring it back and see what you can come up with. We did that for this policy; still not supported.*

(Participant A, ACO)

This approach was not only recognised in specific relation to Alberta’s consultation policy, but was viewed as characteristic of the province’s approach to consulting with First Nations more generally; a feature which is dictated and justified by these underpinning policies on consultation:

*The push back…not just for First Nations but for Aboriginal Peoples in general, is government like to come out and say ‘hey, this is what we’re doing, tell us what you think’, and then they go back and write out their policy and their paper and they’ve never included a single thing of what they’ve heard…’*

(Participant D, Energy Regulator)

*What we’ve traditionally done is we’ll say ‘okay, we’re going to develop a policy around this and we’ll go consult and we’ll gather up this information input, from Aboriginal communities and other stakeholders, and we’ll take it back, dissect it and analyse it, come up with something and then put it back out and say, you know, here’s our policy, thanks for the input’. The reality is that it doesn’t work in the Aboriginal context. I’ve never seen it work and I’ve been doing this work now for over a decade. It just doesn’t work.*

(Participant A, ACO)

Although Participant C from the ACO attempted to explain this lack of progress by recourse to it ‘only being 10 years’ since the 2005 Mikisew decision, the situation experienced by First Nations, with regard to their input into both the 2005 and 2013 policies on consultation, is one characterised by repeated marginalisation. A decade may have passed since the duty to consult was enshrined in law (see Chapter 3.3.1), but the lack of progress made during this time only lends further support to a comment made by one of the First Nation participants; ‘[i]t’s an attitudinal change that’s required; the attitude of government to the duty to consult [and] Treaty rights; they pay lip service to consultation’ (Participant B, First Nation 1).

Throughout this initial phase of the regulatory process, encompassing the selling of land leases through to the decision confirming the adequacy of the duty to consult and accommodate, consultation is either non-existent, as with regard to the former, or narrow and unable to account for cumulative environmental effects, with regard to the latter. Set against a backdrop of an incomplete strategic land use plan that excluded substantial portions of indigenous input prior to its release (see Section 6.1), the subsequent consultation on individual projects is seen by First Nations as occurring too late in the process. Indeed, the land has already been divided up by the time consultation is required by the ACO, despite the presumption of development being built into the land disposition legislation. Even then, the depth of consultation carried out by individual project proponents varies according to the corporation in question, causing the issues around cumulative environmental effects to be omitted from discussion and redirected to the growth-orientated LARP.

Facilitated by a narrow interpretation of Treaty rights on behalf of the ACO, which abstracts hunting, fishing and trapping rights from the material environmental dimensions which permit their exercise, the 2005 and 2013 policies on consultation underpinning these interpretations were developed with little integration of First Nation input. It would therefore appear that First Nation voices are excluded not only as part of each project-by-project consultation, but that this exclusion is premised on some previous higher level exclusion, be it on the LARP or the provincial policies on consultation. This forces First Nations to bear the brunt of concessions with regard to their ability to hunt, fish and trap on the land. As such, the pattern of cultural loss identified in Chapter 2 can be seen to result, at least in part, from an operational process characterised by the continued and systemic marginalisation of First Nation input. Building on the findings presented in Chapter 6.1, the diluted participation of these non-elite groups goes beyond the LARP, extending to both the applications for individual projects and the policies on consultation themselves. The dominant feature of ‘strong’ eco-modernisation identified throughout the policies analysed in Chapter 5 can thus be seen as almost entirely without foundation, demonstrating that, in practice, it is very much a ‘weak’ strain of the philosophy that is being operationalised.

## 6.3 Justifying Marginalisation: Paternalistic Provincialism and the Disinterested Stance of Government in Modifying Consultation

Decisions which resulted in the marginalisation of First Nation concerns at this ‘planning’ stage of the regulatory process were described not as occurring in a vacuum, or through maliciousness, but as part of a more fundamental justification for acting on behalf of the provincial majority. Indeed, many of the participants expressed frustration at the institutional arrangements serving to exclude First Nation concerns and generate antagonism. Nevertheless, there was evidence to suggest, at the very least, existence of an ideological, yet no less operational, institutional bias against the specific rights held by First Nations. This was communicated through the justifications made for regulatory decisions, taking the form of a conceptual coupling, where a perceived moral authority to act on behalf of an imagined majority was anchored to the assumption that resource development was in their common interest.

A number of the participants outside of government, but who were also involved in the consultation process, framed this as a form of institutionalised bias, considering such prejudice to enter consultation procedures through its governing agencies. This was described as having both individual and systemic elements, and as being realised in the present but having roots in Canada’s colonial history:

*It’s a white man constructed process. So there’s very little in the way in which we go, typically, on an oil project of one sort or another, that we go into a consultative process that pays attention to any of the cultural realities or process wishes of First Nations. So we’ve already created a structure that is ours, not theirs, meaning whites not [Aboriginal]…it’s not a collectively agreed upon structure.*

(Participant B, Consultation Group)

While this speaks to regulatory characteristics giving contemporary form to a historical bias, participants from First Nation 1 described in greater detail the more micro-level conditions underpinning its manifestation. Participant A from First Nation 1 noted that the Government of Alberta ‘…treat us like any other stakeholder’, considering the process to negate their specific rights. Such a reality has already been seen in the broad marginalisation of their input at the strategic level of land use planning, consultation policy and in their engagement at the more operational level of individual projects (see Sections 6.1; 6.2). Another participant similarly described how the pursuit of oil sands development comes into conflict with Treaty rights, but explained this tension as being associated with the province’s broader reliance on the oil sands industry:

*It’s about perceptions. Treaty and Aboriginal Rights get in the way, right? It* (resource development) *is for the greater good of society. Economic well-being drives attitudes, racial attitudes. White people have a problem with First Nations in Canada, and believe that they* (First Nations) *have special privileges.*

(Participant B, First Nation 1)

During the course of the interviews this notion of Aboriginal Rights serving to ‘get in the way’ of oil sands expansion was a recurring theme. While this was entwined with broader justifications surrounding what activities were in the best interests of the provincial majority, and has a number of related dimensions, the more direct ‘racial attitudes’ spoken about here were observed in one particular instance.

Although the findings overwhelmingly suggest that the Treaty rights of First Nations are being indirectly undermined by a more systemic, and somewhat structural, marginalisation of their concerns, via a consultation process which operates according to the pluralist assumption that expansive resource development is an unquestionable ‘social good’, another, more direct form of marginalisation was observed which has parity with First Nation comments on attitudinal prejudice. With the consultation process requiring agency recommendations to be ultimately decided on by government officials, the system has built within it a space in which the individual bias of those with power has the potential to influence outcomes. The risks associated with this were reflected in comments made by a participant from the Ministry of Environment and Sustainable Resource Development. Under any other scenario the singular origin of these comments would be disregarded as an outlier within the data, but the seniority of the participant’s position, and associated role in departmental decision-making with regard to recommendations made during the regulatory process, gives greater significance to the content. Indeed, this participant was the most senior interviewed, being situated in the more political sphere of the provincial government. Firstly, the specific constitutional rights held by Aboriginal peoples in relation to non-Aboriginals were viewed negatively, as though they conferred a degree of unwarranted privilege:

*If you’ve read the Constitution we’re all equal, but Aboriginals are more equal than others.*

(Participant A, ESRD)

Such a comment embodied a derisory view on the source of antagonism between First Nations and the provincial government, where First Nation claims to being self-governing nations, which dates back to their status at the signing of the original numbered treaties (see Chapter 1), were treated disparagingly:

*The First Nations want government-to-government relations. What I would ask in response is, ‘what country is on your passport?’ Don’t say that to them, though.*

(Participant A, ESRD)

The ideological imprint of colonialism is clearly visible in such comments, contributing a more targeted prejudicial agency into a process otherwise characterised by a relatively impersonal systemic marginalisation. Indeed, the issues surrounding connotations of racial difference mentioned by some participants were rendered most starkly visible in a comment made on the 2013 floods of Southern Alberta, in which a number of First Nations required aid (see CBC, 2015):

*…what came out of that was the idea that First Nations are Albertans…the flood said we’re changing the way we do business.*

(Participant A, ESRD)

Suggesting that prior to 2013 a distinction was made between ‘Albertans’ and First Nations to such an extent that assistance would not have been offered, this comment not only implies an exclusivity between the two, but also demonstrates how individual attitudes can penetrate a system of regulation which requires recommendations on consultation to be channelled through specific individuals for approval. Indeed, it also displays the potential for public interest justifications to act as a vehicle for individual partiality, cloaking prejudice in the rhetoric of mutual benefit.

Although this individual bias is distinct, it must be understood as part of much more prevalent and indirect systemic and institutionalised bias, which the findings suggest operate through the more impersonal recourse to a notion of ‘social good’. Confined to the interviews focusing on agencies within the ‘planning stage’ of the regulatory process, likely because of its more explicit, legislated role within the ‘approval stage’ (see Chapter 7), a very particular form of ‘social good’, manifest as provincialism, was invoked to justify the narrower, government interpretation of Treaty rights and concomitant consultation standards over those held by First Nations. Essentially, it was maintained that over-riding First Nation interpretations was justified because such marginalisation permitted oil sands expansion, which was understood to be for the good of the provincial majority. Indeed, the comments did not dispute the environmental harm resulting from over-riding First Nation interests, but juxtaposed, both implicitly and explicitly, First Nation rights against those interests assumed to be held by broader provincial society:

*The development of the resources in the Province is to the benefit of all Albertans.*

(Participant B, ACO)

*We work on behalf of all Albertans, everybody, not just First Nations.*

(Participant C, ACO)

*Alberta’s view is that revenue generated by resource development is…for the benefit of all Albertans.*

(Participant A, ACO).

*At a practical level we’ve tried to balance industry with First Nations, where what we do has positive outcomes for all Albertans.*

(Participant A, ESRD)

Such language is mirrored in the overarching policies relevant to the ACO and the LUS. In the 2013 policy on consultation (Government of Alberta, 2013a: 3), it is noted that the purpose of consultation by the Government of Alberta is to reconcile First Nation Treaty rights ‘within its mandate to manage provincial Crown Lands and Resources for the benefit of all Albertans’. This is an echo of the 2005 policy on consultation, which was ‘…designed to create an approach to consultation that benefits all Albertans’ (Government of Alberta, 2005: 2). Similarly, the purpose of the 2008 LUF is to ‘…propose a path to the future that Albertans want’ (Government of Alberta, 2008b: 15). The 2009 Alberta Land Stewardship Act establishes the legal basis for land use plans, describing its purpose as ‘…providing a means to plan for the future, recognising the need to manage activity to meet the reasonably foreseeable needs of the current and future generations of Albertans, including aboriginal peoples…’ (Government of Alberta, 2009c: 4). Finally, the LARP is intended to inform decision makers about how to manage activities so that they ‘…meet the reasonably foreseeable needs of current and future generations of Albertans…’, also specifically including aboriginal peoples in this conception (Government of Alberta, 2012a: 8). The language of ‘all Albertans’ is also visible in several of the policies governing oil sands development stretching back to 1999, where it is used in conjunction with bitumen extraction to frame industrialisation of the resource as a provincial ‘social good’ (see Chapter 5.1). In this sense, the individual justifications given for over-riding First Nation interpretations of Treaty rights borrow credibility from the language deployed in broader policies and strategies relevant to oil sands extraction.

While reflecting Alberta’s constitutional mandate to ‘…make laws in relation to…development, conservation and management of non-renewable natural resources…’ (Government of Canada, 2013: pp.29-30), the references made to a specific provincial public interest during the interviews acted to discursively undermine the more specific and unique rights and interests of First Nations. By invoking the imagined wishes of a similarly imagined provincial majority, and automatically aligning such interests with expansive resource development, the more environmental aspects of First Nation rights and interests were rendered problematic. This is because such a process situates First Nation interests in opposition to this perceived majority goal. In this sense such justifications tended towards the ‘moral majority’ justifications spoken of by Beyleveld and Brownsword (2007: 272); a pattern of reasoning used by states to oppose indigenous campaigns attempting to enshrine standards of Free, Prior and Informed Consent (FPIC) into national laws (see also Doyle, 2015).

Within the ‘planning stage’ of the regulatory process, this justification for acting on behalf of some provincial majority allowed for decisions to be made in opposition to First Nation interests, and potentially in breach of their Treaty rights, without challenging the perceived moral integrity of the process. However, there was also simultaneous recognition that these decisions may not be meeting the legal duty to consult and accommodate, and that the SCC was the only institution with the authority to decide whether this was indeed the case. The potential illegality of agency decisions was thus also justified by an absence of litigation. This deference to a higher authority created a space characterised by ambivalence, in which government agencies could act with relative impunity, under the comforting rubric of a provincialism anchored to extractives operations, until some retrospective, future form of litigation forced them to change by expanding on First Nation Treaty rights. This was described by a variety of participants:

*So we don’t know, for sure, like I don’t know if all this work we’ve been doing, all this consultation and engagement we’ve been doing would satisfy the Supreme Court. Let’s just say it goes all the way up. Will the Supreme Court say ‘Alberta, you’ve done your job on consultation?’ Yes or no? I have absolutely no idea.*

(Participant A, LUS)

*We’ll come out with a policy, and we’ll operate in a certain way, we’ll get challenged, the Supreme Court will decide at some point, and give us further guidance, and then we’ll operate under that further guidance and it continues to evolve. So it’s this weird system of always…it ends up the Supreme Court dictates for the most part how things happen. We as a government take a minimalist approach until the Supreme Court forces us to inch a little further along.*

(Participant B, LUS)

*Really, the conversation boils down to ‘what does case law in Canada tell us that we need to do to govern ourselves accordingly and to comply with it, and how we need to consult?’ Because that’s ultimately the authority in Canada…our court system and what it’s telling us we need to do and how we need to define ourselves and our processes.*

(Participant A, ACO)

Indicative of an absence of proactive government guidance with regard to the duty to consult and accommodate, the situation described was one in which the expectation of First Nation litigation had become normalised. Indeed, this is such an omnipresent possibility that it appeared to provide the dominant standard by which agencies expect to validate the legality of their own decisions and processes. In this sense, the Government of Alberta cannot be seen to be taking a positive approach to the recognition of First Nation rights and interests, choosing instead to adopt a distinctively negative and almost casual approach that invites conflict and tension. It is as Participant A from Industry observed, ‘[a]ll the policy is coming from Supreme Court decisions…it’s not government leading and knowing’. Ultimately, the potential illegality of existing consultation policy and practice was acknowledged by regulatory personnel, but the lack of official recognition given to this by the SCC only served to permit its continuation in accordance with the ‘moral majority’ justification. Put another way, consultation policy and practice, while subordinating First Nation interpretations of Treaty rights and being potentially illegal, was justifiable in the present because the higher authority of the SCC had not yet validated such criticisms.

A third justification was also visible in comments made by participants who maintained positions higher in the government hierarchy, or had done so in the past. This was demonstrably paternalistic, proceeding from the basis that government aversion to expanding on its minimalist interpretation of Treaty rights was justified because of the benefits seen to accrue to First Nations under existing arrangements. Indeed, the narrow government interpretation was considered to be conducive to an expansionary pattern of resource extraction. In turn, this was seen by these higher-level participants as the most appropriate means for addressing what Participant A from First Nation 1 labelled ‘…very serious social and economic concerns’. Indeed, these issues actually formed the basis for the labelling of the situation in Canada as a ‘crisis’ by the UN Special Rapporteur on the Rights of Indigenous Peoples, where reference was made to the living conditions and employment rates being much lower among the indigenous population, and their incarceration and suicide rates much higher, than its non-indigenous population (Anaya, 2013; see also Kirmayer et al, 2007; Government of Canada, 1999). However, despite recognising these issues there was only one option available for their resolution. This has parity with the ‘public interest’ assumptions of ‘all Albertans’ in that the answer lies with greater First Nation engagement with processes of oil sands industrialisation:

*We’re trying to help them build businesses to make them sustainable. We believe what happened over the last 200 years is that a remove ghetto system has developed. The key is education and business development.*

(Participant A, ESRD)

*…the Courts keep creating these new process rights and a lot of the problems that we’re having right now* [in First Nation communities]*, the dysfunction, is around processes that can’t really resolve the underlying issues. They create very, very high time and money cost structures associated with development.*

(Participant A, Research Organisation 1)

Viewed through this lens, the prosperity of First Nations can be achieved only if recognition of their specific rights does not interrupt the overarching plan of action determined to be in their best interests. Here, that plan of action is the expansion of the oil sands industry. It is therefore recognised that the government’s interpretation of Treaty rights is opposed by First Nations, but also that this interpretation is still justified because it is seen to be for their own good. Within this context, the possibility that First Nations may be able to determine their own, alternative path of development is not an option. As such, by assuming that industrial expansion is for the benefit of ‘all Albertans’, *including* First Nations, the specific rights of the latter are negated by equating them with the expansionary interests assumed to be maintained by the former, meaning First Nation interests are never fully appreciated or accounted for. This undermines the consultation process from the offset because what is in the best interests of First Nations has already been decided, establishing a paternalistic pathway from which deviation is not possible. As Participant A from Research Organisation 1 noted with respect to developing the economic capacity of First Nations, ‘…substantive Treaty rights will get in the way and process rights will get in the way’. This culminated in perceived tension between the SCC and the provincial government, where ‘…there’s a really fundamental lack of interest on the parts of government to further develop the process rights base…’ precisely because such rights risk interrupting growth of the oil sands industry (Participant A, Research Organisation 1).

This conflict between the procedural rights handed down and expanded upon by the courts, and the perception of them risking development of the oil sands resource, was also apparent in relation to human rights, although in a different form and to a greater extent. Indeed, both recognition of, and purposive operational adherence to, human rights can only be described as virtually non-existent across the spectrum of participants interviewed. This was with specific regard to the UNDRIP and the UN Guiding Principles on Business and Human Rights (UNGPs) (see UN General Assembly, 2007; UN, 2011), where the former was recognised as problematic because of its article on FPIC, and the latter was not recognised at all. Not one of the 33 participants had knowledge of its existence. The lack of knowledge on the UNGPs was particularly visible with industry participants, who later withheld consent to participate. Similarly, the most senior member of government interviewed had no knowledge of the framework, initially mistaking it for the UNDRIP during discussion. As Participant E from Industry, who was a member of a well-established corporation of significant size and reputation noted, ‘[i]n Canada we don’t follow the UNGP’s’. Participant A, from the ACO, reiterated this alongside the primacy of the SCC, noting that ‘…our focus is really on the case law that comes down from the Supreme Court of Canada…not necessarily, you know, United Nations Commission or something’. In contrast, the UNDRIP was known to all participants, being recognised as highly problematic because of its various articles on FPIC (see UN General Assembly, 2007). Described as a ‘complicating factor’ by the most senior participant interviewed because of its associated power of veto (Participant A, ESRD), there was little doubt as to where future guidance on its adherence would come from:

*…[FPIC] was one of the reasons why Canada didn’t sign onto that UN Declaration, but they eventually did, right? But they’re really soft on that and so I think there’s probably gonna be a court case to…to really sort out that Free and Prior Informed Consent.*

(Participant D, Energy Regulator)

Although this primacy of the courts, with regard to FPIC in particular, was reiterated by others, Participant A from Research Organisation 1, who had spent several decades in government prior to his position at the time of interview, explained the opposition to its central tenets; ‘[c]ourts have told them (First Nations) that they deserve full and informed prior consent to things. These are all philosophies that don’t coincide with the need to be business-like and the way you think about time’. Echoing the patterns seen throughout the ‘planning stage’ of the regulatory process, even here economic development of the oil sands is posited in direct opposition to the rights of First Nations, irrespective of whether they are enshrined in domestic or international legal frameworks.

## 6.4 Conclusion

As can be seen, First Nations face systemic marginalisation within each aspect of this initial ‘planning stage’ of the regulatory process. The three key clusters of process-specific tension, surrounding consultation on the LARP, the level of consultation delegated to industry proponents, and the Crown’s narrow interpretation of Treaty rights, are all premised on an underpinning paternalistic justification for subsuming the specific rights of First Nations into an overarching interest imagined to represent the province’s population as a whole. As this perceived interest is aligned with the expansion of oil sands developments, any consultation or modification to the regulatory process is weighed against the potential threat such actions would have on achieving this objective. This includes expanding on narrow interpretations of constitutionally protected Treaty rights or adhering to standards enshrined in international human rights frameworks. Considering the limited accommodation of First Nation input throughout this stage of the process, and the similarly limited incorporation of their considerations into the LARP and policies governing consultation, the situation can only be described as one of widespread and perennial systemic marginalisation. With this occurring under the auspices of a pattern of industrial expansion perceived to be in the interests of a provincial majority, decisions resulting in the negation of First Nation rights and interests become justified despite knowledge of their harmful consequences.

# 7. Issues at the ‘Approval Stage’ of the Regulatory Process: The Role of Techno-Scientific Mitigation in the False Negation of Risk and the Influence of Perceived Consensus

Chapter 6 demonstrated that, at the ‘planning’ stage of the regulatory process, the input of First Nations has been roundly excluded from the creation of policy and strategy, with the marginalisation of their voices also extending to the consultation that occurs on individual oil sands projects. While the former of these issues is characterised by consultation without accommodation, particularly when discussing responses to cumulative environmental effects, the latter exhibits an absence of both. This is because the procedural component is delegated to individual proponents who cannot see these overarching issues. With this project-level marginalisation being premised on the provincial government’s diluted interpretation of Treaty rights (see Chapter 6.2), which effectively annexes the material conditions required for their exercise, and justified through the use of ‘moral majority’ justifications (see Chapter 6.3), the ‘planning’ stage of the process operates to displace First Nation concerns into the future instead of addressing them in the present. As such, when taken together, these issues create a space in which non-elite opposition to the policy objectives identified in Chapter 5 can proceed uninhibited and unaltered by the consultation requirements of the ‘planning’ stage. The ‘approval' stage of the regulatory process thus forms the final and most visible point at which First Nation concerns are subordinated to those pertaining to capital. The difference here, however, is that it occurs in a different forum and according to a different test.

As explained in Chapter 3.3.2, the purpose of the hearings within the ‘approval stage’ of the regulatory process is to allow for the energy regulator to make a decision on whether construction of an oil sands project is in the 'public interest'. Over the twelve public hearing documents analysed (see Chapter 4.4), the factors underpinning this consideration have been consistent with the legislation governing hearing panel decision making; through examination of the social, economic and environmental impacts of each project. However, there has not yet been a single hearing in which an oil sands project has been rejected, ultimately because ‘…the public interest lies not in eliminating risk but in managing risks so that they are “acceptable”’ (Low, 2011: 38). As such, the means for mitigating the risks highlighted by the First Nations at these hearings requires examination. Here, findings from an analysis of the twelve public hearing documents for the oil sands projects approved between 1997 and 2013 will be presented, with focus being directed at how the hearing panels address First Nation concerns in each. Reflecting the organisational alterations outlined in Chapter 3.3.2, the term ‘Panel’ is used in reference to both the ‘Boards’ and ‘Panels’ that have presided over the hearings since the mid-1990s. While their name has changed over time, the function of these regulatory bodies has not.

Presented according to the three periods in which Panel decisions on expansion were clustered, 1997-1999, 2004-2007 and 2011-2013, the findings demonstrate that the process of determining the ‘public interest’ is premised on a particular form of reasoning. Through recourse to a future point in time, where anticipated techno-scientific advances are expected to mitigate the risks raised by the First Nations in the present, the Panels repeatedly grant approvals despite lacking data on the possible impacts which could arise, or the effectiveness of possible mitigation measures. This is visible throughout each of the three sections analysed, water quantity, water quality and the more general area of cumulative effects management, making repetition a defining characteristic of this chapter. Although this has been avoided elsewhere, it is here intentional and necessary as it serves to highlight a consistent aspect of the deliberation process; that the same techno-scientific risk-based approach to approving projects under the rubric of the ‘public interest’ has been utilised time and time again, over almost two decades and without deviation. Following the three sections in which these findings are presented is a fourth. This final section presents data gathered from the interviews with regulatory personnel at the 'approval' stage, providing information on why such approvals have been made despite such shortcomings, and providing information on the influences being exerted on the regulator’s ability to reject project applications at this phase of the process.

## 7.1 Absent Data, Unforeseen Consequences and Recognising the Need for Regional Cumulative Environmental Effects Management Mechanisms: 1997-1999

Of the five approvals issued under the public interest test between 1997 and 1999, all are characterised by an uncertainty about uncertainty. Put another way, and with the benefit of hindsight, the Panels do not know what they do not know. Manifest in their deliberations on the environmental issues which may possibly arise due to project approvals, along with their determination of the most effective means by which such impacts may be mitigated, illustrated here is an uncertainty reflecting the immaturity of the industry. During this time the Panels are only beginning to appreciate the scale of oil sands operations, leading to an emerging recognition of the type of initiatives required to address the resulting regional effects. However, at no point does this appear to challenge a project application, only resulting in greater recourse by the Panels to a future point in time where expected technological advances will mitigate the risks raised by First Nations. As will be seen, this marks the beginning of an almost two-decade period in which such faith is deployed as a risk-mitigation strategy, allowing for projects to be approved under the rubric of the ‘public interest’ despite the widespread unavailability of data pertaining to both impacts and the most appropriate means for their redress.

### 7.1.1 Water Quantity and In-flow Needs

The reliability of data on water management, groundwater levels and surface water quantity attracted criticism from First Nations throughout most of the approval documents. Here, the main area of concern is with establishing a minimum amount of water in the Athabasca River at a particular point in time. This level is generally referred to as the 'in-flow needs' (IFN). Absent from the concerns expressed by First Nations during the 1997 Steepbank (AEUB, 1997a), 1997 Aurora (AEUB, 1997b), 1999 Millennium (AEUB, 1999a), and 1999 Muskeg River Project decisions (AEUB, 1999b), the lack of consideration given to this aspect of environmental effects during this period reflects the immaturity of the industry and the associated lack of awareness surrounding its potential impacts. Nevertheless, independent of this input, and despite its complete absence from the initial Steepbank and Aurora decisions, the Panel did consider the impact of water withdrawal at the project level in the subsequent Millennium and Muskeg River project decisions. In the former, the proponent’s ‘efforts to maximise water reuse and minimize water releases’ (AEUB, 1999a: 29) was noted, whereas in the latter, monitoring was advocated as a means of meeting the flow volume requirements established by government agencies (AEUB, 1999b: 34). Crucially, however, such considerations did not extend to the sections on cumulative effects, meaning that these four approvals were granted without any substantive consideration into their collective impact on regional water quantity.

It is not until the 1999 Mildred Lake decision where concerns about water quantity are raised by First Nations, exhibiting the delayed recognition associated with various forms of environmental victimisation. Sharing these concerns (see AEUB, 1999c: 18), the Panel’s response is not to suspend the project until empirical data can be gathered on the impact itself, or attain greater certainty on the means by which such risk could be mitigated. Instead, it invokes a faith in the future capacity of science and technology to lessen the risk following approval:

*The Board encourages Syncrude and other operators to place a priority on developing strategies and technologies to maximize water withdrawal, minimize water reuse, and decrease on-site water inventories. The Board will require Syncrude to report every year on its effort in this regard…[and for] Syncrude to actively participate in addressing the water management issues raised under the RSDS.*

(ibid: pp. 18-19)

Although this continues to allude to project-specific mitigation, visible here is also the relatively brief suggestion that, in future, such risks need to be addressed at a regional level and in participation with others. As noted in Section 7.1.3, it is around this point that regional multi-stakeholder initiatives are recognised as necessary to tackle cumulative environmental effects. Nevertheless, the implication of this particular response is that sufficient evidence does not yet exist to require a specific measure for mitigation, but that, at some point in the future, it will. This carries within it the associated notions that techno-scientific mitigation is materially possible, that the expected advancements will be sufficient to allay First Nation concerns, and that the actors tasked with developing these solutions have the capacity to do so. Without recognising such underpinning assumptions, these suggested means of mitigation were considered an adequate response under the 'public interest' test, forming part of the justification for project approval.

### 7.1.2 Water Quality and Tailings Management

The impact of oil sands development on the quality of water in northern Alberta was another concern expressed consistently throughout the decision documents. Although this is related to many different aspects of development, two of the key areas in which these arose related to tailings management practices and end pit lake (EPL) technology. Consisting of the waste by-product of oil sands extraction processes, tailings are a mixture of water, sand, silt, clay, unrecovered hydrocarbons and other contaminants (Timoney, 2013). This liquid is stored in large open lakes, known as ‘tailings ponds’, where the mixture undergoes processing in an attempt to separate water from waste. The purpose of this is to solidify the latter in pursuit of eventual land reclamation. EPL technology is a variation on this method of storage, but instead of creating lakes above-ground the mixture is stored in a post-mining pit and becomes a permanent feature of the final reclaimed landscape (CEMA, 2012). Although the latter of these methods is the newest, the uncertainties associated with both tailings pond and EPL technology are present throughout Panel deliberations.

First recognised in the 1997 Steepbank decision, and echoed in the 1997 Aurora hearing, Panel uncertainty about the efficacy of tailings pond technology, and the concurrent expectation of further technological development to address this post-approval, was present from the beginning:

*While the Board is satisfied that it shows promise, it notes that tailings management by CT* (consolidated tailings) *technology is still under development. The data presented by Suncor, from the limited testing that has been done, indicated that…a dry trafficable landscape is achievable with modifications and further development. The Board accepts that full scale trials of CT are required to understand this process. The Board expects that Suncor will continue to work on dry tailings management options, and if CT does not perform as expected, Suncor will reapply to the Board with other tailings management options.*

(AEUB, 1997a: 8)

By 1999, in the decision on the Shell Muskeg River mine, the ACFN were raising concerns about the impact of water quality on human health. In response to this, the Panel again deployed a future faith in science and technology to mitigate the risk associated with the uncertainty. Recognising that ‘…the experimental nature of CT technology…continues to be of some concern’, it here approves the plan with the caveat that ‘…future amendments may be required should more suitable technologies or closure methods be developed within the operating life of the mine’ (AEUB, 1999b: 34). Adding a requirement for ‘further research into local and regional aquatic ecosystems, the potential toxicity of residual CT waters, [and] the impacts of sediments containing PAI (potential acid input)’ (ibid), the decision to approve the project under the rubric of the ‘public interest’ was made without a full understanding of the efficacy or environmental effects of tailings technology. This was in addition to the associated expectation that future techno-scientific advances would both address the knowledge gaps and, through subsequent application, mitigate the risks.

### 7.1.3 The Need for a Regional Initiative Tasked with Addressing Cumulative Effects

Although the more specific concerns of water quantity and quality have regional dimensions, the means for addressing cumulative environmental effects are generally considered separately within the hearings. The first three projects for which decision documents are available, the 1997 Suncor Steepbank, 1997 Syncrude Aurora and 1999 Suncor Millenium mines, show that First Nations did not raise any concerns about cumulative environmental effects. This is not only consistent with First Nation accounts of their initial decision to participate in industrial development, to address issues associated with their increasing integration into a wage labour economy (see Chapters 1; 3.1.3), but also echoes the reality of the situation; that these projects mark the very beginning of rapid industrial development in the region. Concerns surrounding cumulative effects had not yet materialised. However, the Panel does consider the need to enhance ‘…the efficiency of individual application reviews’ through ‘a broadly accepted regional plan’ as early as 1997, noting that such ‘cooperative effort might reduce resource losses, enhance environmental protection, and reduce costs’ (AEUB, 1997b: 29). That said, the overriding concern here is with making the application process more efficient for industrial expansion. It is not until 1999, with the hearing for the Suncor Millennium project, that the Panel begins to recognise a pressing need for regional mechanisms to address the cumulative environmental effects of rapid industrial expansion:

*The Board notes that, although the project-specific impacts from the Millennium project are manageable, some uncertainty remains with respect to environmental capacities for emissions and land use impacts of cumulative development in the region…The Board believes that regional issues should be reviewed in a regional context and that the combination of CEEM and RSDS provides a means to address regional issues. It is satisfied that all uncertainties associated with the cumulative impact predictions, including size of study area and the need for wildlife corridors can be managed through processes such as the RSDS.*

(AEUB, 1999a: pp.37-38)

Visible here is the first instance in which the Panel attempts to mitigate the risk associated with approval by citing its confidence in the ability of CEEM. This is an industry-led multi-stakeholder initiative tasked with studying the 72 issues of research priority outlined in the province’s 1999 RSDS (see Chapter 5.1.2). The CEEM would later transform into CEMA, as referenced throughout later decision documents.

This pattern of mitigating risk through a belief in the future capacity of, as yet partly established, multi-stakeholder initiatives continues in the 1999 Shell Muskeg River Mine, where the Athabasca Chipewyan raise three concerns. Two of these reference regional aspects of project-specific effects and one is dedicated solely to methods for addressing regional cumulative issues. The Panel acknowledged their concerns, noting that the view originally outlined in the 1997 Aurora Mine hearing, of the need for a way to address regional cumulative effects, ‘is still relevant’ (AEUB, 1999b: 39). However, this hearing is also the first point at which an associated and subsequently recurring theme emerges; of the Panel acknowledging problems with the multi-stakeholder initiatives tasked with addressing cumulative environmental effects, but using them to address participant concerns anyway:

*The Board believes an industry led multi-stakeholder approach could be effective in addressing the regional environmental issues that originate from several different projects...The Cumulative Environmental Effects Management initiative…is still, however, under design…The Board notes…that well over a year has transpired since the announcement of several new development projects, yet the CEEM initiative is just now beginning to address certain aspects of its structure and operating process. The Board is becoming increasingly concerned that these processes may not be moving forward at a speed sufficient to meet the Board’s regulatory requirements to ensure that energy developments are carried out in an orderly and efficient manner that protects the public interest.*

(AEUB, 1999b: 39)

Despite this recognition, the Panel goes on to note that it ‘…continues to believe that the two processes [of CEEM and the RSDS]…will create an acceptable and effective framework within which regional cumulative effects can be assessed within the oil sands region’ (ibid). As such, the project was approved despite concerns with the mechanisms responsible for addressing cumulative environmental effects, progressing under the assumption that risk will be mitigated through the future output of these initiatives. An identical course of action is undertaken during the 1999 hearing on the Mildred Lake project, where the Panel ‘…recognizes the potentially significant impacts predicted to occur as a result of current and proposed industrial development in the Fort McMurray region’ (AEUB, 1999c: 20). Going on to note ‘the high degree of uncertainty surrounding the science of predicting cumulative effects’ (ibid), the risks associated with such impacts are again allayed by recourse to project-specific mitigation measures and the additional participation of proponents in CEEM, the RSDS, and the more general framework of the Wood Buffalo Environment Association (WBEA) (ibid).

Taken together, the approvals issued during this initial stage of oil sands development represent the immaturity of the industry. Demonstrating a broad unknowing around not only the environmental effects that may arise from approvals, but also the specific means by which their associated risks can be addressed, panel recourse to some future point in time where techno-scientific advances would provide a solution is repetitive. Importantly, because of this lack of data the proposed solutions are not specific; the faith in science and technology is deployed in abstract form, where little detail is presented on the most appropriate research to pursue or technology to develop. Indeed, during this period the Panels do not have the data to fully appreciate the scope of issues which will later arise, or to consider what the most effective means for mitigation will be. They instead rely on an optimistic belief that future advances, which at this point are removed from any of the more material or organisational barriers to success, will mitigate the risks post-approval, and to a sufficient extent to meet the apparent balance required to approve the project. There is also increasing recognition of the need for a regional mechanism through which these knowledge-based techno-scientific advances are to be achieved, becoming ever more pronounced as the approvals are made. It is therefore clear that, during this phase of development, the pace, eventual extent, and possible regional effects are unforeseen or, at the very least, underestimated by the Panels. This allows relatively broad recommendations for future scientific advances to satiate the ‘public interest’ test in the course of approving expansion of the oil sands industry.

## 7.2 Risk-based Mitigation, Faith in Future Technology and the Increasing Awareness of Flawed Cumulative Effects Management Initiatives: 2004-2007

There is a gap of almost five years until the next hearing, for the 2004 CNRL Horizon project. This delay is largely attributable to heavily publicised environmental concerns and political wrangling between the Federal and provincial governments over energy policy (see Chastko, 2007). Yet, the Panels continued to approve projects despite increased recognition of their potential impacts. Indeed, for the five approvals issued under the public interest test between 2004 and 2007, the quality and extent of data informing the hearing process noticeably increases. This is particularly apparent in the number of concerns raised by First Nations and the evidence base used in support. However, instead of providing greater certainty, this pattern only clarifies just how much is still unknown, not only about the potential for environmental impacts but also the feasibility of measures proposed for their mitigation. The pattern of techno-scientific risk-based reasoning continues, but here there is greater reliance on the industry-led multi-stakeholder initiatives to deal with cumulative environmental effects. Those called upon are again CEMA, the Cumulative Environmental Management Association which emerged from CEEM in 2000, and RAMP, the Regional Aquatics Monitoring Program. Recourse to these initiatives coincides with the Panel becoming increasingly aware of their deficiencies, reaching a plateau in the hearing on the 2007 Imperial Oil Kearl project where the number and significance of concerns raised are, at this point, unprecedented. As such, the repetition between areas of environmental concern and the periods under discussion is instructive, illustrating the consistency of Panel justifications. Indeed, very little progress is made, in terms of reducing the uncertainty associated with the efficacy of mitigation measures, despite all of the projects in this period being approved as before.

### 7.2.1 Water Quantity and In-flow Needs

At the 2004 hearing on the CNRL Horizon project, First Nations raised concerns about the increasing number of water licenses issued, particularly in the context of climate change-induced alterations to the flow of the Athabasca River (AEUB, 2004a: 37). Recognising the need to ensure a minimum level of flow in this river at any one time, maintaining the IFN is considered by the Panel to be ‘critically important to mitigate against cumulative environmental effects of water withdrawal’ (ibid: 41). However, the Panel also openly acknowledges the problematic nature of data availability with regard to this impact, viewing the solution as stemming from the approval itself:

*[The] Panel acknowledges concerns of MCFN regarding analysis of residual effects, specifically with respect to calculation of open water areas, definitions of the RSA, and stream flow. The Panel believe that these concerns relate in part to the current levels of data available to assess the project and that the additional data collection and monitoring requirements that CNRL will be subject to under the conditions of its licenses will assist in addressing these concerns.*

(ibid: pp.42-43)

Such a decision runs contrary to the alternative offered by the MCFN, which was more precautionary. Their request to ‘…delay …CNRL’s approvals and licenses until an IFN has been established, or an interim IFN was declared based on scientific evidence…’ (ibid: 38), was rejected. Even the second, more conciliatory suggestion of pursuing a temporary IFN was not considered by the Panel to be ‘…the right move as it might result in resources being diverted away from the process of determining a permanent IFN’ (ibid: 41). Instead, the Panel continues to deploy its belief in the capacity of future techno-scientific breakthroughs to provide solutions, despite the lack of data on the feasibility of such an outcome. However, in between the uncertainty and expected means for risk mitigation now sits an increased reliance on the CEMA. Crucial to the Panel’s mitigation strategy, this is tasked with addressing the lack of progress on establishing the IFN, believing that ‘…CEMA’s IFN subgroup is the most appropriate forum in which the scientific data can be gathered and all stakeholders’ needs can be addressed’ (ibid: 41).

Coming into contrast here are two inter-related aspects of the Panel’s recurrent faith in the mitigating power of scientific and technological advancement; its reliance on CEMA as the primary organisational enabler of this belief, and the simultaneous failure of the organisation to achieve the responsibilities required of it. Even at this early point, the lack of confidence in CEMA is implied by the Panel’s use of government agencies as a ‘regulatory backstop’, where responsibility for developing the IFN is accompanied by a caveat that such agencies ‘…establish an IFN in the event that CEMA is unable to do so by the end of 2005’ (ibid). This is similar to the subsequent 2004 Shell Jackpine decision, where government departments were required to complete the IFN framework by December 31, 2005, if CEMA failed to do so (AEUB, 2004b: 30). In January 2006, in the absence of a fully developed framework, Alberta Environment (AENV) published an interim framework for public review and comment; a request first made by the MCFN back in 2004, during the CNRL Horizon project hearing (AEUB, 2004a: 37), and again in the 2004 Jackpine decision (AEUB, 2004b: 29). Further demonstrating its belief in mitigating risk by finding solutions post-approval, on both occasions the Panel gave CEMA the benefit of the doubt instead of adopting the more precautionary recommendations suggested by the First Nations.

This theme continues in the Steepbank Extension and Voyageur hearing of 2006, where the MCFN raise concerns about changes made to the resulting draft interim IFN and Water Management Framework. Particularly concerned with the removal of a cut-off limit to water withdrawals, which would be activated in the event of natural low river flow levels, the MCFN went on to request that the Panel ask the relevant government agency to ‘…re-examine the provisions in the interim IFN with a view to ultimately protect the ecology in the Athabasca River basin’ (AEUB, 2006a: 55). In response, the Panel acknowledges the delay by noting that ‘…a finalized backstop IFN and water management framework has not yet been realised…’ (ibid: 56). No mention is made of the cut-off limit removal. Instead, the Panel goes on to confirm its support for the research being done by industry and government departments in their attempt to develop the IFN and Water Management Framework. Echoing the deliberations of the past 9 years, concerns are acknowledged but the associated risks are addressed by recourse to some future capacity for mitigation. It is important to note that CEMA is here relied upon to a lesser extent, only being referenced in this section with regard to its timelines. Instead, government agencies are expected to operate as ‘regulatory backstops’ to ensure it develops the frameworks within the deadlines requested.

The subsequent hearing on the expansion of the Muskeg River Mine, later in 2006, demonstrates not only the failure of existing attempts to establish an IFN, but also the Panel’s steadfast adherence to post-approval means of risk mitigation. At this hearing the ACFN label ‘…the IFN Water Management Framework as the greatest immediate concern of the First Nations’, ultimately because ‘…it did not believe the framework would sufficiently protect the Athabasca River’ (AEUB, 2006b: 68). This was echoed by the MCFN, who added that ‘…when considering water withdrawals from the Athabasca River and its tributaries, the biological or ecological sustainability of the river should be the number-one concern’ (ibid). Despite such clear significance, at this hearing the relevant government agencies ‘…have not yet released a finalized backstop IFN Water Management Framework’ (ibid: 72). Furthermore, despite providing assurances that the IFN would be released prior to the issuance of licenses, such guarantees mask the Panel’s admission that ‘overall project average daily water use within the total project area will increase’ anyway (ibid). This demonstrates the markedly limited capacity of an IFN to address First Nation concerns even in the event of its ultimate introduction. Indeed, this also skirts around the uncertainty emerging from Phase I of the IFN Framework, along with that surrounding subsequent implementation of Phase II, which was supposed to address these very knowledge gaps:

*The Joint Panel acknowledges that there are uncertainty and significant information gaps associated with the framework* [sic]*, but notes that the intent of the Phase II process is to address those gaps and uncertainties. The Joint Panel acknowledges that the amount of uncertainty and the timelines set out in Phase II will require significant commitment on the part of stakeholders. The Joint Panel believes that continued participation of all stakeholders is important and believes that AENV, DFO, industry and all other stakeholders must work together towards maintaining the timelines set out in the framework.*

(ibid)

Bringing the total number of projects approved without an appropriate framework for managing regional water use up to nine, the faith invested by the Panel in the introduction of an IFN Framework has, at this point, yet to materialise. Despite this, the Panel considers that ‘…significant adverse environmental effects associated with water withdrawn from the Athabasca River for use in the project are unlikely’ (ibid: 72), continuing the overarching pattern of post-approval risk-mitigation which allows the effects to be balanced and the project sanctioned under the rubric of the ‘public interest’. It is also important to note that attached to this is the Panel’s recognition that ‘…Albian is not requesting additional water allocations…’ (ibid); a comment deployed as a means of further demonstrating the absence of risk. This may well be true, but only because the proponent had previously acquired water allocation licenses with a limit set beyond its existing capacity (ibid: 67). This is problematic because its physical withdrawal of water would still increase. Also, in the absence of an IFN Framework, the threshold at which this increase could be accommodated by the surrounding ecosystem remains unknown. As such, the Panel’s decision is here no more precautionary than any of those made previously, and is still premised on a risk-based means of determining the ‘public interest’, placing faith in the future capability of techno-scientific advances to negate the ecological disorganisation expected to result.

By the 2007 hearing, on Imperial Oil’s Kearl project, an IFN had still not been established. As the ACFN remarked during the hearing, ‘…a Water Management Framework was still not finalized and the concept of a guaranteed minimum flow had been dropped from the most recent draft’ (AEUB, 2007: 62). At this point the Athabasca Chipewyan, Mikisew Cree, Fort McKay and Deninu K’ue First Nations all raise extensive concerns with the existing draft IFN and Framework. Indeed, the ACFN identified ten of areas of uncertainty in the methodology used in their production. Among its similarly varied concerns, Fort McKay considered the draft Water Management Framework to ‘…put the Athabasca River at unacceptable risk’ (ibid: 63). The MCFN forwarded similar comments on a variety of concerns and uncertainties, noting that the proposed plan ‘…was neither precautionary nor protective enough…was becoming less protective of the river with each revision…’, and that the current IFN ‘…did not take into account the complexities of ecological interactions in the river’ (ibid: 66). In response to this wide range of issues, the Panel noted that it was ‘…concerned that the document has not yet been finalized and approved by the governments’ (ibid: 72), and that an appropriate ecological base flow, as requested by First Nations, ‘…could not be established at this time based on the information currently available’ (ibid: 73). As before, precaution takes the form of risk-based mitigation expected to occur through future, post-approval advances, where the Panel expects government agencies and industry:

*…to dedicate the resources, staff and funding necessary to ensure that Phase II of the Water Management Framework…is completed in a comprehensive manner and according to the timelines established in the current Water Management Framework.*

(ibid: 73)

Going on to recommend that government agencies incorporate the, at that point conceptual, ecological base flow in the final Water Management Framework, the Panel goes on to note that ‘…Phase II *should* provide the needed information to support the inclusion of a measure that *could* provide long-term certainty to industry and other users of the Athabasca River’ (ibid, emphasis added). Going on to issue five recommendations to government agencies, to include in any conditions they subsequently issue to the proponent, the Panel later acknowledges that four of these recommendations ‘would form part of Phase II of the framework development and could be completed as part of a multistakeholder process’ (ibid). As noted in Section 7.2.3, industry-led multi-stakeholder initiatives are broadly considered to have, by this point, failed. This is particularly true with regard to the delayed finalisation of Phase I of the Water Management Framework (see Section 6.3.1), and applies equally to its Phase II, the completion of which is not realised over course of the entire sample of documents analysed. Despite this, and a range of other calls for greater co-operation between government and industry to participate in research, the Panel concludes that ‘…significant adverse environmental effects associated with water withdrawal from the Athabasca River…are unlikely’ (ibid: 74). As in previous hearings, their recourse to future scientific and technological advancements, facilitated by greater multi-stakeholder co-operation through industry-led initiatives, is enough to mitigate the risks raised by the First Nations. This contributes to the balance of social, economic and environmental factors required to approve the project under the rubric of the ‘public interest’.

### 7.2.2 Water Quality and Tailings Management

Going back to the 2004 hearing for CNRL’s Horizon project, First Nations raised concerns about the data on surface water quality. The MCFN targeted criticism at the Environmental Impact Assessment for omitting data on the quality of proposed fish habitat, the type of mercury contamination focused on, and the unreliability of assessment models, noting in particular that the ‘…model predictions pertaining to water quality in EPLs…are unverified’ (AEUB, 2004a: pp.44-45). The Panel’s response is consistent with those aimed at water quantity issues during this period, recommending that government agencies ‘condition any approvals’ to ‘develop and implement a comprehensive monitoring program’ as part of its post-approval risk-based mitigation (ibid: 47). The implied lack of existing mechanisms to deal with water quality concerns is echoed in its subsequent reasoning, where ‘[t]he Panel expects CNRL to support CEMA in its efforts to develop water quality objectives for the lower Athabasca River…’, also expecting ‘…CNRL to adhere to the water quality objectives recommended by CEMA and implemented by the regulators’ (ibid). The concern with EPLs is ignored and the point about mercury assessment dismissed, although the latter of these contains the caveat that CNRL must monitor for mercury until no longer required by the regulator. Consistent with the justifications provided in other hearings, the risk is mitigated by recourse to expected future advances in science and technology.

The water quality section in the CNRL Horizon hearing is also instructive because it illustrates that, even when faced with the relatively rare scientific certainty of an environmental threshold breach, the Panel will still deploy its faith in future technological developments as a solution:

*Although there are some predicted exceedances of water quality guidelines, the Panel believes that by implementing a comprehensive monitoring plan and adaptive management strategies to ensure adherence to the water quality guidelines, the project is unlikely to result in significant adverse environmental effects on water quality.*

(ibid)

This continued use of a faith in future techno-scientific advancement also characterised the Panel’s response to First Nation concerns about the expansive reliance of industry on tailings ponds. Here the Panel explicitly recognised ‘...that NST (non-segregating tailings) is in the development stage’, subsequently noting that ‘…ongoing development and additional research efforts will be required to advance the NST technology’ (ibid: 26). This contributed to the justification for project approval, allowing the Panel to conclude that ‘close attention to design and operations supported by continued aggressive research by CNRL’, coupled with ‘continued monitoring by [A]EUB and [A]ENV’, ‘will ensure that the proposed tailings management scheme is unlikely to have significant adverse environmental effects’ (ibid: 28). As with preceding hearings, the risks highlighted by the First Nations are addressed by recourse to some expected future techno-scientific certainty.

The subsequent 2004 Shell Jackpine decision exhibited similar characteristics with regard to the Panel’s use of technology-focused risk-based reasoning. When confronted with the criticisms pertaining to surface water quality forwarded by the Mikisew Cree, Wood Buffalo and Athabasca Chipewyan First Nations, the Panel again acknowledged the lack of scientific data on the numerous issues raised:

*...water quality predictions of the project are subject to several uncertainties related to modelling assumptions, modelling techniques, baseline data, hydrologic conditions, containment of contaminants, and establishment of closure drainage on reclaimed lands.*

(AEUB, 2004b: 35)

Going on to recognise that ‘…the project has the potential to increase the PAI, both locally and to a lesser extent regionally, with possible effects on critical load exceedances of water bodies’ (ibid), the Panel deploys a similar tactic to that seen in the previous Horizon decision. It asks for further monitoring of these impacts, here using the RAMP and WBEA, as a condition on approval (ibid: 36). As such, the Panel concludes much in the same way as it had done before, noting that, on condition of future implementation and success of these measures, the project ‘is not likely to cause significant environmental effects on surface water quality’ (ibid). First Nations did not submit any specific concerns on tailings management at this hearing, but even in their absence the Panel recognised that Shell’s proposed technology ‘would not meet the objective of eliminating long-term storage of fluid fine tailings in the reclaimed landscape’ (AEUB, 2004: 25). Following this with the recognition that ‘…there is currently no demonstrated means to reclaim fluid fine tailings’ (ibid), the Panel expects Shell ‘…to continue to work to develop solid tailings technology and to evaluate the feasibility of implementing such technology at the project’ (ibid: 26), subsequently asking the proponent to submit periodic reports on its progress towards this goal. This reasoning culminates in the belief that ‘…ongoing tailings research *will* identify alternative means to reclaim fluid fine tailings…’ (ibid, emphasis added), and that ‘…close attention to design and operations supported by continued aggressive research by Shell and continued monitoring by [A]EUB and AENV…’ will ensure that the proposed tailings management mechanism ‘…is unlikely to have significant adverse environmental effects’ (ibid). Again, the concerns and uncertainty visible in the present are mitigated through some supposed scientific advancement expected to occur in the future.

By 2006, at the hearing on the expansion of the original Steepbank mine, First Nation concerns surrounding tailings management come to the fore. Here the MCFN questioned whether the suggested CT (consolidated tailings) method produced a trafficable surface, requesting ‘…that until CT was proven successful, Suncor not be granted approval for expansions using CT technology’ (AEUB, 2006a: 30). Now more able to view industry progress on the previous conditions and recommendations made in other hearings, the Panel ‘…remains concerned that Suncor has not met proposed targets in the management of its tailings as stated in its [original] STP (Steepbank) and Millennium applications’ (ibid). The extent of this failure is revealed in the Panel’s follow-up remarks, where it notes that ‘…Suncor’s CT production was 19 percent of projected values…’ (ibid). In response, the Panel requires the proponent to ‘…meet its predicted 76 percent CT efficiency on a quarterly basis…’, adding that ‘[u]ntil these targets are met Suncor shall not mine oil sands…’ because the additional material produced by such activity will ‘…impact Suncor’s ability to meet its CT performance predictions’ (ibid). Although this appears to be a more precautionary approach to regulation, this condition was later modified by the ERCB in its acceptance of Suncor’s updated tailings plan in 2010 (see ERCB, 2010: pp.2-3). Here the requirement for 76 percent CT efficiency was retained while the threat of production inhibition, in the event of non-compliance, was removed (ERCB, 2009: Sec.21). This left intact the faith in technological advancement while removing the threat to expansion in the event of failure. Alongside this, the Panel acknowledges that ‘progress was slow’ in the development of performance criteria for tailings management (AEUB, 2006a: 31). In its final comment aimed at risk mitigation, the faith underpinning the techno-scientific reasoning of the Panel becomes visible in that it ‘…is aware of several industry and government initiatives that address tailings in various capacities and is *hopeful* that these initiatives will be successful’ (ibid, emphasis added).

First Nation concerns with tailings technology do not end there, with the MCFN believing that ‘…CT should not be part of any approval until peer-reviewed research supported by large-scale demonstration tests were available’ (AEUB, 2006a: 32). In agreement again, the Panel ‘continues to be concerned about the lack of definitive performance data respecting the success of CT operations’ (ibid: 33). However, instead of adopting the more precautionary approach advocated by the MCFN, it maintains the position advocated in other hearings:

*…the Board expects Suncor, and other operators, to place greater emphasis on the development of tailings technology, including research and testing of alternative tailings technology. In addition, the Board expects that any improvements or a breakthrough in tailings technology would be immediately incorporated in Suncor’s tailings management program.*

(AEUB, 2006a: 32)

Here, in the absence of evidence pertaining to tailings performance, the Panel goes on to recommend more research in the process of justifying its approval and discursively balancing the associated risk. Indeed, it goes on to expect Suncor to ‘…not only participate in collaborative efforts on tailings fundamentals studies, investigations of commercial tailing properties, and tailings reclamation studies’, but also requests that it ‘initiate new studies and provide technical leadership to these efforts’ (ibid: 33). This bears similarity to the Panel’s response to First Nation concerns about the lack of evidence on the effectiveness of EPLs. Noting that it ‘…continues to be concerned that the concept of EPLs has not been scientifically proven in the oil sands region due to the complex nature of these landforms and the lack of a test case to date’ (ibid: 36), the Panel goes on to advocate an industry-wide approach to developing a demonstration lake in an attempt to ensure the viability of the EPL concept. However, this was coupled with a requirement for Suncor to immediately begin minimising its inventory of tailings; a response to Suncor’s backup plan for dealing with excess volumes of tailings which ‘…relies heavily on the unproven technology of EPLs’ (ibid). Despite this, the pattern of reasoning is familiar, with the Panel also expecting Suncor’s continued participation in CEMA and its undertaking of ‘additional research work to help resolve uncertainties over the implementation of oil sands EPLs’ (ibid). Again the risks raised by the First Nations, and the related lack of information pertaining to the efficacy of tailings management techniques, are mitigated by recourse to an expected future technological solution.

Prompted by concerns from the MCFN on water quality, the position of the Panel at the subsequent 2006 hearing for the expansion of Albian’s Muskeg River Mine (MRME) was consistent with those preceding it. Responding to First Nation concerns about the intersection between cumulative effects and water quality, the Panel considered this to be ‘…the biggest issue facing the oil sands region’ (AEUB, 2006b: 46). However, its response to such a significant issue included recommending a ‘workshop with experts and stakeholders to examine the current monitoring programs in the region’, integration and peer review of RAMP and CEMA, additional site-specific monitoring, and ‘…ongoing validation of modelling results’ (ibid). This was coupled with greater reliance on CEMA, Albian’s expected creation of a schedule for testing and updating water quality modelling predictions, and greater reporting ‘on advances in wetland and EPL science and management’ (ibid). Taken together, this combined recourse to expected future techno-scientific development, achieved in no small part by industry-led multi-stakeholder initiatives, is enough to support the Panel’s conclusion that ‘…the MRME project is unlikely to result in significant adverse environmental effects on water quality’ (ibid: 47). An almost identical conclusion is reached in response to First Nation concerns surrounding the efficacy of EPLs, despite the Panel noting that ‘…the EPL reclamation strategy remains an unproven and unapproved reclamation option’ (ibid: 64). Indeed, its response is consistent with those offered in previous hearings, stating that research by multi-stakeholder organisations such as CEMA ‘…will address many of the concerns expressed by MCFN…’ (ibid). Requiring submission ‘…on an annual basis a report that describes Albian’s EPL research and development efforts…’, the Panel again concludes that ‘…it is unlikely that there will be significant adverse environmental effects…’ (ibid: 65).

Although the focus on tailings is then drawn towards the specific area of NST management, First Nations express concerns similar to those directed at CT and EPL technology; that it had not yet been commercially demonstrated. This acts as the precursor for their request that the project ‘…be delayed until the uncertainty was reduced or removed’ (AEUB, 2006b: 36). In response, the Panel views NST technology as similar to the already-existing CT method, choosing to support development of a demonstration plant ‘…to assist Albian to understand and optimize the NST process’ instead of pursuing the MCFN’s recommendation (ibid: 37). Going on to consider the information submitted by Albian on expected tailings performance to be ‘unrealistic’, the Panel instruct the company to ‘…work with [A]EUB staff to update the data’ (ibid). This was coupled with a concern that tailings targets would not be met, thus adversely affecting the timelines for final closure of the ponds. Here the Panel asks the AEUB to revisit the possibility of establishing tailings management criteria alongside consequences for non-compliance. Ending its response by ‘…encouraging Albian to continue testing these and other technologies to identify further ways and means of reducing MFT (medium fine tailings) inventory, accelerating pond reclamation, reducing land disturbance, and reducing water consumption’ (ibid), the Panel concludes that ‘…by implementing the proposed mitigation measures, the project is unlikely to result in significant adverse environmental effects’ (ibid: 37). As can be seen, the mitigation measures referred to do not yet exist, and their eventual existence is heavily dependent on the results of future research.

At the 2007 hearing for Imperial Oil’s Kearl mine the Athabasca Chipewyan and Deninu Kue First Nations raise concerns about water quality, eliciting Panel responses broadly consistent with earlier hearings. Implicitly acknowledging the validity of these concerns, which centre on the credibility and suitability of the water quality data submitted by Imperial Oil within its application, the Panel’s response was almost entirely composed of recommendations for further research by industry-led multi-stakeholder organisations. Indeed, CEMA is mentioned seven times in this single response, with recourse to future research by RAMP and the newly-developed Canadian Oil Sands Network for Research and Development (CONRAD) having a lesser but still central role in the Panel’s approach to mitigation (see AEUB, 2007: pp. 82-83). A similar theme is exhibited in its response to ACFN concerns about the environmental effects of EPLs:

*The Joint Panel notes ACFN’s concerns with respect to cumulative discharges to the Athabasca River from EPLs; however, the panel expects that the impacts of EPLs will be fully addressed in the studies that are already under way to prove the efficacy of EPLs…[D]ue to the complexity and uncertainty about EPLs, it is a priority that ongoing, comprehensive research occur now. The Joint Panel supports the use of Syncrude’s Base Mine Lake as a test project beginning in 2009…[and] encourages Imperial Oil to continue to work with Syncrude and other oil sands industry members on developing this demonstration lake to ensure the viability of EPLs as a reclamation concept.*

(ibid: 45)

This recourse to expected technological advances is also mirrored in the Panel’s response to First Nation concerns on tailings technology, specifically that ‘…the use of thickeners to produce CT has not been commercially demonstrated…’ (ibid: 42). Here, in response, the Panel ‘…encourage Imperial Oil to demonstrate this technology in a pilot-scale project…prior to start-up of CT production’ (ibid). Although this appears more precautionary when compared to some of the previous deliberations, the ensuing approval is still an example of risk being negated by recourse to expected techno-scientific developments realised post-approval. Indeed, this accompanied the Panel’s final response to the concerns raised in the area of tailings technology, where its conclusion that ‘…the KOS (Kearl Oil Sands) Project is unlikely to result in significant adverse environmental effects’ is contingent on Imperial Oil’s implementation of the proposed tailings technology, along with its ‘…commitment to MFT recycling and ongoing testing’ (ibid).

### 7.2.3 Concerns Surrounding Industry-led Multi-Stakeholder Cumulative Effects Initiatives

The delay of around four years between the 1999 Muskeg River and 2004 CNRL Horizon projects did little to alter Panel approaches to deliberating over cumulative effects. Indeed, the latter of these was approved despite the presence of uncertainties in the data on the potential cumulative impact. However, the difference here is that the concerns surrounding the capabilities of the multi-stakeholder initiatives to address cumulative effects begin to come to the fore. Indeed, the 2004 CNRL hearing is the first to dedicate an entire section of discussion to the efficacy of regional initiatives, prompted in response to First Nation concerns about the slow progress of these initiatives in achieving their objectives. This issue is particularly problematic when considering their central role in the expected mitigation of risks associated with the more specific impacts to water quantity and quality. After hearing submissions on CEMA’s problems with funding, ability to obtain expert consultants, and the ineffective participation by some of its members, the Panel express additional concerns that:

*…CEMA’s effectiveness may also be influenced by the volume and complexity of its work, multiple priorities of stakeholders, and funding mechanisms that may not keep pace with CEMA’s increased workload from oil sands expansions…*

(AEUB, 2004a: 77).

This culminates in the Panel having ‘serious concerns about delays in the issuance of recommendations and the ability of CEMA to meet the proposed timelines’ (ibid). In order to mitigate such substantial criticism, the Panel recommends a host of remedial measures. These are worth quoting at length because they serve the additional purpose of further highlighting the depth of the Panel’s apprehension with the organisation:

*‘…greater dedication of technical experts would facilitate dealing with complex scientific issues…restructuring and reprioritization are the first steps to ensuring that CEMA meet its goals and the expectations others have of it...The Panel urges all CEMA participants to re-evaluate their financial support and staff resourcing allocated to CEMA and ensure that these are comparable to the amount of reliance they have put on the CEMA process…The Panel also urges all CEMA participants to ensure that their staff are accountable for the completion of CEMA deliverables. CEMA participants may want to consider dedicating staff to this initiative. In addition, the Panel recommends that EC, DFO, AENV, and ESRD review and optimize their financial and human resourcing of CEMA to produce meaningful results in an earlier timeframe.*

(ibid)

Although the Panel is clearly aware of CEMA’s organisational flaws, demonstrated not least of all in its identification of restructuring as a ‘first step’, this does not detract from its reliance on the multi-stakeholder initiative to mitigate risk. Indeed, despite all of this, the Panel reaffirms that CEMA ‘…will assist the [A]EUB in meeting its regulatory mandate to ensure that energy developments are carried out in an orderly and efficient manner that protects the public interest’ (ibid: 76). As such, the Panel’s means of addressing cumulative environmental concerns is consistent with its approach at other hearings, where risks identified in the present are addressed through technological advances expected to occur post-approval. However, the difference here is that this approach is taken following explicit recognition of the deficiencies inherent to the organisation primarily responsible for the attainment of such advances.

During this hearing, First Nations also direct criticism at another primary multi-stakeholder initiative tasked with addressing cumulative environmental effects; the Regional Aquatic Monitoring Programme (RAMP). Here, First Nations raise concerns with ‘…the unequal representation of stakeholders…where industry currently made up to close to 50 percent of its participants’ (ibid: 74). The MCFN in particular questioned the reliability of its data, noting that ‘…the information provided by RAMP was difficult to use and in some cases was based on data collected using different methodologies and from different locations’ (ibid). This was followed with questions on its objectivity, noting that ‘Golder and Associates had been the main consultant used by RAMP’, and ‘…reports generated by RAMP predominantly cited previous Golder work, as opposed to other scientific literature’ (ibid). Here the Panel’s response differs to that used in support of CEMA, choosing instead to defer to the results of a peer review being conducted on RAMP at the time of the hearing, ultimately ‘expecting that improvements’ noted through this process ‘…be implemented in a timely manner…’ (ibid: 78). This likely explains why RAMP is barely referred to throughout the Horizon hearing as a way of addressing First Nation concerns. Chapter 8.3 presents the results of this evaluation in more detail.

During the subsequent 2004 Jackpine hearing this peer review is still underway, partially explaining why the decision contained only two references to RAMP as a possible means for addressing First Nation concerns. Instead, CEMA is relied upon to a greater extent, despite similar concerns surfacing around its efficiency, lack of outputs, adequacy of funding, and creation of a water quality framework or Muskeg River basin management system (AEUB, 2004b: pp.77-78). In closing argument the Fort McKay First Nation reiterated its ‘…significant reservations about CEMA’s ability to fulfil its mandate based on recent restrictions on CEMA funding imposed by industry participants’, believing the rate of industry expansion to have ‘outstripped’ CEMA’s organisational ability to develop adequate thresholds (ibid: 75). The Panel’s response is here almost identical to that issued in the previous CNRL Horizon project, where it recommends government agencies ‘…review the progress of CEMA…’, before going on to use the exact same text in its comment, asserting that ‘…restructuring and reprioritization are the first steps in ensuring that CEMA meets is goals and the expectations others have of it’ (ibid: 78). Indeed, the majority of this section appears to have been lifted, with only slight adjustment, from the text of the Horizon hearing document, raising additional questions as to the extent to which attempts have here been made to address the specific concerns of First Nations. Those raised are, after all, qualitatively different to the concerns voiced in the previous 2004 hearing. The important role of CEMA in assisting the Panel meet its public interest mandate is also repeated verbatim and, as before, the project is approved despite these concerns and uncertainties.

By 2006, at the hearing for the Suncor Steepbank expansion, little progress had been made on CEMA’s organisational capacity. Here, the MCFN criticise the organisation’s ‘progress towards recommending thresholds and limits for mitigation of impacts…’, raising concerns about ‘…Suncor’s and other operators’ dependence on CEMA for studying, understanding, and adjusting the cumulative impacts of a project…’ (AEUB, 2006a: 66). Going on to state that the CEMA process was ‘flawed and imbalanced in terms of its consensus function and the representation on its committees’ (ibid), the latter of which is a repeat of a similar concern raised during the 2004 Jackpine hearing (see AEUB, 2004b: 75), the First Nation then emphasised seven areas where it felt government agencies needed to take responsibility from CEMA to ensure effective mitigation was realised. These were with respect to the:

*IFN for reaches 1, 2 and 3 of the Athabasca River, water quality objectives for reaches of the Athabasca River, completion of the Muskeg River Watershed Integrity Plan, air containment management framework, regional reclamation guidelines and management standards for EPLs, wetlands, and ecosystem diversity, and regional sustainable ecosystem management.*

(AEUB, 2006a: pp.66-7)

Although dismissing the criticism levelled at the consensus-based nature of CEMA’s decision-making, the Panel goes on to explicitly recognise the validity of the majority of these concerns. Tellingly, the Panel also subtly modifies its recognition of CEMA’s role in its public interest deliberations, noting that CEMA ‘…may assist’ it in meeting its mandate (ibid: 68). This is a clear break from the ‘…will assist’ language used in the previous 2004 CNRL and Jackpine hearings (AEUB, 2004a: 77; AEUB, 2004b: 75). However, its response is not to reject the application on the basis of these acknowledged areas of scientific uncertainty, or the implied lack of organisational capability to address the issues. Instead, it proposes that the Government of Alberta ‘…initiate a review of CEMA’s purpose, priorities and timelines’, and encourage CEMA to ‘…define a mechanism for reporting progress against goals, work plans, and…objectives’ (AEUB, 2006a: 68). This is followed by further requests that ‘…CEMA members outline their expectations and the resource allocation needed for such initiatives in order to determine whether the members’ goals and timelines are practical and achievable’ (ibid). Finally, support is given to the Government of Alberta to review the 1999 RSDS, also recommending the use of government-led ‘regulatory backstops’ in the event of continued regional initiative underperformance. Yet, despite such far-reaching concerns, the suggested avenues for organisational improvement are used to support a pattern of reasoning based on a faith in the future capacity of technology and science, contributing to the justification for project approval under the rubric of the ‘public interest’.

During the next hearing, for the 2006 expansion of the Muskeg River project, an entire section is dedicated to discussing the issues associated with CEMA. Examination of this is particularly important in this instance because, after hearing First Nation comments on eight areas of environmental concern, CEMA forms part of the recommended response in no fewer than six of them. Here, the Athabasca Chipewyan and Fort McKay First Nations criticised its lack of progress on addressing the issues identified in the RSDS, going on to note that, since its inception in 1999, only three management frameworks had been completed (AEUB, 2006b: 75). Following its acknowledgment of the complex task required of the organisation, the MCFN then criticised CEMA for not keeping pace with industrial development, mirroring the ACFN and Fort McKay in requesting greater government involvement in the regulation of regional cumulative effects (ibid: 76). The Panel’s response demonstrates its continued commitment to this industry-led multi-stakeholder approach, criticising the older command-and-control forms of regulation requested by First Nations to be inferior, considering ‘…recommendations founded on good knowledge…and based on consensus’ to be ‘a superior approach to a regulator imposing solutions on the region’ (ibid: 78). This acts as the precursor to its recommendation that the Government of Alberta participate to a greater extent in CEMA. This aside, the responses to First Nation concerns are similar to those provided at the previous hearing, on the 2006 Steepbank expansion, where greater participation in CEMA, creation of more detailed timelines, and greater management of expectations by its participants are posited as remedies (ibid: 75). There is, however, a difference here, in that the Panel recommends the creation of interim frameworks by CEMA sub-groups until their finalised versions are provided, going on to reinforce the role of the Government of Alberta in this CEMA-led task. Nevertheless, the concerns are still mitigated by recourse to the imagined future capacity of the organisation to develop adequate thresholds, contributing to the project approval.

By the 2007 hearing on the Imperial Oil Kearl project the concerns raised with CEMA are unprecedented. Here the ACFN confirm their withdrawal from the organisation, with the MCFN going on to note that it had begun to limit its participation due to ‘…frustrations over the slow progress…’ (AEUB, 2007: 89). The criticisms levelled at the organisation are far-reaching, demonstrating the level of frustration exhibited by the First Nations, and particularly by the ACFN:

*CEMA members were participating for the interest of their own organization and not for the health and sustainability of the environment; CEMA had not delivered tangible results pertaining to the Regional Sustainable Development Strategy; government and industry members controlled the agenda, committee chairs, and resources of CEMA, thereby giving themselves a disproportionate level of decision making influence; the work to create management frameworks to sustain the environment was not driving the work of CEMA; instead, the resourcing of CEMA dictated what work could be accomplished.*

(ibid: 89)

The MCFN build on this, noting that CEMA still adheres to RSDS standards created in 1999, requires greater government funding and direction, and would benefit from more terrestrial monitoring (ibid). In response, these concerns are once again acknowledged and validated by the Panel, but the recommendations made for improvement are now more extensive. Indeed, they include ‘…a need to develop specific timelines for priority projects’ (ibid: 93), for CEMA to meet established deadlines and ‘…members in CEMA…to increase and improve their participation’ (ibid). Going on, the Panel suggests the need for a review to ‘…identify opportunities to streamline its operation…’ and ‘...improve communication among the various levels…improve management support, and strengthen its strategic direction given to its committees and working groups’ (ibid: pp.93-94). It finishes by encouraging ‘…regulators to take a more direct leadership role in all aspects of CEMA’ (ibid: 94). In its concluding statement the Panel notes the absence of a ‘satisfactory alternative’ to CEMA, therefore considering its success ‘critical’ (ibid). However, as with all of the hearings before it, these fundamental issues, with the primary organisation responsible for developing the management frameworks needed to address cumulative environmental effects, are nullified through recourse to some imagined future point in time where it will be operationally effective. The Kearl project was therefore approved in the same manner as its predecessors.

## 7.3 Absent Data, Foreseen Consequences and Requests for Greater Government Participation at the Level of Strategy: 2011-2013

There is a gap of four years until the next hearing, for the 2011 Josylin North project proposed by TOTAL. During this time, the ERCB was created out of the dissolution of the AEUB, with the change coming into effect on January 1st, 2008 (see Chapter 3.3.2). A similar alteration was made on June the 17th, 2013, where the AER succeeded the ERCB. In keeping with this period of change, on August 22, 2012, a partially completed LARP was also introduced, mirroring other legislative alterations made during this time (see ibid). Despite this, the mandate of the energy regulator, to balance social, economic and environmental considerations in the process of making a decision on approval, did not alter substantially. This period does see the Panels forward stronger calls for greater government participation in environmental regulation, echoing the First Nation requests seen in earlier hearings. Culminating in the 2013 Jackpine decision, where the Panel issues an unprecedented number of recommendations to government to undertake such responsibility, this appears to be an organic outcome, emerging from the criticisms levelled at the multi-stakeholder initiatives seen in Section 6.2. Indeed, at this point the industry has matured and, although there are still many gaps in understanding, of both impacts and efficacy of measures for mitigation, the consequences of expansion are better understood. There is also a developing awareness of just how much is still unknown, as reflected in the decision document for the final, 2013 Jackpine decision:

*The Panel finds that the Project would likely have significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity. There is also a lack of proposed mitigation measures that have been proven to be effective. The Panel also concludes that the Project, in combination with other existing, approved, and planned projects, would likely have significant adverse cumulative environmental effects on wetlands; traditional plant potential areas; old-growth forests; wetland-reliant species at risk and migratory birds; old-growth forest reliant species at risk and migratory birds; caribou; biodiversity; and Aboriginal traditional land use, rights, and culture. Further, there is a lack of proposed mitigation measures that have proven to be effective with respect to identified significant adverse cumulative environmental effects.*

(AER, 2013b: pp.2-3)

This can therefore be seen as the period in which the explanation of industry immaturity loses credibility, concurrently bringing the economic dominance underpinning regulator decisions on expansion into view. Indeed, it is from this point, most visible in this final decision on the Jackpine expansion, that the interview findings presented in Section 6.4 proceed, providing data on the reasons for Panel prioritisation of socio-economic considerations over its environmental and indigenous counterparts.

### 7.3.1 Water Quantity and In-flow Needs

Four year after the hearing for the 2007 Imperial Oil Kearl project, for the Josylin North Mine Project of 2011, First Nation input was withdrawn prior to the hearing because of agreements reached with TOTAL. However, concerns surrounding water quality were still submitted in the absence of any witnesses for cross-examination. As such, the ERCB still considered their content, providing insight into the reasoning used to support the eventual project approval. In response to concerns raised by the ACFN and Fort McKay First Nation regarding the water levels in the Athabasca River, and the issues with Phase II of the IFN Water Management Framework, the Panel continues to acknowledge their validity. The Panel also states that it ‘…understands that since the mid-1970s, the Athabasca River’s average flow has been dropping…’ (ERCB, 2011: 99). Its means of dealing with the issue is, however, consistent with previous hearings, in that it addresses existing information gaps by recourse to the presumed capability of future scientific and technological development:

*The Panel…notes that the governments of Canada and Alberta are currently working with CEMA’s Surface Water Working Group to develop the most appropriate monitoring program to address concerns with respect to the…ecosystem base flow. The Panel understands that Phase II’s progressive implementation will commence in January 2011 and be fully operational in January 2016. The Panel considers that the proposed Phase II Water Management Framework and subsequent adaptive management measures would address potential issues related to water withdrawals during low flow conditions.*

(ibid)

The Panel expands on this reasoning by referencing TOTAL’s proposed mitigation measures and commitments, using its confidence in future methods of mitigation as a counterweight to the risk posed by the information gaps on ecological impacts of water withdrawal. Although TOTAL’s commitments include future adherence to the Phase II Water Management Framework, assistance in developing a program focusing on producing a cumulative effects assessment of water withdrawal from the Athabasca River, and participation in a proposed framework aimed at protecting fish and fish habitat in the delta system, the same theme of Panel confidence in the ability of future methods to mitigate impact is still present. Taken together, this enables the Panel to address concerns in a manner almost identical to those found in prior hearings, allowing it to conclude that ‘...significant adverse cumulative environmental effects associated with water withdrawals from the Athabasca River during low flow periods are unlikely’ (ibid).

The final hearing record available for analysis is the 2013 decision on the expansion on the Shell Jackpine mine. Unprecedented in the extent of the evidence heard, the hearing document is 405 pages long. Considering that the original 1997 Steepbank decision document was 13 pages long, the progress made in terms of the scientific evidence available in support of the increasing variety of arguments is clearly visible. The recognition given to cumulative effects has also expanded significantly, now having dedicated consideration under many different sections and in addition to project-specific impacts. Indeed, here the levels of water withdrawal established under the finally-completed Phase 1 Water Management Framework are referred to as one of Shell’s post-approval commitments, with the Panel agreeing to a conceptual precautionary cut-off level which would equal the Ecological Base Flow requested by First Nations in the decision on the 2007 Imperial Oil Kearl project hearing (AER, 2013b: 61; AEUB, 2007: 73). Although this demonstrates greater understanding of project-specific impacts and the most appropriate measures for their address, there are still knowledge gaps which continue to be mitigated by recourse to expected techno-scientific rectification post-approval. This is visible in the manner with which the Panel consider the credibility of monitoring data used by Shell, while concurrently recognising the deficiencies inherent to the agencies responsible for at least part of its production:

*The Panel believes that the data used by Shell was adequate based on what was available, including RAMP data. The Panel recognizes that RAMP will be wound down in due course and its monitoring activities will be assumed by an agency under government management. The Panel also recognizes that the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring proposes a more comprehensive monitoring program…that will address concerns over deficiencies in current monitoring activities.*

(AER, 2013b: 62)

Criticisms of the Regional Aquatic Monitoring Program (RAMP) were recognised almost a decade prior to this, in both the hearing for the 2004 CNRL project and peer review released the same year, but it would appear that the ‘…deficiencies in current monitoring activities’ have persisted over this time (ibid). In considering the data produced by RAMP to be valid anyway, and going on to use the expected future success of the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring (JOSM) as a method for mitigating the risk associated with doing so, the Panel’s approach is still dependent on the imagined capability of initiatives to address issues post-approval. It is here worth noting that the JOSM was introduced in February 2012 as a response by the Governments of Alberta and Canada to the problems with existing monitoring mechanisms.

As a distinct but related issue in the area of water quality, the 2013 Jackpine hearing also saw First Nations express concerns with Shell’s plan to divert 21km, or 13 miles, of the upper reaches of the Muskeg River to gain access to the bitumen underneath. As expected, the significance of such a landscape modification, and the potential impact on the surrounding ecosystem, elicited a broad swath of concerns from the First Nations, which are worth quoting at length:

*…diverting the river would permanently affect water flows, water quality, and fishery resources. These impacts would in turn affect access to traditional lands, reducing the opportunities to use the resources in the area and significantly affecting spiritual values of the watershed…The ACFN claimed that it was impossible for it to evaluate the impacts of the…Plan on the Muskeg River because Shell provided few quantitative details... [The] ACFN considered that Shell’s…Plan did not actually mitigate its concerns about disturbance…[The ACFN] stated that the river has cultural and spiritual significance…[and] have used the Muskeg River basin for millennia and continue to use the river and to access the lands within the basin. ACFN’s preferred option would be to not divert the river. ACFN stated that it believed the ore beneath the Muskeg River and its riparian zone should be sterilized and that full protection of the river be put in place. ACFN stated that should the Project be approved, it strongly urged the Panel to approve it only on the condition that the Muskeg River be left in a natural state and not be diverted.*

(ibid: 66)

*[The] ACFN stated that the Muskeg River Interim Management Framework for Water Quantity and Quality included an objective that there be no diversion of the Muskeg River mainstream and was put in place in response to past joint review panel recommendations to manage cumulative environmental effects and protect the integrity of the river…Fort McKay stated that ESRD has not completed a comprehensive management plan for the Muskeg River but instead has set out arbitrary water quantity and quality parameters for it.*

(ibid)

The Panel’s response to these concerns is consistent with the reasoning used in prior hearings. It explicitly ‘…recognizes that ACFN has significant unresolved concerns about the proposed diversion of the Muskeg River’ (ibid: 69), including the impact of this on traditional activities, rights, ‘…and on the spirit of the river’ (ibid). The Panel also recognises the absence of mechanisms capable of mitigating the cumulative environmental impacts likely to result:

*The Panel finds that although Shell has provided an acceptable degree of information at the Project level, the current Muskeg River Interim Management Framework for Water Quantity and Quality does not fully address cumulative effects on the Muskeg River from oil sands projects. The Panel finds that the province has not applied the precautionary approach in considering the Project’s impacts on the Muskeg River.*

(ibid)

Appearing to disregard this important gap, the Panel immediately follows this with a statement that is not only inconsistent with the admissions surrounding the absence of measures for the mitigation of cumulative effects, but also demonstrates the comparative absolutism with which the economic dimension of industrialisation is considered:

*The Panel has determined that diversion of the Muskeg River is in the public interest…there will be significant and unacceptable sterilization of oil sands resources if the diversion does not occur.*

(ibid)

In addition to the way in which the Panel elevates the economic value of this activity over all others, the subsequent reasoning is consistent with the pattern of decision-making during this period. Indeed, the Panel goes on to recommend that the provincial government adopt a more leading role in developing the Muskeg River Water Management Plan, to negate the expected cumulative effects. As such, gaps in existing knowledge still persist and are recognised as such by the Panel, but the mitigation of risk is expected to be achieved at some future point in time, when the scientific and technological means to do so are supposed to manifest. While the 2007 Water Management Framework for the Lower Athabasca River was replaced in 2015 by the Lower Athabasca Region Surface Water Quantity Management Framework (Government of Alberta, 2015c), as of March 2017 the completed Muskeg River Water Management Plan to which the Panel refers is yet to be published.

### 7.3.2 Water Quality and Tailings Management

At the hearing for the 2011 Josylin North Project the First Nations again question the potential impact of approval on the water quality of the Athabasca River. These concerns centre on the absence of detailed monitoring mechanisms needed to assess its cumulative regional dimension. The means by which the Panel mitigates these concerns is, again, consistent with previous hearings, where risk is mitigated by recourse to some future scientific or technological development. In acknowledging that there are ‘…existing exceedances of water quality guidelines for several water quality criteria…’, recognising that ‘[t]he project…would likely add to some extent to these exceedances’ and that, ultimately, ‘…there are uncertainties about the effects of industrial development on water quality in the lower Athabasca River’, the Panel concludes that ‘…these *should* be resolved through better monitoring programs’ (ERCB, 2011: 102, emphasis added). In commending Environment Canada for its research progress towards this aim, the Panel notes that ‘[t]his research *might* help determine…’ the sources of contamination (ibid, emphasis added). This is followed by other recommendations for future research before concluding there to be ‘…no reason to believe that these [cumulative] effects are significant’ (ibid); a decision reached ‘…on the basis of the RAMP data…’ which, earlier in the hearing, TOTAL had been criticised for using as part of its assessment of the effects of pollutants on the environment (ibid: 58).

At the hearing on the expansion of the Shell Jackpine Mine, in 2013, First Nations did not raise any concerns within the section specifically dedicated to tailings technology. However, this is only because their concern with the increasing volume of tailings ponds is spread throughout the hearing. Indeed, the Panel is still ‘…concerned about the viability of the Project’s tailings management plan since Shell has not been able to demonstrate the success of its thickener technology at its Phase 1 operation’ (AER, 2013b: 37). The Panel’s reservations about Shell’s proposed technology are substantial:

*…thickener underperformance may hinder fines capture rate...[the proposed technology] has been unable to meet the Directive 074 strength requirements...off-spec NST produced by low solids content thickener underflow will not be able to meet the Directive 074 strength requirement…The Panel is also concerned that Shell’s thickener underperformance would result in the TT* (thickened tailings) *deposit not developing in a trafficable deposit in a timely manner...*

(ibid: 37-38)

As before, the Panel responds to these concerns with a belief in the proponent’s ability to make scientific and technological improvements of such capability, and within such a time frame, that they would mitigate the concerns raised and meet the standards within Directive 074. Despite requiring Shell to provide a tailings management plan prior to start-up, which should indicate compliance, the achievement of this is based on not only a faith in the possibility of its attainment, but also Shell’s capacity to do so:

*…The Panel concludes that Shell’s Project tailings plan is overly optimistic and may not be achievable. However, the Panel recognizes that Shell has made improving the Phase 1 thickener performance a high priority. Shell intends to continue improving its understanding of fines in ore and will incorporate the knowledge gained from existing operations in the Project’s thickener design. Shell will also continue to develop other technologies to improve its tailings management.*

(ibid: 38)

The uncertainty underpinning this proposed faith is further heightened by the acknowledged difficulty in deploying an alternative tailings management technology should the proposed technology be unsuccessful. In recognising this, the Panel raises a concern about the delay associated with such compliance ‘…because Shell indicated that it would take almost a decade to identify a technology and take it to full-scale commercial implementation’ (ibid). As such, significant uncertainty is associated with both the method proposed and any alternatives which may be pursued should it fail. Consistent with other hearings, such uncertainty does not pose a challenge to project approval because ‘…the Panel recognizes that Shell’s commitment to have no fluid tailings at closure surpasses *Directive 074* requirements in the long term’ (ibid, emphasis in original). In the absence of evidence and presence of concerns, a commitment to future techno-scientific advances, irrespective of feasibility, facilitates the risk-based mitigation seen in previous hearings.

The concerns of First Nations surrounding the related area of Shell’s proposed End Pit Lakes were heard in one dedicated section. Here the ACFN considered the ‘littoral zone’, which is the area at the edges of a lake able to support plant and animal populations, to be ‘too small in current pit lake designs’ (ibid: 70). They also stated that ‘…Shell had not considered the cumulative effects of discharge from multiple EPLs into regional freshwater bodies’, requesting that ‘…any approval or recommendation that the Project proceed be made conditional upon completion of an independent and scientifically rigorous assessment and verification of the accuracy of models used to predict the functioning of EPLs’ (ibid). As before, the Panel responds to the First Nations by acknowledging the validity of their concerns, following this with a reiteration of the need for further research as a means of mitigation:

*The Panel acknowledges interveners’ concerns about the lack of evidence demonstrating that EPLs are technically and economically feasible and about Shell’s reliance on adaptive management to address potential EPL did not perform as expected. The Panel recognizes that the work that industry and others have completed through CEMA to update the EPLGD* (CEMA’s 2012 End Pit Lake Guidance Document) *is a positive step toward improving the design of EPLs. The Panel considers that this guidance document contains reliable research about EPL design, but that until more information becomes available (i.e., Syncrude BML* (Base Mine Lake) *test results), the Panel can only view the EPLGD as a guidance document and not as a regulatory tool. The Panel expects Shell to continue its participation in CEMA and other multi-stakeholder groups to research and refine assumptions about EPL development.*

(ibid: pp.76-77)

These recognised gaps in existing knowledge continue throughout the Panel’s response. Indeed, it actively recommends that any approvals issued by government agencies include validating the models proposed, updating mitigation plans as more information becomes available, and developing a research schedule for testing EPL predictions and design features (ibid: 75-76). The Panel also recognises that ‘mineable oil sands operators will not be able to meet the expectation to demonstrate the efficacy of EPLs by 2018 that was established by previous joint review panels’ (ibid: 76). A wide variety of other recommendations and requirements for both government and proponent are subsequently issued, continuing the expectation-based nature of the risk-based mitigation deployed in other hearings. Taken together, this enables the Panel to conclude that ‘…it is unlikely that significant environmental effects would result…’, allowing for the project to be approved (ibid: 78)

### 7.3.3 Pursuit of Greater Government Involvement in Cumulative Effects Management

The hearing for the 2011 Josylin North project did not contain a dedicated discussion of regional monitoring initiatives, but still made occasional reference to CEMA and RAMP in the course of mitigating the risks made visible by First Nation input. However, there is a qualitative shift here, in that the Panels no longer defer to these organisations, to the extent that they had done previously, in their responses. This is likely because December 2008 saw a significant shift in cumulative effects management, where the Government of Alberta announced the development of the LARP; a framework for managing cumulative issues beyond CEMA’s existing remit. Concurrently establishing the LUF, which replaced the RSDS after its 9 years in operation, the government also initiated a major review of CEMA’s governance structure, the findings from which were highly critical (see Chapter 8.3). It therefore becomes clear as to why reliance on the organisation during the 2011 Josylin North project is seen to diminish, and why the Panel increasingly deferred to ‘regulatory backstops’ in the period prior to this (see Section 6.2). Indeed, these reports not only speak to CEMA’s limitations as an organisation, but also retrospectively confirm the flaws underpinning the years of expectation-based, techno-scientific mitigation deployed as the rationale for approvals, particularly as realisation of these advances was largely contingent on the success of this very organisation.

By 2013, and the hearing on the expansion of the Shell Jackpine project, it is clear that the Panel is in a difficult situation with regard to making decisions on cumulative environmental effects. At this point, knowledge of the potential impacts has grown, but so too has the awareness of what is still unknown. Although cumulative effects are taken into account to a far greater extent than in prior hearings, with both project-specific and regional impacts being given dedicated attention within most of the separate areas in which concerns have been raised. There is also a section dedicated to ten regional effects which ‘may or may not be contributed to directly by the Project’ (AER, 2013b: 300). Of these, the Panel recognises the limits to existing mitigation measures in nine, suggesting use of the LARP as a possible means for future mitigation in five of these. Indeed, the criticisms levelled at existing measures for mitigation are numerous. Not only are the management plans in use prior to the LARP seen as ‘…of limited use’ because they are ‘at varying scales, out of date, and not reflective of the present state of development’ (ibid: 301), but ‘…there is still insufficient evidence to demonstrate that reclamation works or will work as intended’ (ibid: 302). The Panel considers there to have been a ‘lack of mitigation that has been shown to be effective’ with respect to losses of wetlands and old-growth forests (ibid: 304), that Phase 2 of the Water Management Framework has yet to be developed as a means of mitigating risks to water quantity and quality (ibid: pp.305), and that ‘…there is still uncertainty regarding cumulative effects on fish and fish habitat’ (ibid: 306). Finally, recognition is given to the lack of a regional monitoring initiative, with the panel noting that ‘funding has not yet been finalized’ for the proposed JOSM (ibid). Yet, despite these quite clear acknowledgments of the insufficiency of existing knowledge, as before, the risks raised are mitigated by recourse to the expected future potential of the LARP, which is broadly recognised as incomplete at the time of the hearing, or recommendations for further scientific or technological advancements by government departments. This culminates in a now-familiar outcome for the latest and final oil sands project which went to hearing; approval in the name of the ‘public interest’.

## 7.4 Analysis of Public Hearing Documents: Conclusion

Despite occurring over almost two decades, the pattern of reasoning used by the regulatory Panels to consider whether a project is in the ‘public interest’ exhibits a number of consistent characteristics. Although occasionally deviating from the particular order presented here, the deliberation process contains several features which have remained largely constant over this time. First, the concerns of First Nations, with regard to water quantity and quality, and broader cumulative effects, are largely acknowledged, meaning that the presence of an issue is officially recognised. Second, the Panel may expand on this, either recognising that a current measure for mitigation is inadequate or, more commonly, that there is a gap in the existing understanding of the concern raised. Taken together these present a risk to the ‘public interest’, acting as a counterweight to the acceptability of the project because, if it was approved at this point, without the provision of solutions, the balance internal to the term would be compromised. As a means of mitigating this risk to approval, the Panel subsequently refers to some proposed techno-scientific means by which the issue might be addressed in future. This response contains three implicit assumptions; that there is the organisational capacity to achieve the expected advances, that the expected advances are even possible, and that the expected advances will be sufficient to mitigate the environmental impacts of which existing knowledge is incomplete. As these characteristics are unchallenged throughout the hearings, the broad recourse to some future techno-scientific means of risk-based mitigation serves to discursively rebalance the drawbacks associated with the environmental dimension of the social, economic and environmental trinity. This allows for the procedural, if not substantive, mitigation of First Nation concerns in the process of approving an oil sands project under the rubric of the ‘public interest’.

As is visible throughout the documentation, it is the difficulty in realising future advances that has been a persistent issue for both the Panels and the First Nations, the latter of which have seen little progress made in addressing their concerns. Indeed, it is here where the crux of the issue lies; the Panels have not significantly altered their approach to deliberation in almost two decades. They have granted approvals founded on an evidentially insufficient process of techno-scientific risk-based mitigation time and time again. Although a counter-argument could be made, that the conditions and recommendations come into effect prior to project construction, this ignores the central role of First Nation and public participation in the process of ensuring transparency and accountability. Following their approval at the hearings, projects move past the point at which they can be subjected to such scrutiny, meaning that the progress on the supposed advances, which are the very features relied upon to bring projects into accordance with the ‘public interest’, is more difficult to ascertain. This effectively shields them from further questioning. Indeed, the projects are effectively removed from the public realm after the hearings, with their progress on any expectations, recommendations or conditions only resurfacing at a hearing in the future, where the same process of techno-scientific risk-based mediation is then repeated, First Nation concerns nullified and approvals issued. Taken together, Panel use of techno-scientific forms of risk-based mitigation is a ‘weak’ form of precaution married to the ‘weak’ strand of eco-modernist philosophy (see Chapter 3.2.1). Indeed, despite their supposed ‘independence’ from vested interests (see Chapter 3.3.2), the Panels appear able only to make choices about project modifications with the aim of mitigation, but not about the ultimate existence of a project. Data on the validity of this observation was gathered through interviews and, in addition to other findings, is presented in the next sub-section.

## 7.5 Issues Raised by the Regulator and the Influences on their Decision-making: Interview Results

While analysing Panel decision documents provided important insight into the techno-scientific, risk-based means by which First Nation concerns have been mitigated at this ‘approval’ stage of the regulatory process, interviews were conducted with those within the energy regulator itself to gather data on where the impetus for this approach originates. With regard to this latter area of focus, throughout the interviews participants identified two primary issues within the ‘approval’ stage of the process that have a detrimental impact on their decision-making capability. One of these centred on the insufficient technical information available to inform regulator decision-making on cumulative environmental effects; an issue which has persisted for the near-two decades in which development has occurred. The other issue focused on the limited avenues available for public and First Nation discussion on the direction and pace of development at the level of strategy. Both points referred to deficiencies in the LARP, largely due to its purpose of informing regulatory decision making at the point of the hearings. Here, data gathered on these broader issues will be presented in Section 7.5.1 before moving onto Section 7.5.2, which details findings on the influences underpinning the regulator’s techno-scientific risk-based approach to approving projects under the 'public interest' justification.

### 7.5.1 The Technical and Participatory Inadequacies of the Lower Athabasca Regional Plan

Framed as ‘…our most significant challenge’ (Participant A, Energy Regulator), concerns surrounding cumulative effects were described as difficult to manage in the context of the project-by-project approval mechanism. The unfinished status of the LARP was seen to exacerbate this by hindering the ability of regulatory personnel to make informed judgements on project approvals, including decisions pertaining to the type and extent of conditions and recommendations required. Broadly supportive of the LARP as a concept, criticisms were directed at the difference between what was being espoused in policy and what was occurring in practice. Indeed, participants noted that decisions were being made on expansion in the absence of complete or suitable scientific data:

*...conceptually [the LARP] makes a lot of sense. It would be very helpful…but it’s still a work in progress. Some of the detailed tools are not yet available. Things like the Biodiversity Management Framework, we have some air emissions limits, we have some things around water quality, but in terms of usable tools that’s really about all there is…If the government was a little more advanced in its planning, and some of its tools…*

(Participant C, Energy Regulator)

*…the province…in my mind, hasn’t been fast enough in developing these tools that would help to provide sufficient guidance to decision makers like ourselves. That’s an area where there’s still a gap. There’s been lots of talk but there isn’t enough action in the area. So that’s certainly an area where our system could improve, because we now make decisions without having that kind of guidance, and you keep making these decisions and the problems from the stakeholder standpoint and the First Nations standpoint, just get more and more critical…so the level of anxiety and conflict rise[s]…*

(Participant A, Energy Regulator)

These criticisms, on the lack of technical guidance provided by government, were discussed in more detail with specific regard to the latest 2013 hearing on the Shell Jackpine expansion. This was a controversial approval because of the Panel’s explicit recognition that ‘…the Project, in combination with other existing, approved, and planned projects, would likely have significant adverse cumulative environmental effects on…Aboriginal traditional land use rights, and culture’ (AER, 2013b: 2). Here, one of the most senior participants interviewed provided the rationale for the conditions and recommendations issued on that decision, reflecting the pattern seen throughout Sections 7.1, 7.2 and 7.3, where the Panel increasingly requests greater government responsibility for managing cumulative environmental effects:

*…if you remember Jackpine, the decision, I think there are about twenty-something conditions for Shell, the project proponent, and there were 88 recommendations for the Provincial and Federal governments. And that speaks to the fact that there’s kind of a lot of detail that we don’t have to help us make decisions. And if they want us to make good decisions, consistent with government policy, they need to provide some direction’.*

(Participant C, Energy Regulator)

With the total number of conditions for Shell totalling 22 (AER, 2013b: pp.371-383), and four times the number of recommendations for government, regulatory personnel view the lack of data on regional effects as the immediate source of the problem, considering the most appropriate remedy to be greater participation by government in its provision.

While there was never any suggestion that the lack of accurate data on cumulative effects could lead to the rejection of an application, it was explained as imposing clear constraints on the ability of the regulator more generally, and the Panels more specifically, to make recommendations to individual proponents that go beyond the minimum requirements established in law:

*The panels have some flexibility to require things that go above and beyond [the regulatory requirements]. Let’s use conservation offsets because it’s a good example, and it’s one that came up in Jackpine…[T]he Canadian Federal legislation kind of contemplates the use of conservation offsets, but nowhere is it a requirement. So when you go to the company and you start to have this dialogue at the hearing, they’re saying ‘it’s not a regulatory requirement, we don’t have to’. And it’s a complex issue, because we did think about whether [we should do it, but] we left it at both the Provincial and Federal governments [to] consider the need for and use of offsets to mitigate these effects. And the reason we didn’t go farther and require the proponent to do it was because there were a lot of questions. First of all, we didn’t have any information on where these offsets would be, what kind of offsets, how big would the area have to be? And the other thing you’ve got to remember is that this is Crown land, and we didn’t have any information on that. So it would have been challenging and difficult for the panel, in the absence of any information on the use of offsets, to say ‘no, we think you’ve got to do offsets and here’s what we want you to do’. We just didn’t have the information.*

(Participant C, Energy Regulator)

Although the unwillingness of some within industry to go beyond the minimum regulatory requirements is clearly depicted here, echoing findings in Chapter 6.2 on the similar variability with regard to industry consultation, most starkly visible is the stultifying influence of informational absence upon the authority of the regulator. Restricting its ability to make informed decisions pertaining, in this instance, to conservation offsets, and subsequently requiring government agencies or proponents to remedy these information gaps post-approval, the absence of information limits the options available even for techno-scientific risk-based mitigation. Indeed, even the adequacy of the conservation areas already designated under the LARP were questioned. This demonstrates the lack of confidence in its existing capacities and provides another reason as to why the ‘offsetting’ of environmental impacts was not pursued in the Jackpine decision:

*...if you look at the Lower Athabasca Regional Plan, I think the Government, in its mind, has done some offsets – in their mind; I’m not saying that it’s sufficient or appropriate but, you know, they’ve set aside certain areas in the plan as protected areas. But what we don’t know is, ‘well, how did you pick those areas and what biodiversity potential do they have, and how would they act as an offset for caribou or wetland?’ We don’t know any of that. I think the government, in their way of thinking, thinks ‘we already set aside those areas, so why are they telling us we should do more?’*

(Participant C, Energy Regulator)

As demonstrated in Chapter 6.1, the primary factor in determining the location and extent of these conservation areas was their place in relation to the oil sands resource. Their ability to offset environmental impacts in relation to the ecosystem or Treaty rights was a secondary consideration. Validating the critical approach taken by regulatory personnel, these questions, about the capacity to offset ecological damage generates a lack of confidence in the extent to which offsets can be regarded as a viable option for environmental mitigation. In terms of establishing conditions and recommendations during a hearing, the lack of progress made by the Government of Alberta in facilitating the creation of effective mechanisms for regional effects mitigation narrows the options available to the regulator. This lessens the conditions required of the proponent by converting them into non-binding recommendations for government, hence the 88 issued in the Jackpine decision.

In addition to the issues raised around the more technical dimension of the LARP, participants from the Energy Regulator criticised the absence of a forum for public discussion on the strategic direction and pace of development. Although findings on this have been presented in more detail in Chapter 6.1, where the input of First Nations was found to be excluded throughout consultation on the LARP, here findings are presented on the subsequent influence that this has on the ‘approval’ stage of the regulatory process. Indeed, it was the opinion of various participants from within the energy regulator that cumulative effects concerns were only raised during the hearings because there were no appropriate avenues for discussing the issue elsewhere. This observation encompasses the LARP because ‘…the [consultation] process leading to the development and affirmation of the Land Use Plan was intended to address and deal with, among other things, the issue of cumulative effects’ (Participant E, Energy Regulator). Described as the ‘crux of the matter’ by Participant C, this position was adopted by various participants:

*…we’re the only game in town in terms of a place to bring those [cumulative effects] concerns, so it creates frustration for parties…’*

(Participant A, Energy Regulator)

*…when either a community or First Nations group come to a hearing they are concerned about cumulative effects, but…the ability of an individual proponent to assess regional cumulative effects is limited…because there doesn’t seem to be a good forum for discussing and getting a resolution on these broad regional cumulative effects issues, people come to our hearings and want to talk about government policy…and those are not things that we have any direct control over.*

(Participant C, Energy Regulator)

*If I could highlight a point of frustration that I think some people have, is that when it comes to things like cumulative effects, some of the more policy-oriented discussions about what’s going on in the whole region; that becomes very difficult to manage because all of our tools are designed around making decisions around a single project.*

(Participant F, Energy Regulator)

The regulator’s constrained ability to deal effectively with concerns about cumulative environmental effects is here related to the lack of alternative avenues, including the LARP, through which they can be addressed. Implicitly encompassing the limited accommodation of First Nation input, and taken alongside the information omitted from certain aspects of the LARP, regulator criticisms and related confidence in the land use plan were concisely summarised:

*‘The process [of finalising the LARP] is incomplete, inadequate and therefore can’t be assumed to take care of all the things it’s supposed to be taking care of’.*

(Participant E, Energy Regulator)

Despite being under construction since 2008, the LARP is still viewed with criticism by regulatory personnel. This continues the legacy of approvals being made in the presence of deficient cumulative effects management initiatives, bearing similarity to the technical and participatory flaws identified with CEMA and RAMP between 1999 and 2008 (see Section 7.1; 7.2). However, the issue for the Energy Regulator, particularly at the point of the hearings, is that this deficiency forces them to consider cumulative environmental effects within the mechanism designed for applications on single projects. If this were addressed at the level of strategy or during the ‘planning’ stage, encompassing the possibility for the relocation or even rejection of projects, then fewer issues about cumulative effects would be raised at this point in the process. In effect, more parties would be satisfied that subsequent approval would not exacerbate existing levels of environmental degradation.

### 7.5.2 Influences on the Regulator’s Ability to Reject a Project Application

Although criticisms of the overarching land use plan clearly constrain the ability of the regulator to make informed decisions on cumulative environmental effects, including making recommendations to government and proponents on how to mitigate their impacts, this does not explain why projects have been consistently approved in spite of these broadly recognised flaws. Indeed, when introduced in 2013, the AER was described as ‘operat[ing] at arms-length from the Government of Alberta’ (see Government of Alberta 2016f: 29), suggesting an independence which may permit the rejection of project applications. However, as explained by Participant C of the Energy Regulator, ‘[w]henever someone says they’re arms-length, the first question you gotta ask is, ‘well, how long is the arm?’’. Answers to such a question were provided during the interviews, particularly at those points where discussion turned to First Nation criticisms of the hearing process, and the reasons for the wholesale approval of oil sands applications over the past two decades. The reasons given were linked to the policy priorities of government:

*…people sometimes think that, as a regulator, we can do whatever we want, right? We’re independent, we can turn down projects? And while that’s true, we can turn down projects, it has to be because they’re not in compliance with government policy, there’s some very significant adverse effect that we think the company can and should mitigate but isn’t…those kinds of things.*

(Participant C, Energy Regulator)

As government policy has been distinctly pro-growth for almost two decades (see Chapter 5.1), the regulator’s capacity to reject a project application is determined by the overarching direction outlined within these documents. The same participant clarified this further, using language which identifies both the origin of influence and the reasoning process through which it flows:

*As regulators…we’re really implementers of government policy. So we have an eye for: this is the government’s policy, these are the technical requirements that are in place, [and] how does the proponent do in terms of meeting those?*

(Participant C, Energy Regulator)

As seen within the hearing documents, this is an echo of the rather technical, administrative approach which allows for First Nation concerns to be addressed through future advances in science and technology. However, here an additional feature of decision-making is rendered manifest, and one which is not explicitly visible within the hearing documents; the limited options available to the regulator when deciding on an application.

Interview participants described government policy as having an influence on the 'approval' stage of the regulatory process, beginning from the point at which an application is submitted. Appearing as an omnipresent consideration, various policies and strategies were described as having an influence akin to ‘steering’, suggesting that the regulator can recommend modifications to a project as long as it does not threaten its existence or economic feasibility. For instance, the first ‘Regional Outcome’ for the LARP requires agencies to ensure ‘[t]he economic potential of the oil sands is optimized’ (Government of Alberta, 2012a: 37: Chapter 5.1.7), and although this is only one of seven outcomes, two of which are more environment-orientated, the primary influence of this upon regulatory decision-making was made clear:

*…if an application comes along and it is squarely within an area that’s been identified and established through an approved and adopted land use planning process as being a priority for oil sands development, then that’s a clear policy signal to the decision maker that it’s our intention, after going through all this process, through consultation, balancing, that that should be the primary activity.*

(Participant E, Energy Regulator)

As such, the framework established by government policy and strategy sets the limits within which the regulator can act, influencing the relative weightings required to strike a balance between the social, economic and environmental concerns under the public interest test (see Chapter 3.3.2). This means that, within an area designated a priority for oil sands development, a decision to reject a project can only occur if concerns raised to the contrary of said priority are of such significance that they outweigh its position as the dominant consideration. With development of the oil sands being consistently framed as a source of provincial economic importance (see Chapter 5.1), the relatively localised concerns of the First Nations are not substantial enough to provide the counterweight necessary for this outcome. However, as can be seen throughout the hearings, the space situated between these two considerations is occupied by recurrent Panel use of techno-scientific risk-based mitigation. In the context of zero application rejections over two decades, and with the clear priority given to growth within the LARP, the purpose of this mitigation process is made clear. Faced with the environmental concerns of First Nations, which mount a challenge to this priority, Panel recourse to a faith in science and technology serves to rebalance considerations in favour of approval, irrespective of whether evidence exists as to its past success or future viability.

A related feature alluded to throughout the interviews was the presence of compliance-based regulation within the entire ‘approval’ phase of the process, where balance and compromise with corporate entities is sought instead of conflict (see Section 3.1.4). Indeed, the influence of government policy on regulator actions goes beyond the more direct instructions to prioritise development in the oil sands region, imbibing the regulator with a perspective unable to challenge the intrinsic pro-growth attitude of corporate entities because of the need for their co-operation. As one of the most senior participants from the energy regulator explained:

*More and more we’re trying to shift away from a traffic/policeman approach to regulation, where we’re just writing black and white rules and writing tickets, and we’re getting more into…a dialogue with companies about the relative spectrum of performance. So if all the companies are compliant, some of them are doing better than others, even though they’re all compliant, so it’s really interesting to be able to learn from the companies who are leading, and helping the companies who are just barely compliant to get better. So we’re trying to get into that space for them.*

(Participant F, Energy Regulator)

Here is very clearly described a broadly recognisable distinction within the regulatory literature, between the archetypal command-and-control position described in Kagan and Scholz’s (1984) ‘regulator-as-policeman’ strategy, and its theoretical opposite, the ‘compliance school’ identified by Pearce and Tombs (1990; see also Chapter 3.1.4). This strategy of avoiding conflict by actively pursuing negotiation and compromise between regulator and the regulated was explained as a key part of the regulator’s approach:

*…our role really is to work with companies to make sure that, as the policy is translated into regulatory detail, that we set up a framework where they can be successful, they have clarity about what’s expected, they know what to expect from us, in terms of our oversight, and we know what to expect from them, in terms of reporting and information sharing.*

(Participant F, Energy Regulator)

The issue here is not the communicating of standards, which is clearly an important part of any regulatory system, but the stated regulatory purpose of ensuring corporate entities ‘...can be successful’. While there are many instances where such a statement is not in itself problematic, those occasions where such success is equivalent to industrial expansion, and expansion itself is the key issue with regard to cumulative environmental effects, the very aspect that becomes unquestionable is at the same time the immediate cause of the problem.

From this it would appear the influence of government policy on the regulator occurs within the ‘approval’ stage of the regulatory process, but at a point separate from the hearings themselves, which are supposed to be independent and quasi-judicial (see Chapter 3.3.2). However, such a perspective makes an artificially clear distinction between ‘the regulator’ and the Panels sitting on the hearings, suggesting that the hearings are a separate, non-partisan process. In reality, this compliance approach spills over into the hearings; a characteristic rendered visible by the approvals granted through consistent recourse to unproven strategies for techno-scientific risk-based mitigation, which have been largely responsibilised to industry-led multi-stakeholder organisations. At no point in any of the hearing documents did there even appear to be the possibility that an application may be rejected. Supported by comments from a senior member of the energy regulator, the influence of this compliance-based approach on the hearing process was made clear:

*…if you have a major project, and it’s going to hearing, and there’s any possibility…any genuine possibility, at that point, that it might not be approved, then it shouldn’t be in the hearing. The regulator should go back to the proponent and say ‘this may not fly, you need to do something different’. And none of that…[is] actively transparent. It’s not in the hearing room, we don’t issue notices, we don’t tell people this is going on. It just happens.*

(Participant B, Energy Regulator)

This explanation has a number of implications. First, that the ultimate result of a hearing is a predetermined outcome; approval. Second, that these ultimate decisions are being made without First Nation, or even broader public, input or scrutiny, and third, that the consensus-based approach is a characteristic of the energy regulator and not just the hearing panels. As a senior member of the regulator explained, ‘…we’re a development regulator. We do want development to take place, we believe that’s inherently in the public service…’ (Participant F, Energy Regulator). Despite the apparently non-coercive nature of this influence, these considerations do compromise the balancing of social, economic and environmental concerns in the process of making a ‘public interest’ determination. It leads to the assumption that expansion, or increasing production, automatically equates with the ‘public interest’; an unquestionable, default feature from which no concessions can be taken and against which all other considerations are weighed.

## 7.5 Conclusion

This chapter has demonstrated that First Nation concerns are dealt with in a very particular way within decisions on project approval, being absorbed into a broader process which operates in the supposed ‘public interest’. Through recourse to an operationalised belief in the future efficacy of science and technology, the risks made visible by the First Nations have been mitigated in the process of balancing regional and comparatively localised environmental concerns against the provincial socio-economic benefits which accompany such large-scale developments. As such, the Panels have been able to discharge their duty by appearing to negate risks to such an extent that projects have been approved in the name of the ‘public interest’. This is despite such risk mitigation being based on very little, if any, evidence pertaining to the efficacy of this mitigation. It is therefore a belief in the capacity of science and technology to address concerns and uncertainties, as opposed to any evidence for its capability to do so, that has underpinned the deliberative balancing of social, economic and environmental interests in pursuit of the ‘public interest’ determinations.

The findings from the analysis of decision documents also demonstrate that the dominant Panel responses to First Nation concerns on various environmental effects have been consistent over two decades. While this exhibits the characteristics of risk-based regulation (see Chapter 3.1.4), it has been pursued in a specific manner. Faced with First Nation concerns targeted at both the expected environmental effects of a project and the credibility and adequacy of the methods available for their monitoring and mitigation, the way in which risk has been mitigated by the Panels is through recourse to some expected future scientific or techno-scientific development. This is despite their broad failure to materialise; a feature that the Panels become increasingly aware of as the number of issued approvals grows. An associated feature of this is that a significant proportion of the responsibility for meeting these expectations has been tasked to industry-led multi-stakeholder initiatives. Despite persistent recognition of their flawed capacity to provide the solutions to issues assigned to them, the Panels still defer to the imagined capacity of these initiatives to mitigate the increasingly numerous problems identified by First Nations. Even when recognition of their multiple failures becomes acute, around 2008, recourse to government agencies in their stead has little apparent influence on the adequacy of data or the availability of options for impact mitigation. The outcome of this pattern of reasoning is ultimately the same, permitting the approval of each project by appearing to balance social, economic and environmental concerns in the process of meeting the ‘public interest’ test.

While the means by which this ‘public interest’ is achieved forms an important part in understanding how non-elite participation in decision making occurs at the point of the hearings, information pertaining to what those within the regulatory agency itself consider to be problematic elements of the process also provides important insight. Painting the hearings as a meeting point, where issues within each stage of the process become both concentrated and most visible, participants from the energy regulator criticised the lack of adequate public and First Nation participation in determining the strategic direction of development, along with problems stemming from the more technical shortcomings of the LARP. More significantly, however, the interviews also indicated that hearing outcomes are more a consequence of the regulator’s tendency to seek consensus with industry, compromising its ability to reject applications. This was associated with the origins of this approach to regulation, with participants explaining the substantial, constraining influence exerted by government policy on the regulator’s ability to reject an application.

# 8. The Catalyst for Harm: ‘Weak’ Ecological Modernisation in Policy and Practice

The overarching goal of this study was to examine factors precipitating the emergence of an under-researched form of environmental victimisation: the cultural loss experienced by indigenous peoples in northern Alberta. As an exploratory study, it has sought to identify how, and to what extent, the regulatory process prioritises economic production over the land-based cultural interests of First Nations. Drawing on an examination of government policy, interviews with members of industry, government agencies and First Nations, along with an analysis of the regulatory approval documents for oil sands projects in the Athabasca Deposit, the findings presented in Chapters 5, 6 and 7 have provided insight towards this goal. Informed by the theoretical literature set out in Chapter 3, this chapter presents an analysis of these findings in greater detail to directly address the research sub-questions:

1. What environmental philosophy is underpinning provincial strategies for the ‘sustainable development’ of Alberta's oil sands resource?
2. To what extent is this environmental philosophy being operationalised by the regulatory process in the pursuit of ‘sustainable development’?
3. How has the duty to consult and accommodate been actualised within the regulatory process to permit operationalisation of this environmental philosophy?
4. What influences are being exerted within the regulatory process to produce this actualisation?

The analysis is split into two distinct but related sections, with the first of these addressing the first and second sub-questions, and the second addressing the third and fourth. The first of these sections is addressed in this chapter, which is primarily concerned with the justifications and policies, or ‘driving forces’ and ‘pressures’ (Spangenberg, 2010: 561), operating to compel the ‘sustainable growth’ objective seen in policy and strategy (see Chapter 5.1). The second section is addressed in Chapter 9 and focuses on the depth and extent of consultation with First Nations at the ‘planning’ stage of the regulatory process, taking into account their Treaty rights (see Chapter 3.3.1). This is largely because non-elite participation in decision-making processes is seen as a primary mechanism by which harmful patterns of production can be controlled, operating as an additional indicator as to the presence of ‘weak’ or ‘strong’ eco-modernist philosophy (see Chapter 3.2).

In answer to research sub-questions one and two, the findings indicate that the regulatory process governing oil sands expansion has internalised many of the characteristics central to the environmental philosophy of ‘weak’ ecological modernisation. Operating within a context defined by the Government of Alberta’s policy objective of ‘sustainable growth’ for almost two decades (see Chapter 5.1), the regulatory process is orientated towards a preconceived idea of ‘hegemonic progress’ (Christoff, 1996: 487), maintains a staunch reliance on techno-scientific means of mitigating environmental risk (see Chapters 5.2; 7), employs an energy regulator with a perspective firmly rooted in the ‘compliance school’ of regulation (see Chapter 7.5.2; see also 3.1.4), which ensures decisions are made in a highly technocratic manner (see Hajer, 1995), and displays a systematic disregard for the ‘non-elite’ input of First Nations in both policy and practice (see Chapters 7; 9). Taken together, the entire process, from policy to ‘approval’, is tasked with pursuing the ‘green growth’ seen as central to ‘weak’ eco-modernist philosophy (see Chapter 3.3.2). Supported by a broader, unquestioned assumption that acceleration of oil sands production is a ‘good’ common to all provincial inhabitants (see Chapters 5.1; 7.5), including First Nations (see Chapters 6.4; 9.2), these dimensions operate in tandem, acting to enable the overarching objective of apparently ‘sustainable’ industrial growth.

This chapter examines these eco-modernist characteristics in more detail, providing an explanation as to why the regulatory process has operated according to its philosophical principles despite increasing evidence that their application has been facilitating expansion of an environmentally harmful industry for almost two decades. With the overarching policies and strategies (see Chapter 5), hearing panels (see Chapter 7), senior regulatory personnel (see Chapter 7.4.2), and even those involved in consultation at the ‘planning’ phase of the process (see Chapters 6; 9), all considering expansive resource extraction to be in the ‘public interest’, or a ‘social good’, the origins of this claim are initially evaluated in Section 8.1. This accounts for the influence exerted by broader political-economic context upon policy objectives, paying heed to Kovel’s (2007: 123) observation that neither technology nor the regulatory mechanisms through which it is deployed can exist independently from the system in which it is operating. As such, the credibility of this prevalent and largely unchallenged assumption is tied to a reality manufactured according to certain neoliberal political and economic precepts.

Section 8.1 brings into focus the particular strain of ‘modernisation’ being ‘greened’ by the regulatory process, taking into account the contextual pressures of political-economy. Section 8.2 examines the way in which this overarching narrow and economistic imperative, given form by the policy and strategy objectives, is idealised and prioritised by those within the more operational, ‘approval’ stage of the process. Acting to justify a consensus-based approach to regulation that serves to undermine the public hearings and, by extension, give primacy to state and corporate elites throughout the decision-making process, this broader political-economic and policy context provides the foundation upon which operational decisions favouring expansion are given credibility. As such, Section 8.2 presents a detailed examination of the assumptions upon which the economistic, rational-elitist dimension of ‘weak’ ecological modernisation rests. Finally, Section 8.3 evaluates a mainstay of eco-modernist literature; the extent to which the faith placed by both policy and regulatory Panels in techno-scientific methods of risk mitigation is vindicated. This demonstrates that the means for achieving ‘sustainability’ have proven to be less effective, and indeed less aggressively sought after, than those for achieving industrial expansion. Considering that growth has been repeatedly permitted despite recognition of this, and through use of an idealised image of the ‘social good’, the ‘approval’ stage of the regulatory process is conceived of as a procedure that, instead of prohibiting environmental harm, is demonstrably catalytic in its production and reproduction. Taken together, this chapter provides detailed answers to sub-questions one and two. Ultimately, the environmental philosophy underpinning provincial strategies for ‘sustainable development’ is that of ‘weak’ ecological modernisation. This is operationalised in an almost dogmatic fashion throughout the regulatory process, where little attention is paid to its continuing, and increasingly apparent, inability to ‘green’ the growth being sought.

## 8.1 ‘Weak’ Ecological Modernisation in Policy and its Manufactured Necessity in the Context of Neoliberal Political Economy

As illustrated in Chapter 5.1, the primary objective towards which policy and strategy are directed, along with the regulatory process over which they preside, is that of ‘sustainable growth’. With technology and science acting as the dominant means by which the oil sands industry is to be made ‘sustainable’, expansion is positioned in and of itself as the *ultimate* objective. It is in this context that the ‘weak’ form of ecological modernisation becomes apparent, with policy reflecting its associated and foremost emphasis on economic growth to such an extent that it ‘…remains only superficially or weakly *ecological*’ (Christoff, 1996: 486, emphasis in original). Within the philosophy more generally, this objective is justified by recourse to the notion that, without economic growth, protection efforts would be compromised because market-based solutions would remain undeveloped by interests with the capital to do so (see Dryzek, 2013). However, according to Chapter 5.1, the justifications upon which the policy objective of ‘sustainable growth’ have been based are anchored to more traditional justifications for economic expansion, including provision of public services and, to a lesser extent, employment opportunities. This further reinforces the subordination of environmental and social interests to those more economic, with similar language being used by personnel at both the ‘planning’ and ‘approval’ stages of the process (see Chapter 6.3; 7.5.2; see also 8.2 and 9). While such prioritisation is not to be unexpected under the capitalist mode of production, it does have a contextual specificity that is important to account for if the source of its associated strategic and operational justifications are to be fully understood. This is also necessary if the limited opportunities available for ‘strong’ forms of eco-modernist, or even eco-socialist, environmental reforms are to be appreciated. As Tombs (2012: 180) highlights:

*…in any capitalist state, private corporations are key sources of providing goods, services, taxation and employment…But the forms of such dependence are dynamic and historically specific – constituted in different ways, at different times, with different intensities and thus having different impacts.*

As noted in Chapters 1 and 3.1, in Alberta this dependence on private sector revenues is particularly high and, by virtue of its natural resources, largely concentrated on those collected from the extractives industry. As Figure 6 illustrates, since 1990 between 18 and 41 percent of annual provincial revenues have been derived from the non-renewables industry, with resource revenues averaging 29 percent of total government revenues for the period between 2003 and 2014 (Government of Alberta, 2015: 2). By situating this data in the context of total government expenditure, the extent of Alberta’s dependency is more immediately visible. Despite being based on nominal data, which does not account for population increases or inflation, Figure 7 shows that there would indeed be a substantial funding shortfall, each year, for public services provision in the absence of revenues from non-renewables. It is this that lends credibility to the justifications for ‘sustainable growth’ outlined in the policy documents (see Chapter 5.1), appearing to demonstrate existence of a fundamental alignment between private extractive and provincial social interests in terms of public expenditure and, by proxy, the ‘social goods’ of public services. However, such a conclusion is premature, apolitical and decontextualized, serving to discount the way in which this reality has been purposefully manufactured over time, and according to the ideological precepts of neoliberalism.

#### Figure 6) Non-Renewable Resource Revenue\* Expressed as a Percentage of Total Provincial Revenue

\*Includes Coal, Natural Gas, Conventional Oil and Oil Sands

Source: Government of Alberta (2016b)

#### Figure 7) The Role of Non-Renewable Resource Revenue\* in Meeting Provincial Expenditure, Nominal Data

\*Includes Coal, Natural Gas, Conventional Oil and Oil Sands

Source: Government of Canada (2016a: 33) and Government of Alberta (2016b)

Although government provision of public services depends on continual expansion of resource extraction, this condition must be understood as tied to decisions made in the overarching context of provincial political economy. As noted in Chapter 3.1.5, in Alberta (Taylor and Friedel, 2011; Miller, 2007), and Canada more generally (Slowey, 2008), these decisions are characterised by their affinity with neoliberal ideology. Indeed, this has been the case since the early 1970s (Miller, 2007; see also Hayden, 2014), when the doctrine first gained traction in political circles (see Centeno and Cohen, 2012; Litonjua, 2008). While its particular forms are many and varied, it can be generally recognised as a:

*…theory of political economic practices proposing that human well-being can be best advanced by the maximisation of entrepreneurial freedoms within an institutional framework characterised by private property rights, individual liberty, unencumbered markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.*

(Harvey, 2005: 2)

The divided sovereignty of the Canadian state provided fertile ground for this ideology in advance of the free trade agreements established in the 1980s (see Chapter 3.1.2), meaning that ‘…by the early 1990s, neoliberalism had become a familiar framework in much of Western Canada – particularly in Alberta, Canada’s most conservative, “free enterprise” province’ (Carroll and Little, 2001: 39). Such a transformation is also related to a broader movement towards the formation of an energy-based relationship with the USA, after the attacks of September the 11th, and the rise of Alberta’s international political importance following the rapid growth of oil sands in the mid-late-2000s (see Stefanick, 2015). However, there are a number of specific manifestations of this ideology within provincial tax, royalty and savings arrangements that have increased provincial dependency on oil sands revenues over time. It is these factors that lend credibility to the public service justifications underpinning the pursuit of ‘sustainable growth’ in both policy and practice (see Chapters 5.1; 7.5.2).

By virtue of its oil wealth, Alberta has lead all other provinces in economic growth over the past 20 years, averaging an annual Gross Domestic Product (GDP) increase of 3.2 percent year on year over this time, despite oil market volatility (Government of Alberta, 2016g: 2). It is to such data that past premiers and senior regulatory personnel speak when referring to the oil sands as the ‘engine’ of the provincial and national economies (see Prentice, cited in Fawcett, 2015; Stelmach, 2008). In this sense, the province has successfully adhered to the counsel offered by Hayek (2008) [1944]: 216), in that:

*The one thing modern democracy will not bear without cracking is the necessity of a substantial lowering of the standards of living in peace time or even the prolonged stationariness of its economic conditions.*

Notwithstanding the fact that these very conditions have manifest under various neoliberal regimes (see Wilkinson and Pickett, 2009), the unparalleled increase in productivity has not been matched by a proportional growth in levels of provincial government expenditure, when adjusted for population growth and inflation. Between 1989 and 1993 this averaged 22.6 percent of provincial GDP; a proportion that declined to 13.7 percent for the five years between 2005 and 2009 (Taft, 2012: 105). By 2014 this figure had fallen further, to 13 percent, which is far below the Canadian average of 22 percent (Flanagan, 2015a). This divergence, between GDP growth and provincial government expenditure, challenges the cogency of the relationship-based justifications drawn throughout policy, where the economic need for ‘sustainable growth’ in oil sands production is premised on a more social need to provide public services (see Chapter 5.1). Indeed, examining some of the key destinations for the capital associated with this increase in GDP, including taxation rates, the primary provincial savings fund, and levels of corporate profit, illustrates that this need, although real to a certain extent, has been manufactured by application of broader policies associated with neoliberal political-economic doctrine for over twenty years. As such, the justifications for growth are not as infallible as they first appear, destabilising their footing when considered in the context of the concomitant indigenous environmental victimisation and Treaty rights abuses that also result from its pursuit (see Chapters 2 and 9).

Gradual changes to provincial tax arrangements broadly mirror neoliberal justifications for limiting state intervention in markets (see Kotze, 2002), with Alberta experiencing significant reductions in taxation for businesses and the investing class under the expectation that it will stimulate future economic growth. Beginning in 2000, Premier Klein introduced a single personal income tax rate of 10 percent as a general means of stimulating the economy in response to a provincial deficit (Government of Alberta, 2000). Colloquially termed the ‘flat tax’, this was followed in 2006 by a reduction in the rate of corporate income tax, from a high of 15.5 percent in 2000 to a level of 10 percent (Government of Alberta, 2006a: 2), being added to in 2009 with the elimination of all provincial healthcare insurance premiums payable by individuals and employers (Government of Alberta, 2009d: 2). According to the budget documents, these changes were justified by recourse to their ability to stimulate a generalised economic growth, with increased revenues from expected expansion in non-renewable resource extraction intended to fill the gap. Alberta also has no provincial sales tax, although this is not a recent modification. Had such changes been avoided, the province would have collected an additional $5.7 billion revenue in 2009 alone (Lahey, 2015: 21). For perspective, the projected deficit for 2015-16, which has resulted from the drop in world oil prices, is $6.4 billion, with the deficits for the three fiscal years thereafter being estimated at $10.4 billion, $10.1 billion and $8.3 billion, respectively (Government of Alberta, 2016h: 110). It is this situation that leads Lahey (2015: 2) to conclude that:

*…budgetary reliance on ongoing sale of non-renewable resource assets to compensate for the lack of adequate provincial tax revenues has left crucial social programs underfunded and vulnerable to market swings in volatile oil prices.*

It is worth noting that the individual tax savings resulting from these changes have also been distributed inequitably across the province. As of 2009, the 30 percent of Alberta’s population on the lowest income received only 6.9 percent of this privatised revenue, compared with the 54.1 percent received by the wealthiest 30 percent (ibid: 34). It is this that has contributed to an inequality gap described as a ‘chasm’ by Flanagan (2015b), who concludes that Alberta ‘…has the greatest inequality of income…’ in all of Canada, and that its tax system also produces ‘…the smallest improvement in levels of income equality…’ across the nation as well. Considered in the context of the unprecedented wage increases depicted by Figure 8, which have appeared alongside the similarly unparalleled rise in homelessness and reductions in public service expenditure (see Chapter 8.2), the conditions are reminiscent of Galbraith’s (1998 [1963]) juxtaposition of private affluence and public squalor. Ultimately, however, these gradual changes to provincial tax arrangements have served to concentrate Alberta’s dependence on revenue streams derived from non-renewable resources, with corporate income tax accounting for, on average, 10 percent of government revenues between 2003 and 2014, compared to non-renewable resource revenues which stood at 29 percent (Government of Alberta, 2015e: 2). This has increased the sensitivity of provincial public service provision to market volatility, lending credibility to the idea forwarded in both policy and practice that industrial expansion in the oil sands is a provincial social necessity.

#### Figure 8) Average Weekly Earnings Alberta Extractive Average and General Canada Average

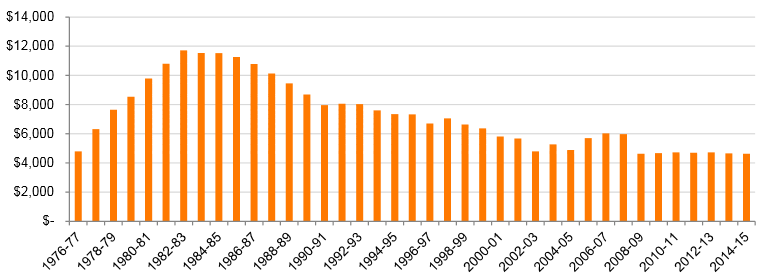
Source: Statistics Canada CANSIM Table 281-0063 (2016)

In addition to this lack of taxation, an imperative to continually permit oil sands growth can be seen to emerge from a marked government aversion to saving a proportion of oil-derived revenues over time. This would serve the dual purpose of providing a fund that could be used to smooth out the unavoidable volatility associated with future downturns in the oil market, whilst also ensuring that the economic wealth derived from natural resources could be shared with future generations (Roach et al, 2015). A mechanism introduced with this original intention does exist in the Alberta Heritage Fund (AHF), which was established in 1976 with the aim of saving as much as 30 percent of annual revenues derived from non-renewable resource extraction (van den Bremer and van der Ploeg, 2014). Instead of deducting from the amounts deposited into the fund, the interest resulting from its gradual accumulation could be spent as needed in the future. However, as the provincial government struggled with recession between 1984 to 1987, the proportion of non-renewable revenues moved into the account was revised to 15 percent, with additional transfers frozen later that year and funds redirected into general revenue for spending (Tsalik, 2003: 27). The issue with this is made clear by Murphy and Clemens (2013: 8):

*In strict economic theory, [non-renewable resource] revenues are not income in an accounting sense, but are a transformation of one type of capital asset (oil deposits in the ground, for example) into another type of asset – cash in the Treasury’s bank account. Therefore, to treat these revenues as analogous to sales tax receipts and spend them on projects that provide a flow of present services, would be to engage in unwise capital consumption…Intuitively, the present generation would be selfishly eating away at a finite stock pile of wealth, rather than acting as custodians of nature’s gifts on behalf of future generations.*

Despite this, the provincial government has since maintained the approach adopted in 1987, even in times of economic upturn. The period between 1992 and 2006 actually saw the value of the fund almost halved by inflation before it was finally protected from its influence (Gibson, 2007a: 29; see also Murphy and Clemens, 2013: 11). Some isolated deposits were made in the mid-2000 boom years but, ultimately, following the almost forty-year period in which the AHF has existed, the total directed into it stands at nearly $18 billion; less than 10 percent of the $217,931 billion in non-renewable resource revenue collected between 1976 and 2014 (Roach et al, 2015: pp.18-21). Instead, Alberta has ‘…spent budgeted and “surprise” surpluses on a range of tax cuts, discretionary spending, and giveaways…’ (Thompson, 2008: 3), with the latter of these referencing the tax-free amount of $400 given to every Alberta resident in 2005 as a result of a budgetary surplus (see also Milke and Palacious, 2015). Controlling for population growth, this equates to a fund that was worth almost twice as much per member of the provincial population in 1983 than in 2015 (Figure 9); a figure which, in reality, would be much lower if the effects of inflation were accounted for. In essence, over the last forty-year period, the provincial government has avoided prioritising saving-orientated measures that would reduce the impact of market volatility on future levels of public expenditure and employment security, simultaneously increasing the need to constantly expand the oil sands industry as it continues to operate as the dominant source of government revenue.

#### Figure 9) Per Capita Market Value of the Alberta Heritage Fund, 1976-2015



Source: Alberta Treasury Board and Finance (2015: 10)

The reluctance demonstrated by the Government of Alberta, to increase taxation rates or diversify revenue sources, adopt an apprehensive stance towards saving a portion of such revenues for some future point in time where state intervention may be socio-economically necessary, and its presiding over a substantially decreasing proportion of GDP expended on public services since 1989, are all hallmarks of the limited government role imagined under general neoliberal theory (see Centeno and Cohen, 2012; Harvey, 2005; Chang, 2003). However, it is only when these features are considered alongside per capita data on corporate profits, corporate taxation, and collected revenues, that the destination of the wealth derived from the unparalleled GDP increase becomes apparent. Figure 10 illustrates this in detail, demonstrating that over the period in which the provincial economy has grown at an unprecedented rate, so too have corporate profits, but in a manner entirely disproportionate to both their taxation and the collection of oil and gas royalties. Campanella (2012: 7) evidences an almost identical pattern with specific regard to the destination of oil sands profits, also showing its return to near-2008 levels in 2010 following the downturn of 2009 depicted in Figure 10. Indeed, Taft (2012: 75) explains that these profits have exceeded per capita rates of government expenditure, accumulation of reserve funds for the future, and increases in personal income over this twenty-year period. As a proportion of provincial GDP, corporate profits have risen from 9.6 percent in 1989 to the 22.8 percent seen just before the global economic downturn of 2009 (ibid). Over this same time frame, the proportion of corporate taxation rose from less than 1 percent of GDP to less than 2 percent (ibid).

#### Figure 10) Alberta Corporate Profit before Tax per Capita, Oil and Gas Royalties per Capita and Corporate Income Tax per Capita, Inflation Adjusted

Source: Adapted from Taft, 2012: pp.129-131

In light of these broader government decisions to prioritise measures ensuring low corporate taxation, high corporate profits, minimal amounts of revenues diverted into savings funds, and a continually low royalty rate (see Acuna, 2016), it can be said that provincial dependence on extractive revenues is real, but that it is a reality constructed according to the key tenets of neoliberal doctrine. Lending credibility to the public service justifications underpinning the policy objective of ‘sustainable growth’ (see Chapter 5.1), this highlights the constraints such a context exerts on the type of eco-modernist environmental reforms that can be achieved under a neoliberal political-economic regime. Indeed, Christoff (1996: 487) maintains that, in its ‘strong’ form, ecological modernisation may permit ‘multiple possibilities’ for ‘modernisation’, however defined, and not simply one dependent on ‘…Western science, technology and consumer culture’. However, what is presented throughout the policy documents is a fixed, ‘hegemonic’ (ibid) notion of progress that is defined by a narrow, economistic emphasis on accelerating production, the ‘greening’ of which is to be facilitated not by recognising environmental limits, but by deploying science and technology to overcome them. With these being recognisable features of ‘weak’ eco-modernist philosophy (ibid: 490; see Chapter 3.2.1), and pursuit of such characteristics rendered necessary, or at least justifiable, by the neoliberal political-economic context in which they are situated, then it is not unreasonable to invoke Ruggiero’s (2013: 139) observation that ‘[n]eoliberalism does not observe and describe the economic reality, it creates that reality’. Indeed, the public service justifications offered throughout policy and strategy can be seen to ‘…legitimise economic conduct by conferring on it the character of inevitability, of a divine project aimed at the happiness of all’ (ibid: 137). In this sense, although the ‘very fundamental questions’ about the ‘modernisation’ component of eco-modernist philosophy have simply ‘…not been addressed’ in the literature (Buttel, 2000: 64), in the context of the oil sands it may be more accurate to speak of attempts at ‘ecological neoliberalism’, for this is the overarching system of production within which environmental modifications are pursued, and towards which attempts at ‘sustainability’ are being directed.

## 8.2 Rational Elitism and the Justificatory Power of Idealised Consensus at the Level of Operations

While the manufactured imperative to continually expand the oil sands lends credibility to the public service justifications for the ‘sustainable growth’ objectives at the level of policy and strategy (see Chapters 8.1; 5.1), it is also serves the same function at the more operational ‘approval’ stage of the regulatory process. This acts to underpin the ‘public interest’ justifications for expansion offered by hearing Panels and regulatory personnel (see Chapter 7). However, at this level the assumed parity between public and private interests also extends to justifying a rational elitist approach to decision making that further operationalises the ‘weak’ eco-modernist philosophy visible throughout the policy and strategy documents. Although the rationalist, ‘technocratic’ (see Christoff, 1996: 490) aspect of this particular eco-modernist trait is mostly visible in the risk-based forms of techno-scientific mitigation deployed within the hearings (see Chapters 7; 8.3), its elitist element is more directly manifest in the stated process of ensuring oil sands projects are approved at a point prior to the date on which public hearings are held (see Chapter 7.5.2). This undermining of the quasi-judicial process is inseparable from the more general regulatory preference for maintaining a dialogue with industry outside of the hearings to ensure its acquiescence; an approach common to the ‘compliance school’ of regulation (see Chapter 3.1.4). This alignment between regulator and regulated results in the prioritisation of ‘techno-corporatist’ measures (Hajer, 1995), which are decided upon ‘…through corporatist relationships between government and industry...’ (Gibbs, 1998: 12), ultimately ‘…serving to legitimise the continuing instrumental domination and destruction of the environment’ through ‘…the promotion of less democratic forms of government…’ (Christoff, 1996: 497). Put another way, buttressed by a provincial reliance on oil sands revenues rooted in a similarly provincial aversion to diversifying income streams (see Chapter 8.1), and supported by the imagined ability of science and technology to mitigate environmental impacts (see Chapter 8.3), it is the perceived parity of purpose, between government and industry, that plays a substantial role in the sanctioning of oil sands project applications at the ‘approval’ stage of the regulatory process.

The influence of expansionary government and corporate interests upon the energy regulator is manifest in two separate but ultimately related ways. This mirrors the duality identified by Ruggiero (2015: 34) in his analysis of relationships of authority, where harmful activities of the powerful are recognised as ‘…not based exclusively on coercion but also on some degree of consensus’. The first of these categories relates to the more direct influence exerted by government policy on regulatory behaviour, where decisions are made in accordance with overarching strategic parameters. Indeed, regulatory personnel spoke of the need to act in accordance with policy priorities (see Chapter 7.5.2), such as land use designations outlined in the LARP, describing the influence as stemming from the ordinary asymmetry of relations inherent to the vertical chain of command within the regulatory agency itself. Low (2011: 38) identified a similar influence in her analysis of the public interest decisions made by hearing Panels, noting a key issue produced by the legislative requirement to balance interests of the ‘provincial public’ against those of ‘local publics’:

*…the larger the revenue stream and other benefits to the public at large from a particular project, the more significant and immitigable the local public interest concerns have to be to outweigh that side of the balance. Indeed, for projects that are extensive in scope promising benefits over a long period of time such as oil sands development, the presumed interest of the public at large in the development of the resource appears to be insurmountable. Under the existing legislative framework, the ERCB cannot be expected to stop or hinder oil sands development on the basis of the public interest.*

As such, a direct influence is exerted by the overarching and consistent policy objective for ‘sustainable growth’ on the activities of the energy regulators over time, all of which have professed to act ‘independently’ from government and industry during the period in which the hearing documents have been analysed. Although Low (2011) demonstrates that the economic interests of a perceived majority are considered to outweigh those of a more localised minority, her study does not state why this prioritised interest is conceived purely in terms of socio-economic gain. The reason lies in the second relationship of the regulator to government, which is much less coercive, and can be seen to operate in parallel to the legislative influence on regulatory decision making.

The findings in Chapter 7.5.2 demonstrate the presence of the second relationship of authority spoken of by Ruggiero (2015: 34), of that referring to ‘consensus’. Depicting a more accordant relationship than the coercive variant identified above, regulatory personnel work alongside industry to ensure individual project applications are approved because of a perceived equalisation of interests. The most serious operational consequence of this is that oil sands projects are approved at a point prior to the date on which public hearings are held, validating Hierlmeier’s (2008: 4) observation that the ‘public interest’ decisions made at the hearings appear to be ‘…simply used to justify the decision that has been made…’. In noting the preference for maintaining a dialogue with industry outside of the hearings, as a means of ensuring corporate acquiescence, regulatory personnel described their role as akin to ‘…consultants rather than the police’ (Tombs and Whyte, 2007: 154). With such strategies being founded on persuasion, bargaining and compromise between regulator and regulated (Tombs and Whyte, 2015), what is essentially being advocated is an approach affiliated with the ‘compliance school’ of more general regulation (see Chapter 3.1.4). The justification given by regulatory personnel for using this approach echoed the content of justifications deployed in policy (see Chapters 5.1; 8.1), and those given for approving projects under the rubric of the ‘public interest’ at the hearings (see also Low, 2011: 38), where public service provision is dependent on revenues collected from extractive activities:

*…well, what kind of a society are we building? What’s happening to the resource wealth that’s being generated?’ If you track those dollars you can build a very compelling case that this is part of the engine of the Canadian economy and the dollars that are being generated are flowing back in for societal goods. If you look off into the horizon there, there’s a new cancer centre, new hospitals, and...it’s quite a wonderful country that we’ve built, and it’s all been built on resource wealth. So, and I’m not saying that’s a reason to set aside environmental concerns. You can have your cake and eat it. You can manage these things well. Create a healthy, wealthy society and, although the in-the-moment, when the mine is in active operation and looks ugly, it’s something that you’d be willing to put up with for all these other good things that come along with it. So that story hasn’t received nearly enough attention because it’s a hard one to tell. A lot of it goes right back to the level of the average citizen’s understanding of how the economy works, and it’s not where it needs to be. Because people can isolate big bad development company over here, yet they walk down the street to their local playground and enjoy the amenities there, attend the public school and partake of all the benefits of the society that we’ve created, but they criticise the engine of the whole system.*

(Participant F, Energy Regulator)

As seen in Chapter 8.1, if taken at face value, this linear, unidirectional relationship, between an expansive oil sands industry and the provision of public services, is not without foundation. Indeed, the substantial employment benefits created by the industry are undeniable, with 520,404 direct and indirect jobs being linked to the oil sands industry as of 2015 (Millington and Murillo, 2015: xviii). However, focusing on these equivalences alone is highly selective and decontextualized, neglecting to account for the various detrimental province-wide social issues that have emerged alongside such benefits. This serves to privilege economic interests above all others in operationalising an idealised image of oil sands growth and ignores the societal tensions that result from its singular pursuit.

At a fundamental level, a myriad of broader socio-economic problems emerges from tying government revenues so closely to the market for oil, not least because the former internalises the inherent volatility of the latter. As Figure 11 illustrates, provincial surpluses and deficits tend to correspond with respective increases and decreases in the share of revenue derived from natural resources. Not only does this expose its inhabitants to periodic disruptions in their socio-economic circumstances, as changes in the world price for oil influences the economic viability of bitumen products, but these spikes of rapid growth also generate a provincial scarcity in the labour and materials needed to fuel its expansion. Importantly, this precipitates an industry willingness to pay greater amounts for both (Lemphers and Woynillowicz, 2012: 10). Contributing to a higher rate of inflation across the province (ibid), which has been rising above the national average for the majority of the post-2002 period (Flanagan, 2015a), this readiness to pay higher wages to attract and retain skilled labour has contributed to substantial levels of net inter-provincial migration into Alberta since at least 1995. Figure 12 illustrates the disproportionality of this movement in stark detail, showing British Columbia to be the only other province to have experienced a cumulative inflow of inter-provincial migrants over the same period of time. The only difference is that its figure of 85,000 comes a distant second to Alberta’s sum of almost half a million.

#### Figure 11) Alberta Provincial Government Surplus (+)/Deficits (-) and Natural Resource Revenue Shares (%), 1990/91 – 2015/16, Nominal Data

Source: Source: Government of Canada (2016a: 33) and Government of Alberta (2016b)

#### Figure 12) Net Inter-Provincial Migration, Q1, 1995 – Q4, 2015

Source: Statistics Canada, CAN-SIM Table 051-0017 (2016)

As of 2006, this rapid population growth had caused provincial infrastructure, transport and support services to be ‘stretched to the maximum’ (Government of Alberta, 2006b: i), even provoking opposition from organised labour, which is traditionally considered one of the three major treadmill actors with a vested interest in accelerating production (see Chapter 3.1.4). As the Alberta Federation of Labour (AFL) (2007: 2) stated, provincial public projects have been ‘…priced out of reach as the energy sector soaks up the available labour and building materials’. This is a reference to the high demand on construction companies that occurred during the particularly rapid expansionary years of 2006-2008, which led to few or no tenders for public infrastructure projects. As a consequence of their deferral, and in the context of increasing inflation, this led to the steady escalation of costs to such an extent that public funding was spent on ‘…more-expensive infrastructure instead of more infrastructure’ (Parkland Institute, 2011). As of 2015, these consequences of rapid oil sands expansion were still exerting influence:

*Alberta’s continued population growth and an underinvestment in infrastructure has resulted in an infrastructure backlog, requiring significant reinvestment to “catch-up” and meet the needs of Albertans, while also ensuring existing infrastructure is maintained in a sustainable manner.*

(Government of Alberta, 2015f: 68)

In this sense, the assumed relationship between private extractive and provincial public service provision is not necessarily one of equivalence, as realisation of the former has had detrimental socio-economic consequences for the latter. Indeed, the higher rate of inflation has also made public services proportionally more expensive in Alberta, all other factors constant, than any other jurisdiction in Canada (Flanagan, 2015a). This has become particularly problematic in the aftermath of recent falling world oil price, triggering calls for the provincial government to rapidly reduce public spending (Graveland, 2015; Mason, 2015). While these voices frame the issue of expenditure as one emerging from a government over-spending on public services, leading to subsequent calls for austerity, Chapter 8.1 has demonstrated that the problem is tied more closely to the disproportionately low rates of taxation, a privileging of short-term corporate profiteering, and an aversion to revenue saving by the provincial government over a much longer period.

Although the more direct consequences of such reductions would fall on the more vulnerable sections of the provincial population, particularly in the context of rising unemployment rates (Government of Alberta, 2016i), other adverse effects of rapid inflation and cumulative inter-provincial migration are already visible. In noting that increased inflation translates into an erosion of household purchasing power, and a higher cost of living for provincial inhabitants on the whole, Gibson (2007b) argues that this has had a particularly detrimental effect on those with fixed incomes, seniors and those dependent on minimum wage jobs or social assistance. Indeed, in the midst of resource development, Alberta ‘…has experienced some of the worst affordability problems and sharpest increases in homelessness in Canada…’ (Evans, 2015: 313). Varying across the province, this is mirrored in the most recent report on homelessness in Edmonton, which records a ‘strong link’ between the increasing numbers of homeless people and the rise in rent prices seen since 1999 (Homeward Trust Edmonton, 2014: 11). In noting that ‘…an increase in income for the average person and an influx of workers from outside puts pressure on the housing market’ (ibid), it establishes the link between the more specific housing difficulties encountered by already-vulnerable groups and the socio-economic symptoms of oil sands expansion. With a near 260 percent increase in homelessness witnessed in Edmonton since 1998 (ibid), and an increase of 700 percent recorded between 1992 and 2008 in Calgary (Calgary Homeless Foundation, 2014: 4), it is to such figures that Campanella and Bower (2013: 1) speak when noting the ‘rampant homelessness’ that has resulted from the rapid growth of the industry.

Even those employed directly in the oil sands, or indirectly through one of the sectors supporting it, are not shielded from negative socio-economic consequences. While the average wages of those working in Alberta’s oil and gas industry have been consistently higher than the general average across any other province since at least 2001 (see Figure 8), the employment created by the oil sands industry itself is largely temporary and precarious (Dobson et al, 2013; Campanella and Bower, 2013). Not only has the industry relied on transitory forms of labour since its inception, with the population of both domestic and foreign workers housed in temporary trailer camps increasing from 5903 in 2000 to 9178 in 2005, and up to 26,284 in 2008 (Ferguson, 2011: 107), but provincial employment levels track closely to the spikes and drops in oil sands production. This generates labour conditions defined by an insecurity derived from oil market volatility. Indeed, between January and June of 2015 the sharp downturn in world oil prices sparked a similarly rapid decline in employment, causing relationships to be drawn with the 30 percent increase in provincial suicide rates compared to the year prior (Mouallem, 2015). Such serious consequences were mirrored in data released by the AFL (2012: 3), which noted that the number of workers in the four occupations with the highest rates of disabling injuries and fatalities, construction, mining, transportation, and manufacturing, increased by almost 50 percent between 1991 and 2009. With this period being simultaneously marked by a decreasing spend on occupational health and safety measures per worker, the period of unprecedented oil sands expansion, between 2006 and 2008, also saw provincial workplace fatalities, per 100,000 workers, pushed beyond the national average (ibid: 2).

More inter-generational consequences can be seen in the low graduation rates within the provincial education system. In 1999 the proportion of 18 year olds graduating from Alberta’s secondary schools stood at around 64 percent, increasing to around 68 percent by 2006 (Taylor-Vaisey, 2008; Edmonton Journal, 2008). This has barely changed over the five years since, with most recent statistics placing the figure at 69 percent (see Figure 13); more than ten percent lower than both the national and OECD averages. Each of these issues are seen to have resulted from the attraction of better paid jobs in the oil sands region serving to pull people out of education early (Campanella and Bower, 2013; Taylor-Vaisey, 2008). While this funnelling of young people without a secondary education into the oil sands sector is not necessarily problematic in and of itself, issues arise when understood in the context of the industry’s inherent volatility, which leads to peaks and troughs in employment rates, and the increasingly global attempt to move away from reliance on the fossil fuel industry.

#### Figure 13) Upper Secondary School Graduation Rate by Province, 2011

Source: Statistics Canada (2015)

Considering these various socio-economic detriments, maintaining an unquestioned, blanket justification that equalises the continued expansion of the oil sands with some undifferentiated provincial public ‘good’ becomes not only untenable but, when used to facilitate the very expansion generating these consequences, harmful. Considered alongside the extensive environmental degradation outlined in Chapter 2, and the disproportionate amounts of capital flowing into the industry illustrated in Chapter 8.1, then this idealised consensus can be conceived of as a form of ‘romantic pluralism’. Associated with the ‘theory of balance’ spoken of by Wright Mills (1956: 247), which ‘…rests upon the moral idea of a natural harmony of interests, in terms of which greed and ruthlessness are reconciled with justice and progress’, and the broader ‘consensus school’ of regulation (see Chapter 3.1.4), this idealistic perception is operationalised by regulatory personnel in justification for the growth-enabling regulator-regulatee relationship. However, as claims forwarded under this ‘social good’ rubric ‘…are not likely to be credible on exclusively ideological grounds unless they are prepared to grant concessions…to the powerless’ (Ruggiero, 2015: 40), then repeated reference to employment opportunities and public service provision enables this credibility to remain intact, despite the broader socio-economic and environmental consequences. In this sense, use of consensus-based reasoning by regulatory personnel demonstrates an internalisation and prioritisation of the narrow and idealised aspects of the structural, neoliberal state-industry relationship examined in Chapter 8.1, generating ‘mentalities’ and ‘sensibilities’ conducive to producing, reinforcing and reconstituting the social relations inherent to the political-economic realities in which they operate (Snider, 2009: 4; see also Whyte, 2012).

Whether the consensus-based approach adopted by the regulator is derived from a ‘romantic pluralism’, or coerced by the direction established in policy and strategy (see Chapter 5.1; 8.1), both modes of influence, when taken to their logical conclusion, frame the expansion of natural resource extraction under the terms of an economistic and ultimately idealised ‘social good’. It is this that provides the justificatory foundation for the close relationship between state and corporate actors at the ‘approval’ stage of the process, permitting such extensive co-operation that individual oil sands projects are approved at a point prior to the public hearings. This represents an operationalised form of rational elitism, where First Nations and other stakeholders may have token input into the types of environmental mitigation required, but the ultimate decision on expansion is a foregone conclusion. With the power of ‘non-elite’ participants to decelerate, or even relocate, production almost completely diminished (see Chapters 6; 9), it is left to the spheres of technology and science to ‘green’ the forthcoming industrialisation, mitigate its tensions with environmental limits, and achieve the overarching policy objective of ‘sustainable growth’.

## 8.3 Flawed Techno-Scientific Precaution and the Fallacy of Dematerialisation

In order to ‘green’ the imperative to expand oil sands production, policies, strategies and hearing panels made extensive reference to techno-scientific methods for addressing its environmental impact (see Chapters 5.2; 7). Visible throughout their risk-assessment deliberations, where balance is sought between social, economic and environmental issues in the process of making a ‘public interest’ decision (see Chapter 3.3.2), such methods were continually deployed as a form of precaution, appearing to negate the uncertainty and risks associated with project approvals. This is not especially unusual, as ecological modernisation was originally conceived as an operationalised form of precautionary principle (see Benn, 2009). Indeed, while science was seen to ‘…detect possible dangers’, the role of technological innovation was to ‘…develop alternative paths of development’ (Andersen and Massa, 2000: pp.338-339). In the oil sands these two aspects are broadly pursued by different parties, with ongoing environmental monitoring and data gathering being conducted by industry-led multi-stakeholder initiatives, and technological innovation left to industry members themselves (see Chapter 7). It is to these two related spheres that the Panels defer in the process of mitigating environmental impacts, meaning that they are involved as separate but related aspects of precaution in the final determination of whether a project approval poses an ‘acceptable’ level of risk. As such, the extent to which these precautionary measures are successful holds the answer to the ‘…central question before ecological modernisation theory’, which is ‘…whether the hare of institutional and technological transformation can outpace the tortoise of relentless growth’ (York and Rosa, 2003: 279).

With regard to the first of these spheres, science, the repeated requests for a greater degree of environmental monitoring and data collection, made by both Panels and First Nations throughout the hearings, mirror the emphasis placed in policy on the precautionary approach of adaptive management (see Chapter 5.2). With uncertainty acting as ‘…the unifying hallmark of environmental and natural resource regulation’ (Doremus, 2007: 548), the capacity of adaptive management to ‘…recognise the inherent uncertainties of dynamic and unpredictable ecosystems’ and ‘…test these uncertainties [to] progressively improve’ (Kingsford and Briggs, 2012: 9), makes the approach itself appear well-suited to addressing the complex environmental issues identified in the oil sands (see Chapter 2). Indeed, the fundamental element underpinning this form of systematised improvement is learning-based modification of actions. Identified throughout the many and varied forms of adaptive management, such learning is viewed as a tool for responding to environmental complexity (Allen et al, 2011; Walters, 1997), a straightforward means of increasing knowledge about unpredictable ecosystems (Armitage et al, 2008), or as a method for recognising and managing the intricacies of socio-ecological relationships (Runge, 2011). Whichever conception is used, value is placed on the process by which actions taken on objectives have their effects monitored and their results reflected on, leading to the iterative alteration of objectives to ensure social, economic and environmental balance (Fabricius and Cundill, 2014). However, one of the key issues in the oil sands is that the monitoring organisations have experienced recurrent and fundamental organisational deficiencies, undermining this very learning process and, by extension, the singular element upon which adaptive management is made achievable as a precautionary technique.

As illustrated throughout Chapter 7, two of the monitoring organisations repeatedly referred to by the Panels are the RAMP and CEMA. Although concerns were increasingly raised by First Nations and Panels over the period in which the hearings were held, culminating in calls for greater government leadership in environmental monitoring (see Chapter 7.3), the organisations were still referred to by the Panels as a means of negating risk in a substantial proportion of the hearings. This was despite widespread evidence demonstrating their fundamental flaws. With respect to the earliest concerns about the RAMP, the Panel convened to decide on the 2004 CNRL Horizon project deferred to a scientific peer review of the organisation in response to First Nation concerns (see Chapter 7.2.3). However, upon publication it identified significant organisational deficiencies:

*In the current state, RAMP is not in a position to measure and assess development-related change locally or in a cumulative way. Reviewers reported serious problems related to scientific leadership and a lack of integration and consistency across components with respect to approach, design, implementation, and analysis. Reviewers also reported a lack of an overall regional plan, that clear questions were not been addressed in the monitoring and that there were sometimes significant shortfalls with respect to statistical design of the individual components.*

(Ayles et al, 2004: 59)

The Panels continued to defer to RAMP-derived data in the subsequent hearings, despite further evidence as to its organisational deficiencies being presented by First Nations (see Chapter 7.2). In a successive scientific review, Burn et al (2011) considered the RAMP, since 2005, to have met only one of its ten organisational objectives. The reviewers conclude that the program ‘…is not sufficient to detect changes [in the environment] if they occur, ‘…cannot sufficiently identify sources resulting in the change(s) if changes are detected’, and that ‘not all of the questions are being asked’ or ‘appropriate criteria being monitored to answer those questions’ (ibid: 2). This ultimately led the reviewers to conclude the RAMP, thirteen years after its inception, to be ‘…incapable of detecting regional trends and cumulative effects’ (ibid: 3). This overarching criticism was also echoed by Kelly et al (2010), with Dillon et al (2011: iii) further noting that the RAMP ‘…has a very extensive monitoring design’, but the systems being monitored are ‘…large, complex and variable, and their sampling frequencies are too low and the sampling locations are not adequate to account for this’. Dowdeswell et al (2010: 33) added to this, describing the RAMP as ‘…not designed to be systemic, holistic or adaptive’, lacking integration with other monitoring initiatives, and ultimately suffering from an absence of both scientific leadership and a peer-review process.

Similar deficiencies are also seen with the CEMA, which was referenced by Panels in seven of the hearings as a means of mitigating the risks raised by First Nations (see Chapter 7). Indeed, it was as early as 1999 when reference was first made to its precursor, CEEM (see Chapter 7.1.3). Although the Panels express concerns with the organisation in the subsequent Muskeg River hearing, and those for the 2004 CNRL and Jackpine projects, before reaching a head in the 2007 hearing for Imperial Oil’s Kearl Mine, it is still used by the Panels to balance risk in the process of approving these projects (see Chapter 7.3.3). Despite this, the government-initiated review of the organisation in 2008 produced two reports that confirm the deficiencies spoken of by First Nations during the hearings (see Chapter 7). One of these considered CEMA to be ill-equipped to deal with the pace of oil sands expansion, that the lack of policy and planning in the region had blinded CEMA’s participants to the implications of their recommendations, and that the absence of government direction made establishing regulatory backstops difficult (PricewaterhouseCoopers, 2008). The other report was more explicit in its criticism:

*Traditional Ecological Knowledge has not been incorporated into CEMA Guidelines and Management Frameworks in a way that addresses the broader land management perspective of aboriginal people…CEMA’s immediate outcomes of having both resource developers and regulators apply cumulative effects-based environment management practices have not been successful over…[its] nine year life… A Regional Management System has not been achieved…[CEMA] has not been successful in creating a forum for all interests to successfully work together…[and] CEMA has not achieved a stakeholder driven process when considered in an aboriginal context…*

(Tumbleweed Consulting Ltd, 2008: 53)

Expanding on its findings, the report also notes a ‘…lack of connection between CEMA’s recommendations and government’s implementation of these recommendations’ (ibid). It finishes by recognising that ‘[i]n addition to a lack of implementation by government, there has also been little evidence of implementation by corporate members and a resulting lack of participation by aboriginal groups’ (ibid). Although similarly critical, Kennett (2007) identifies the recursive relationship between Panel approvals and the difficulties encountered by CEMA. Recognising that since its inception the monitoring organisation has been ‘…perpetually playing catch up…’, he goes on to warn of the consequences associated with rapid industrial growth outstripping its effective monitoring; ‘…limits of acceptable ecological impacts may be crossed before they are even identified’, and opportunities to ‘…direct development in ways that are less environmentally damaging may be missed’ (ibid: ix). Lott and Jones (2010: 36) take a broader view, noting that all of the monitoring programs suffer from a lack of integration, where ‘…no one is pulling all of this data and information together to create an integrated, higher level monitoring report…’. These findings are echoed by the subsequent Alberta Environmental Monitoring Panel (2011), with Lott and Jones (2010) repeating some of the conclusions reached in the ‘Radke Report’ from five years earlier (Radke, 2006: pp.133-134). As of April the 1st 2016, CEMA (2016) has shut down ‘…due to a shortage of funding’.

The final hearing document analysed, for the 2013 expansion of Shell Jackpine, shows the Panel referencing the JOSM. This plan was in existence until 2016, having the purpose of mitigating concerns surrounding water quantity, the acknowledged deficiencies in the RAMP, and the lack of integration between monitoring systems. However, the faith placed in the ability of these monitoring initiatives to address uncertainty and subsequently mitigate risks continues to be misplaced. In December 2014, the Auditor General of Alberta raised significant concerns with the first implementation report on the JOSM. Assessing whether the results in the report were complete and verifiable, he concluded that:

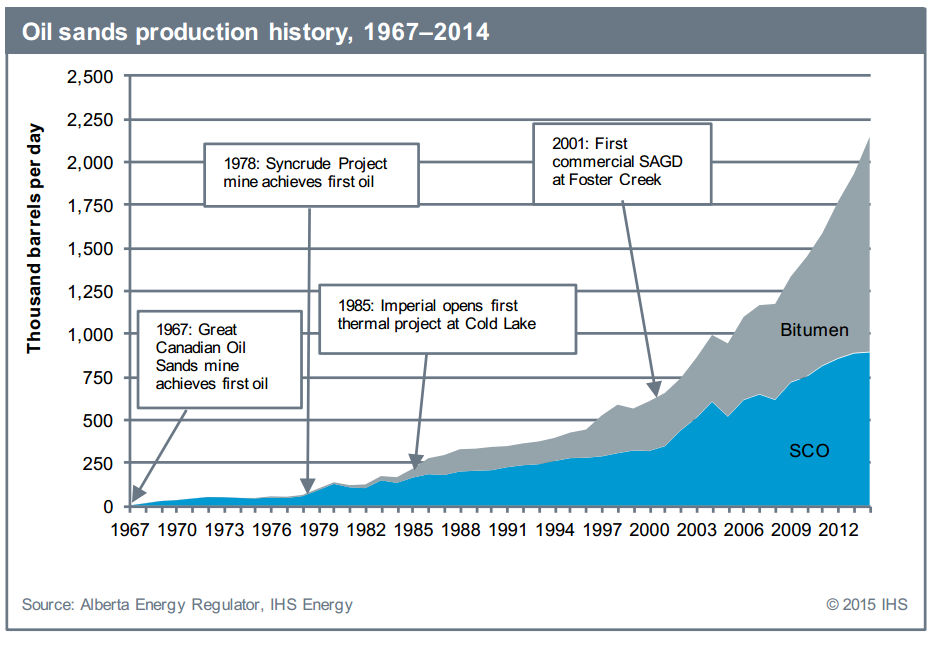
*Most projects we tested lacked project plans or had plans without key information such as clearly defined deliverables and timelines. Without clear deliverables, effective monitoring of progress is not possible. We found insufficient evidence that the department regularly monitored progress of most projects we tested. Evidence for the project status stated in the report was also insufficient. Despite committing to do so in the joint plan, neither government monitored the projects the independent monitoring organizations were delivering to ensure they implemented them as required.*

(Office of the Auditor General of Alberta, 2014: 25)

In another report, which analyses the technical adequacy of the JOSM and the extent to which its supporting institutional and legal structures can be considered sufficient to support its implementation, Olszynski (2014: 35) considers it ‘…unlikely to be an effective – let alone world class – monitoring program’. Although finding the technical component to offer some promise, this is hindered by a ‘…lack of appropriate institutional and legal structures…’ needed for its implementation (ibid). As such, over the near-twenty years in which the oil sands industry has experienced rapid expansion, the initiatives and more recent plan, recourse to which has balanced the trio of factors underpinning the ‘public interest test’ at the hearings, have been consistently identified as unfit for purpose. Attempts at ‘adapting’ to environmental changes as a result of oil sands expansion have therefore been fundamentally flawed for the entire period in which the industry has existed.

The monitoring and gathering of data forms only one side of the precautionary, eco-modernist duality of science and technology outlined by Andersen and Massa (2000). As Olszynski (2014: 25) recognises, ‘…even a “world class” monitoring system will not, in and of itself, prevent ecosystem decline’, meaning that actions aimed at understanding ecological impacts must be followed by those able to modify material reality. In the context of ‘sustainable growth’, this role is largely undertaken by technological innovation. The faith in the idea that its advances will be able to mitigate the environmental harm associated with increases in production is an assumption consistently held by Panels (see Chapter 7). However, the data available indicates the presence of a challenge similar to that identified with respect to scientific monitoring, insofar as the expected gains have not materialised. This is not particularly unusual, as ecological modernisation is commonly recognised as a philosophy that ‘…endow[s] technology with heroic powers’ (Bonds and Downey, 2012: 168). Indeed, this characteristic is particularly visible in its ‘weak’ (Christoff, 1996: 490), and ‘techno-corporatist’ forms (Hajer, 1995). However, this is an over-simplification. In reality it is a very particular type of technological innovation that holds relevance for reducing environmental impacts. Differentiating between ‘[e]xplorative innovation’, ‘[e]xtractive innovation’, and ‘end-use innovation’, Czech (2013: 206) explains how the first allows producers to locate resources that were previously undetectable, whereas the second permits access to those previously inaccessible. As such, both are geared towards increasing the rate and extent of production. This is visible in Figure 14, which illustrates the role played by new extractive technologies in increasing productive output in the oil sands.

#### Figure 14) Technology and Oil Sands Production History, 1967-2014\*



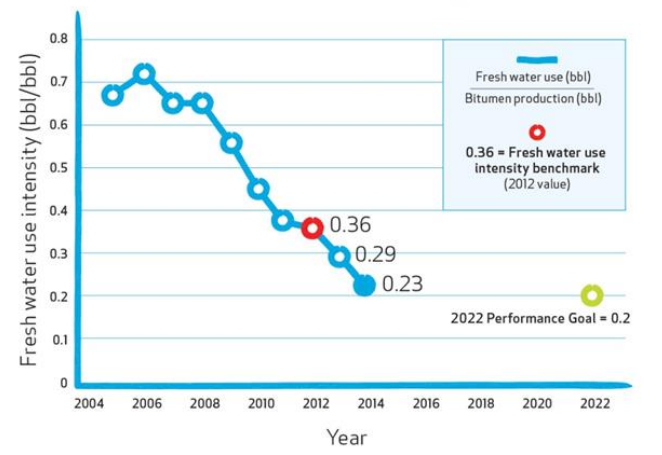
\*SCO – Synthetic Crude Oil (a product based on refined bitumen)

Source: Birn and Meyer (2015: 8)

In light of this, it is only forms of ‘end-use innovation’ that ‘…could conceivably reconcile economic growth with environmental protection’ (Czech, 2013: 207). This is because it is ‘…largely synonymous with increasing productive efficiency’ (ibid), which not only implies a proportional decrease in material input per unit of material output, which suggests fewer ecological additions and withdrawals, but also a similarly proportional increase in value produced by a certain level of investment. ‘End-use innovation’ thus holds the key to the ‘green growth’ valued by ecological modernisation (Jacobs, 2012), facilitating the production modifications needed for dematerialisation, or ‘decoupling’ (see Chapters 3.2.1; 5.2), to occur. However, it is this assumed potential of science and technology to mitigate environmental risks, and its sweeping presence throughout contemporary economics, that has led Foster et al (2010: 112) to label it as a ‘transmutation myth’. This is because ‘…green techniques may reduce some forms of ecological risk, but they may also help to prop up, to sustain, an unsustaining social whole’ (Davison, 2004: 144). As visible in Chapter 7.3, the Panels increasingly begin to recognise this contradiction but ultimately echo the faith described in policy; that, at some point in the future, advances in science and technology will mitigate the environmental issues associated with expansion.

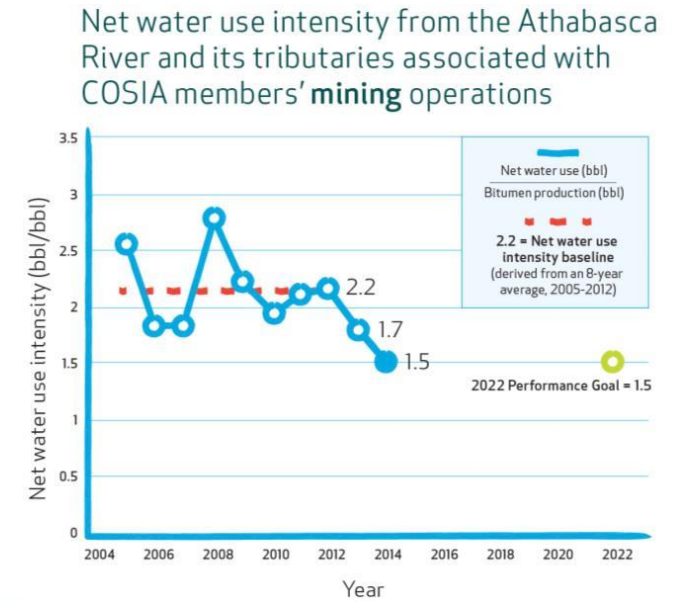
When examining the validity of eco-modernist claims of decoupling it is important to distinguish between its ‘relative’ and ‘absolute’ forms. Essentially, relative decoupling ‘…refers to a decline in the ecological intensity per unit of economic output’ (Jackson, 2009: 65), and is ‘…about doing more with less: more economic activity with less environmental damage’ (ibid: 68). In contrast, absolute decoupling occurs when environmental impacts decline in total, or absolutely, while total economic output increases. It is this latter situation that is ‘…essential if economic activity is to remain within ecological limits’ (ibid: 65). The data needed to evaluate government and industry reports of progress with respect to water quality is available. Against a backdrop of increasing production (see Figure 14), freshwater intensity, which essentially refers to the number of barrels of freshwater used in the production of one barrel of bitumen, has fallen in relation to both in-situ and mining projects. For the former, it was reported that producers had achieved a 36 percent reduction in freshwater use intensity between 2012 and 2014 (see Figure 15), and that, for the latter, it had fallen from 2.2 barrels in 2012 to 1.5 in 2014 (see Figure 16). Although certain corollaries must be attached to the data, such as the difficulties in drawing trends from the highly variable mining data (ibid), it would appear that there has been a marked success in achieving the technological advances needed to decouple environmental impacts to water quantity from each barrel of bitumen produced.

#### Figure 15) Fresh Water Use Intensity: In-Situ Operations



Source: Canada’s Oil Sands Information Alliance (2015: 5)

#### Figure 16) Fresh Water Use Intensity: Mining Operations



Source: Canada’s Oil Sands Information Alliance (2015: 7)

However, these achievements, which ultimately demonstrate some progress with respect to relative decoupling, are not mirrored in the data on its absolute counterpart. As Figure 17 indicates, the total quantity of water withdrawn from the Athabasca River has increased alongside the total rise in production, meaning that the expected techno-scientific methods of risk mitigation have failed to materialise over the entire lifespan of the industry. The same situation can be seen in Figure 18, with respect to greenhouse gas emissions from oil sands projects post-1990, where ‘…since 2005 emissions in production have been marching in lockstep, with…both growing by 80 percent’ (Partington, 2014). Put another way, the future arrival of some eco-modernist panacea, where the ‘…dirty and ugly caterpillar transforms into an ecological butterfly’ (Huber, 1985, cited in Spaargaren and Mol, 1992: 34), has yet to emerge almost two decades after the first contemporary project approval in 1997 (see Chapter 7.1).

#### Figure 17) Total Industry Production vs. Total Industry Water Use\*

\*Data presented using an equivalence of 6.29 bbl oil to 1m3 water.

Source: AER (2015b; 2015c)

#### Figure 18) Oil Sands Production and GHG Emissions

Source: Government of Canada (2016b) and AER (2015c)

While comparably detailed data pertaining to water quality is unavailable, other sources demonstrate the similar inadequacy of technologies referred to by the Panels in their pursuit of balance. Tailings technology is such an example, where the Panels repeatedly deploy a misplaced faith in its future development as a means of reducing the risks posed by tailings ponds to the quality of the surrounding water systems (see Chapter 7). Indeed, a recent Expert Panel, convened to evaluate the potential for new and emerging technologies to reduce the environmental impacts of oil sands development, highlights the continued lack of progress in this area. Noting that tailings ‘…remain a significant remediation challenge’ (Council of Canadian Academies, 2015: 170), the Expert Panel goes on to conclude that ‘[e]ven with complete adoption of the most promising technologies for tailings management and reduction, tailings volumes…are not expected to decline’ (ibid). The problem with the repeated approval of projects becomes apparent in the context of recent research outlined in Chapter 2.3.1, which estimates unlicensed seepage from a single pond to be 6.5 million litres per day (Frank et al, 2014; Weber, 2014), and from fourteen ponds to be 4 billion litres per year (Environmental Defence, 2008: 14). Even the faith placed by the hearing Panels in EPL technology, which was seen as a possible future alternative to tailings ponds, is insufficient, despite being referenced as a means of mitigating risk as early as 2004 (see Chapter 7.2.2; 7.3.2). Indeed, the concerns forwarded by First Nations since this time, regarding the inadequacy of the technology, continue to hold relevance, being validated by the Expert Panel in their concluding remarks:

*Given known risks and lack of knowledge about their long-term viability, the Panel believes that much more research is needed before end-pit lakes become an accepted long-term solution to tailings pond management.*

(Council of Canadian Academies, 2015: 168)

It is for these reasons that the EPLs are considered a ‘problematic’ and ‘highly uncertain’ ‘grand experiment’ (Millar, 2012: 15), being labelled ‘reckless’ by the Pembina Institute (Grant, 2012). Even the demonstration site initially referred to by the regulatory Panels in 2006 (see Chapter 7.2.2), as a means of improving scientific understanding of their efficacy and mitigating the risk associated with project approval, is still only in the development stages almost ten years later (Canadian Oil Sands Innovation Alliance, 2015). As the seminal report produced by CEMA (2012: 263) concluded, ‘[p]lanning, designing, constructing, monitoring, and certifying oil sands EPLs is expected to be a multi-decade process’. The ramifications of this become apparent in its subsequent clarification; ‘…it is not unreasonable to expect that perhaps 100 years will be required from initial planning of an oil sands mine to certification of an EPL at that mine’. Despite this, as of December 2015, 35 EPLs are planned for the oil sands region (Brogly, 2015).

Clearly, the faith placed in future techno-scientific innovation is fundamentally flawed, cannot be seen to fulfil the risk-mitigation role continually assigned to it by the Panels, and has ultimately been used to justify expansion of the very conditions which precipitate its own failure. The three implicit assumptions identified within Panel means of mitigating risk - that there is the organisational capacity to achieve the expected advancement, the expected advancement even is possible, and that it will be sufficient to mitigate environmental impacts, of which existing knowledge is incomplete (see Chapter 7.4) - have yet to be empirically demonstrated. In this sense, the techno-scientific aspect of ‘weak’ ecological modernisation has been operationalised at the point of the hearings, but as a belief system, where the empirical evidence demonstrating the absence or failure of technology and science to mitigate ecological destruction and environmental victimisation lies beyond the boundaries of meaningful consideration. Appearing to deploy the eco-modernist vision where ‘[t]he only possible way *out* of the ecological crisis is by going further *into* the process of modernisation, toward…hyper- or superindustrialisation’ (Mol, 1995: 42, emphasis in original), this approach rests on the assumption that the environmental degradation produced prior to this expected epochal shift can be returned to an original state via human means at some point in the future.

Not only does the pattern of techno-scientific reasoning ignore the environmental harm that occurs prior to the point of supposed transformation, it also neglects to account for the continued failure of technology, science, and the organisations tasked with their advancement, to attain the capabilities expected of them. Such a permissive attitude to industrial expansion, its concomitant and eventually-foreseen risks (see Chapter 7.3), and dismissive attitude to the limits of technology, science and multi-stakeholder initiatives, thus represent the operational deployment of a ‘weak’ ecological modernisation, the default position of which is not to challenge the treadmill of production (see Chapter 3.2.1). In this sense, the Panel deliberations echo Christoff’s (1996: 488) early warnings about the philosophy, where its repeated reliance on techno-scientific means of risk-mitigation can prove to be little more than ‘…a rhetorical device seeking to manage radical dissent’, the purpose of which is to ‘…secure the legitimacy of existing policy while delivering limited, economically acceptable environmental improvements’ (ibid).

## 8.4 Conclusion

This chapter has demonstrated that the ‘approval’ phase of the regulatory process, along with its policy context, is characterised by the extensive operationalisation of ‘weak’ eco-modernist thought. Channelling the fixed, growth-orientated notion of ‘hegemonic progress’ visible in the language of ‘sustainable growth’ deployed throughout policy (see Chapter 8.1), which is granted credibility by broader, province-wide neoliberal reforms, those at the more operational level of the regulatory process echo this in justifying expansion by recourse to a narrow, provincial, economistic and ultimately idealised interpretation of the ‘social good’. In accordance with the government-industry collaboration advocated by the philosophy, which effectively mirrors the ‘win-win’ approach of consensus-based regulation more broadly, these treadmill actors are given disproportionate influence in deciding on project approvals, elevating their interests above their ‘non-elite’ counterparts. This effectively undermines the public hearings by ensuring projects are approved prior to the date on which they are held, transforming the process into one which facilitates and legitimates expansion irrespective of the risks posed to environmental and, by extension, indigenous cultural, integrity. Indeed, the final trait reflected at the ‘approval’ stage is the faith placed in the ability of science and technology to ‘green’ the extraction activities being permitted, which is repeated despite the almost total lack of evidence on its effectiveness. In light of these characteristics, the ‘approval’ stage of the regulatory process can be said to be operationalising the ‘weak’ strain of eco-modernist philosophy forwarded throughout policy (see Chapter 5), facilitating industrial expansion and acting as a catalyst for the production and reproduction of indigenous environmental victimisation.

# 9. The Inefficacy of Control: Systematised Infringement of Treaty Rights and the Justificatory Function of Compound Denial

This chapter forms the counterpart to Chapter 8, exploring how the quality of consultation conducted with First Nations throughout the regulatory process has permitted deployment of ‘weak’ eco-modernist philosophy at the ‘approval’ stage. Having a particular emphasis on the post-2005 legal duty to consult and accommodate First Nations on any activity that may affect their Treaty rights (see Chapter 3.3), along with the successive policies that emerged following this decision, this chapter draws on some of the literature identified in Chapter 3, and the findings from Chapter 6, to provide an explanation as to how the expansionist philosophy of ‘weak’ eco-modernisation has been operationalised so broadly, and for so long, despite extensive evidence detailing First Nation victimisation and opposition (see Chapters 2; 7). As such, this chapter builds on the answers given in Chapter 8, to the first and second research sub-questions, by addressing the third and fourth:

1. What environmental philosophy is underpinning provincial strategies for the 'sustainable development' of Alberta's oil sands resource?
2. To what extent is this environmental philosophy being operationalised by the regulatory process in the pursuit of ‘sustainable development’?
3. How has the duty to consult and accommodate been actualised within the regulatory process to permit operationalisation of this environmental philosophy?
4. What influences are being exerted within the regulatory process to produce this actualisation?

As Chapter 6 indicates, First Nation input at the ‘planning’ stage of the regulatory process is characterised by widespread and systemic marginalisation. This stems from a lack of accommodation on the LARP, the delegation of consultation to industry proponents, who cannot address cumulative environmental issues, and a government which makes premature decisions on the ‘adequacy’ of consultation by relying on a diluted interpretation of Treaty rights. As this stage interrupts the otherwise direct relationship between policy and regulatory behaviour at the ‘approval’ stage of the process (see Chapter 3.3), marginalisation at this point allows for the ‘weak’ eco-modernist philosophy advocated at the former level to proceed largely unimpeded into the latter. However, as noted in Chapter 3, by virtue of the geographical-historical specificity of the oil sands, this limited participation is entwined with the way in which Treaty rights have been actualised within the regulatory process to permit such operationalisation. It is because of this that such actualisation is related to characteristics derived from the more structural dimensions of the settler-colonial state in which the oil sands are located.

This chapter demonstrates that the limited participation of First Nations at the ‘planning’ stage stems from the government’s use of narrowly conceived Treaty rights. Deploying a diluted interpretation of their content, a distinct lack of accommodation on policies and strategies, and a delayed triggering of the duty to consult on individual oil sands projects, Treaty rights have been realised in a manner which allows for the broad subordination of First Nation interests to those of government and industry. Section 9.1 illustrates this narrow realisation by demonstrating the disparity between such actualisation and the SCC judgments that have provided incremental guidance on their content. This is explored in terms of foundational interpretations (Section 9.1.1), the trigger of the duty (Section 9.1.2), the variable content of the duty once triggered (Section 9.1.3), and the duty to accommodate (Section 9.1.4). Building on this, Section 9.2 identifies the influences exerted within the regulatory process to produce this disparity. Indeed, it is at this point where the justifications offered by regulatory personnel, for facilitating the diluted interpretation, are examined, describing the way in which more structural characteristics common to settler-colonial societies influence the continuation of this process. Visible here is the presence of a ‘compound denial’, which is manifest as a variety of individualised, surface justifications which draw upon a pool of broadly accepted background assumptions and deeper, societal disavowals. This underpins the ‘planning stage’ of the regulatory process, operating to ensure that First Nations do not meaningfully intervene in the ultimate provincial goal of industrial expansion. Taken together, these features quell dissenting voices and enable operationalisation of ‘weak’ ecological modernisation’ throughout the regulatory process (see Chapters 5, 7 and 8).

## 9.1 Actualising a Diluted Duty to Consult and Accommodate

This section provides a direct answer to sub-question three, presenting analysis on how the duty to consult and accommodate has been interpreted and deployed within the ‘planning’ stage of the regulatory process. As explained in Chapter 3.3.2, this more procedural dimension of First Nation Treaty rights is both the mechanism by which the more substantive right to hunt, fish and trap on the land is protected, and the process through which policy objectives on oil sands expansion, and the eco-philosophies to which they are aligned, must pass in order to be operationalised. This permits the duty to consult to be interpreted as a mechanism for the control of harmful patterns of production. However, as suggested by the indigenous environmental victimisation outlined in Chapter 2, and confirmed by the interview findings presented in Chapter 6, this mechanism is ineffective for this purpose. Here, these findings are analysed in the context of the two consultation policies published by the Government of Alberta in 2005 and 2013, and the SCC judgments of which they purport to follow. Demonstrating a widespread and systemic discrepancy between these overarching rulings and the operational practice conveyed in the findings, this section examines the way in which a substantially diluted interpretation of the duty to consult and accommodate has been actualised at the ‘planning’ stage of the regulatory process.

### 9.1.1 The Interpretation of Substantive Treaty Rights

As described in Chapter 6.2, the Government of Alberta narrowly interprets the Treaty right to hunt, fish and trap as only for food, also isolating it from geographic location, species quantity and quality. This is an extension of the 'colonial trick' mentioned by Huseman and Short (2012: 223; Chapter 3.1.1). Taking the first of these as the point of departure, conceiving of Treaty rights as restricted to food is a conception outlined in the 2013 consultation policy (see Government of Alberta, 2013a: 1). According to Laidlaw and Passelac-Ross (2014), this interpretation stems from the minority decision in paragraphs 2 and 7 of *R. v. Badger [1996] 1 SCR 771* (hereafter *Badger)*, which considered Treaty 8 to have merged with the NRTA of 1930 (see Chapter 3.1.2). This legislation states that Aboriginal peoples shall have the right ‘…of hunting, trapping and fishing game and fish *for food* at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have right of access’ (Government of Alberta, 1930: 2, emphasis added). However, the majority in the *Badger* (para 47) decision opposed the merger interpretation, maintaining that ‘[u]nless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights’. As such, the assumed parity with case law communicated by a variety of the participants lacks credibility (see Chapter 6.3), at least with regard to the notion that hunting, fishing and trapping rights are limited just to food. Indeed, when read in the context of other SCC judgments, the extent of the inaccuracy inherent to this interpretation becomes clear.

As noted in *Badger* (para 52), the words in a Treaty must be interpreted not in their strict technical sense, but rather in the manner they would have been understood by Aboriginal peoples and the Crown at the time of signing. The content of the Treaties was considered by the SCC in *R. v.* *Horseman* [1990] 1 SCR 901 (hereafter *Horseman*), which considered the right to hunt, fish and trap to include doing so for commercial purposes. Building on the examination conducted in *Frank v. The Queen [1977] 1 SCR 95 (*hereafter *Frank*), into the differences between hunting rights in Treaty 6 and those in the NRTA, which concluded that ‘…under the former the hunting rights were at large while under the latter the right is limited to hunting for food’, *Horseman* (para 47) concluded that:

*An examination of the historical background leading to the negotiations for Treaty No. 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes. The Indians wished to protect the hunting rights which they possessed before the Treaty came into effect and the Federal Government wished to protect the native economy which was based upon those hunting rights.  It can be seen that the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves "their usual vocations of hunting, trapping and fishing throughout the tracts surrendered".*

Although this emphasises the commercial dimension to First Nation Treaty rights, the interpretation must not be restricted to a simplistic subsistence-commercial duality. Indeed, a wider, and arguably more accurate, reading is established in *Mikisew* (para 29, emphasis added), which states that the clause governing hunting, fishing and trapping ‘…cannot be isolated from the Treaty as a whole, but must be read in the context of its *underlying purpose*, as intended by both the Crown and the First Nations peoples’. With this ‘underlying purpose’ referencing the assurance that ‘…the same means of earning a *livelihood* would continue after the treaty as existed before it’ (ibid*,* para 30, emphasis added), and considering that ‘…a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity…and occupation’ (*Mikisew*, para 47, emphasis added), reading Treaty rights as guarantees of a continuation of this ‘livelihood’ permits a broader interpretation. Recognising this, Laidlaw and Passelac-Ross (2014: 25) go on to note that, ‘[t]his is the proper interpretation of Alberta’s numbered Treaties’, where ‘…livelihood was and remains interwoven in the distinctive cultures of Alberta First Nations’. Treaty rights should therefore be taken to encompass the right to harvest and gather for fuel, medicinal plants and food; the right to exercise traditional governance, ceremonial, spiritual and educational practices; and the right to the inter-generational transmission of language and culture (ibid). In light of this, the interpretation communicated in Chapter 6.2, where the Treaty right to hunt, fish and trap is seen as limited only to food, is not only narrow but also inconsistent with SCC rulings.

The additional annexing of Treaty rights from geographic locations, species quantity and quality can be read as a further narrowing of this interpretation (see Chapter 6.2). On the surface this appears accordant with the text of Treaty 8, as the commitments made during its original negotiations were neither location nor species-specific; the Crown only ‘solemnly assure[d]’ the Aboriginal peoples that ‘…they would be as free to hunt and fish after the treaty as they would be if they never entered into it’ (*Badger*, para 39). However, the *Badger* (para 52) decision noted that, to account for their interpretation at the time of signature, Treaties relating to Aboriginal peoples should be ‘…liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians’. As such, the actual assurances given during the original negotiations recognised in *Mikisew* (para 47, emphasis added), for the ‘continuity in *patterns* of economic activity’ and respect for ‘traditional *patterns* of activity and occupation’, should be interpreted in terms of the location, and species quantity and quality relied upon for their exercise.

This is the position taken in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines) 2011 BCCA 247* (hereafter *West Moberly*)at the Court of Appeal for British Columbia, which upheld an Order of the BC Supreme Court stating that the Crown was in breach of its duty to consult and accommodate the West Moberly First Nations when granting permits to the First Coal Corporation. With regard to the question of whether Treaty rights are both species-specific and location-specific, it describes the *Mikisew* case as ‘instructive on this point’ (*West Moberly*, para 138). While the *Mikisew* case itself involved construction of a winter road through an MCFN Reserve, the Federal and provincial Crowns argued that only a small proportion of traditional territory would be taken up, suggesting that it fails the infringement threshold in *Badger* (para 18). This is set to ‘where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains’ (*Mikisew,* para 44), thus failing to trigger the duty to consult. However, in the *Mikisew* case Justice Binnie rejected this argument on the grounds that it implied the dismissal of First Nation procedural rights, that the proposal itself would reduce the territory over which the MCFN could carry out Treaty rights, that ‘apart from everything else, there would be no hunting at all within the 200-meter road corridor…’ (ibid), and that ‘…the road would injuriously affect the exercise of these rights in the surrounding bush’ (ibid). It is in his follow up justification that the species and site-specific nature of his interpretation of Treaty rights is clearly visible:

*The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns loss of vegetations, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions.*

(ibid)

This ruling can be read as establishing a need to account for indirect and cumulative impacts on Aboriginal rights and traditional livelihoods, when considering factors that risk triggering the duty to consult. Following this line of reasoning, Treaty rights should not be divorced from the specific material reality upon which their practice depends, irrespective of whether the impact is direct or cumulative. While in and of itself this narrow interpretation should be addressed by the Government of Alberta within its consultation policy, and as part of a concerted effort to make such clandestine modifications to its own conception more public, its existence has several detrimental consequences for the subsequent stages of consultation.

### 9.1.2 The Trigger of the Duty to Consult

As explained in Chapter 6.2, consultation does not occur at the earliest stage in the regulatory process; the point at which land leases are granted to companies. Participants justified this by stating that a company in possession of a lease may not go on to conduct operations on the land, and that it is only when they eventually do so that it is considered to be ‘taken up’ (see Chapter 6.2). This is a reference to the ‘lands taken up provision’ in Treaty 8 (see Chapter 3.3.1), which describes the transferring of lands from a category in which First Nations retain the rights to hunt, fish and trap into one in which they do not (see *Mikisew*, para 33). Existing practice places the trigger point for consultation at the exploratory drilling or seismic testing stages, which follows land lease disposition. This emphasises the requirement for there to be an observable alteration of the material landscape for an area to be considered ‘taken up’; a definition given in the *Badger* (para 54) ruling, which described the process as ‘…being based upon a concept of visible, incompatible land use’. This is deemed consistent with interpretations of the original promises made. Thus evident is the systematised assumption that land is not to be considered ‘taken up’ until visible activity has transformed it into a state incompatible with the exercise of Treaty rights. This means that, under the present regime, consultation is not triggered unless this change of category occurs, hence the lack of consultation at the point of lease disposition.

Such an interpretation does not correspond to the decisions handed down by the Supreme Court. While the *Haida* (para 35) and *Rio Tinto* *Alcan Inc v. Carrier Sekani Tribal Council [2010] SCC 43* (hereafter *Rio Tinto*) (para 31) judgments suggest that the duty to consult is triggered by evidence pertaining to the *risk* of such an adverse effect on Treaty rights (see Chapter 3), the *Mikisew* (para 56) judgment contains no such requirement for proof of a potential consequence. Indeed, it simply states that the Crown’s right to take up lands under treaty ‘…is subject to its duty to consult and, if appropriate, accommodate First Nations’ interests before reducing the area over which their members may continue to pursue their hunting, fishing and trapping rights’. As such, while the granting of a lease does not in itself constitute a process by which land is rendered ‘visibly incompatible’ with Treaty rights, it can be read as the beginning of the process by which the category of land is altered in this manner. Therefore, in accordance with the text of the *Mikisew* judgment, consultation should arguably be triggered at the point of lease disposition.

Even if adhering to the stricter *Haida* (para 35, emphasis added) judgment, where consultation is only triggered ‘…when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that *might* adversely affect it’, or *Rio Tinto* (para 79, emphasis added), where consultation begins when recognising the ‘…*potential* that the contemplated conduct may  adversely affect the Aboriginal claim or right’, then the trigger is not an actual impact on the substantive component of Treaty rights, but a *possible* impact. Consultation should thus still occur at the point of disposition because regulations governing the process are weighted in favour of activities clearly posing such a risk. For instance, Section 4 of the Oil Sands Tenure Regulation recognises an ‘oil sands agreement’ to ‘convey the exclusive right to drill for, win, work, recover and remove oil sands that are the property of the Crown’ (Government of Alberta, 2010: 11), meaning there is little question as to the intent of the lease mechanism. Erring on the side of non-development of a land lease, as the regulatory interpretation of the trigger to consult does (see Chapter 6.2), also ignores the requirement for purchased parcels to meet the Minimum Level of Evaluation outlined in Section 2 of the Oil Sands Tenure Regulation. This requires ‘the drilling of at least one evaluation well’ prior to seismic testing (Government of Alberta, 2010: pp.7-9). The lease disposition mechanism itself therefore contains within it a high likelihood that lands will be visibly altered in some fashion, from one category of use to another, particularly if compared to the reduced likelihood of conversion prior to disposition. Again, even if following this more stringent line of reasoning, consultation should be triggered at the point of lease disposition.

This position is supported by the *Haida* decision, where the SCC differentiated between the granting and renewal of Tree Farm Licenses, which gives companies exclusive rights to harvest timber within a designated area (para 73), and the implementation of these licenses through cutting permits and forest plans (para 76). While the provincial government argued that consultation at the former level was unnecessary, because the granting of licenses does not impact the substantive element of Treaty rights, this defence was rejected by the Chief Justice:

*Consultation at the operational level…has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licenses.*

(*Haida,* para 76)

Put another way, initiating consultation after the disposition of land leases cannot be considered meaningful because the questions asked at this later point are not ‘whether’ a proposal should go ahead and in what form, but ‘how’ it should be carried out (Passelac-Ross and Potes, 2007: pp.6-7). Indeed, the *Mikisew* (para 44) judgment designated a *potential* impact upon the broader material conditions underpinning First Nation hunting, fishing and trapping practices as an infringement adequate enough to trigger the duty to consult (see Section 9.1.1). Considering also that ‘[t]he flexibility lies not in the trigger (“might adversely affect it”) but in the variable content of the duty once triggered’ (*Mikisew*, para 34), the practice of delaying consultation with First Nations until the exploratory drilling or seismic testing stages appears to be in breach of the procedural component to First Nation Treaty rights.

### 9.1.3 The Duty to Consult

A large part of the frustration communicated throughout the interviews with First Nations centred on the lack of attention given to broader and cumulative effects during consultation on individual projects. This caused them to label the decisions made by the ACO, on the adequacy of said consultation, to be premature (see Chapter 6.2). Such a criticism references the variable scope and content of the duty to consult, the associated duty to accommodate, and the requirements used by the ACO to determine ‘adequacy’ in this regard (see Chapter 3.3). As noted in Chapter 3.3, the scope and depth of any consultation and accommodation is related to the strength of the claim to Aboriginal title or rights, the importance of said title or rights, and the degree to which their exercise would be impacted upon by the proposed activity (see also *Haida*, para 39). Considering that, in a Treaty context, the Crown will always have knowledge of its content (*Mikisew*, para 34), the question turns to the promises made within the specific Treaty and the degree of impact upon the Treaty rights conferred (ibid, para 63). This essentially means that the depth of consultation required corresponds to the strength and seriousness of these criteria. However, as Passelac-Ross and Potes (2007: 15) note, ‘[w]hile the location along the spectrum is important, what matters most are probably the obligations that each location entails’. The *Mikisew* (para 64) case demonstrates just how much is required even at the ‘lower end of the spectrum’:

*…given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the “taking up” limitation, the content of the Crown’s duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew’s interests and what the Crown anticipated might be the potential adverse impact on those interests.  The Crown must also solicit and listen carefully to the Mikisew’s concerns, and attempt to minimize adverse impacts on its treaty rights.*

Following this, Justice Binnie considers what is entailed by ‘adequate consultation’, drawing from the decision in *Halfway River First Nation v. British Columbia (Minister of Forests)* [1999] BCCA 470(hereafter *Halfway*) to highlight that the duty to consult has both ‘informational’ and ‘response’ components (ibid). With regard to the former, the Crown has a positive obligation to ensure that Aboriginal peoples ‘are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns’ (ibid). With respect to the latter, it must also ensure that the representations of Aboriginal peoples ‘…are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action’ (ibid). It is this latter component which leads into the duty to accommodate. While the original consultation policy produced by the Government of Alberta neglected to specify the variable content along this spectrum (see Government of Alberta, 2005), the 2014 guidance issued for the second policy provided a framework of assessment for such a purpose (see Table 4).

##### Table 4) Framework for Determining Depth of Consultation

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Sensitivity of the Location (based on Treaty rights and Traditional Uses)** | High | Level 2 – Standard | Level 3 – Extensive | Level 3 – Extensive |
| Moderate | Level 2 – Standard | Level 2 – Standard | Level 3 – Extensive |
| Low | Level 1 – Streamlined | Level 1 – Streamlined | Level 2 – Standard |
| **Nature of the Project** | | **Low Impact** | **Moderate Impact** | **High Impact** |

(Government of Alberta, 2014b: 14)

The framework appears to mirror the spectrum and content requirements of SCC judgments, particularly as large oil sands mines automatically entail ‘extensive’ consultation in light of there being deemed to have a ‘high impact’ (ibid: A3). At this level there is the requirement for ‘[p]reparation of a consultation plan, notification with opportunity for First Nation to respond, and required follow-up by proponent’ (ibid: 14). However, the heading of ‘[s]ensitivity of the location (based on Treaty rights and traditional uses)’ references the assumption-based boundaries within which this ‘extensive consultation’, and subsequent accommodation, is to occur. Indeed, in its guidance to the ACO, and the determination of consultation requirements for particular categories of project, the policy establishes that ‘[t]he scope of consultation is related to 1) the nature of the project and 2) *its potential impacts on Treaty rights and traditional uses at that location*’ (Government of Alberta, 2014b: 13, emphasis added). As such, not only does the ‘at that location’ specification directly limit the geographical scope of any consultation, this is further narrowed by the need to account for ‘Treaty rights and traditional uses’, directly operationalising the diluted interpretation of the substantive rights to hunt, fish and trap illustrated in Section 9.1.1. Thus imposed are a number of pre-set constraints on the scope of consultation and accommodation even before the process has been initiated, not least of which is the annexing of considerations pertaining to the impact of environmental effects on wider geographical locations that may hold cultural significance to the First Nations. It is for this reason that the ACO considers consultation conducted by individual project proponents to be ‘adequate’ whilst overlooking issues surrounding cumulative impacts. Ultimately, as Participant A from First Nation 2 described it, ‘…the ACO is very administrative’ (see Chapter 6.2).

### 9.1.4 The Duty to Accommodate

Attempts have been made to document First Nation concerns on cumulative effects at the level of strategy since 2008, when consultation began on the LARP (see Government of Alberta, 2013b). Consultation on its content occurred with 21 First Nations and 9 Metis organisations between December 20th 2008 and September 2009, encompassing 107 meetings and a number of written follow-up responses by the First Nations themselves (ibid: pp.3-4). Indeed, this degree of consultation was portrayed as increasingly informing the policies and strategies governing oil sands expansion, giving the appearance of a broad integration of First Nation input, particularly from 2008 onwards, and projecting a trait more closely associated with ‘strong’ ecological modernisation (see Chapter 5.3). However, as noted in Chapter 6.1, despite this consultation First Nations still reported an almost complete lack of accommodation of their input into the LARP, which was finally published in 2012, particularly with regard to its designated conservation areas. Further evidence of this is provided by a 2015 report produced by the LARP Review Panel (2015). In considering whether First Nations had been directly and adversely affected by the provisions of the strategy, the report demonstrates a lack of progress made on the primary issues raised by First Nations during the initial period of consultation on the LARP, between 2008 and 2009 (see Government of Alberta, 2013b). This report was considered so ‘damning’ of the accommodation that occurred that the Government of Alberta delayed its publication until 2016 (Weber, 2016). Indeed, fundamental concerns around land use planning and access, respect for constitutionally protected Treaty rights, traditional patterns of land use, and consultation standards have continued over the interim period, with all but one of the twenty issues raised by First Nations being confirmed by the panel presiding over the inquiry (LARP Review Panel, 2015). Ultimately, when taking this evidence together, the accommodation of First Nation input at the level of strategy, and on the LARP in particular, has been both unsubstantial and inadequate for the purpose of protecting their Treaty rights.

When questioned about this lack of accommodation, the most senior participant interviewed provided justification by referencing its parity with SCC judgments, stating that the ‘…*Mikisew* decision talked about plain language, used a bunch of “reasonable” wordings, and “reasonable” is a lower level test in law when compared to an “absolute” standard’ (Participant A, ESRD). While this is largely accurate, it is actually the *Haida* case in which this language is used to discuss the standard by which the process of accommodation should be judged:

*The* [consultation] *process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: Gladstone, supra, at para. 170. What is required is not perfection, but reasonableness. As stated in Nikal, supra, at para. 110, “in…information and consultation the concept of reasonableness must come into play…So long as every reasonable effort is made to inform and to consult, such efforts would suffice.” The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.*

*Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government’s process is unreasonable.  The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.*

(*Haida*, paras 62-63)

The concept of ‘reasonableness’ represents the Court’s deference to the Crown’s judgment in relation to this duty, indicating that it ‘…require[s] political, as opposed to judicial competencies’ (Craik, 2016: 13). As Sossin (2009) makes clear, when coupled with the *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) [2004] 3 SCR 550* (hereafter *Taku River)* decision, this amounts to a consultation process that does not require a *particular* substantive outcome. However, while ‘[t]here is no duty to reach agreement’ (*Haida*, para 10), at the very least ‘[c]onsultation must be meaningful’ (ibid), and ‘…consultation that excludes from the outset any form of accommodation would be meaningless’ (*Miksew*, para 54). As such, whenever the duty to consult is triggered, the default expectation should be that there is a duty to accommodate.

Taking this as the point of departure, while the substantive outcome corresponding to a particular level of consultation remains ill-defined by the SCC (Sossin, 2009), guidance does exist on its content. In noting that ‘…consultation must be in good faith, and with the intention of substantially addressing the concerns…’ of Aboriginal peoples, the decision in *Delgamuukw v. British Columbia [1997] 3 SCR 1010* (hereafter *Delgamuukw*)(para 168) goes on to note that ‘[i]n most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation’. *Haida* (para 48) clarifies this by differentiating between a Treaty and a non-Treaty context, stating that this consent ‘…is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing of interests, of give and take’. This is instructive because it demonstrates that the accommodation requirement shifts depending on the strength of the claim, much like the duty to consult, and that there must be compromise between parties. In this sense, *Haida* (para 44) provides guidance for situations involving pre-proof consultation, suggesting that accommodation in such a context should seek ‘…compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation’. Even in cases where ‘…a strong *prima-facie case* exists for the claim’, and government action threatens to adversely affect it in some way, accommodation ‘…may require taking steps to avoid irreparable harm or to minimize the effects of infringement’ (ibid: 47, emphasis added). As such, even in pre-proof situations, where treaties have not been established, the duty to accommodate embodies the expectation that plans will be adjusted to minimise their adverse effect on First Nations.

The significance of this is drawn out by Laidlaw and Passelac-Ross (2014: 8) in their suggestion that, if such measures correspond to situations where rights have not yet been established, then the types of accommodation expected in the context of established rights, such as those conferred by the historic treaties, ‘…requires more than a simple balancing of competing societal interests’. This is buttressed by the more general protection owed to constitutional rights and the limits they exert on state power, which informs the duty to accommodate. These arguments are supported by the *Sparrow* judgment, which notes that s.35 of the Constitution of Canada (Government of Canada, 1982) dictates that Aboriginal interests should ‘…be given priority over the interests of other user groups’, the objective of which is ‘…to guarantee that plans treat aboriginal peoples in a way ensuring that their rights are taken seriously’ (*Sparrow*: 1079). Laidlaw and Passelac-Ross (2014: 8) thus conclude that:

*The Crown’s obligation to protect established Treaty rights leads to an expansion of the universe of accommodating measures including causing the least infringement possible, giving priority to Treaty rights, avoiding irreparable damage, compensation, recognizing the Aboriginal preferred means of exercising their rights, and recognizing that only demonstrably compelling and substantial objectives can trump Treaty rights.*

As demonstrated in Chapter 6, accommodation of First Nation input on the LARP cannot be considered adequate. It is as participants from the ACO described; government agencies consult with First Nations but fail to include any substantive aspects of the input (see Chapter 6.2). Ultimately, the consultation and accommodation that occurred on the LARP exemplifies Justice Binnie’s description of an inadequate, ‘meaningless’ consultation process (*Mikisew*, para 54), which he characterised as a situation in which First Nations are provided only with ‘…an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along’.

## 9.2 Paternalistic Provincialism as a Compound Form of Implicatory Denial

With Section 9.1 illustrating the diluted interpretation of Treaty rights deployed within the regulatory process, which limits the extent to which First Nations can displace or decelerate production, this section examines the influences exerted within the process itself to actualise this approach. As described in Chapter 6.3, questions focused on drawing out the justifications for regulatory subordination of First Nation Treaty right interpretations were met with three primary answers; that doing so is in the interests of ‘all Albertans’, that the SCC has not told them to act otherwise, and that such subordination is actually in the interests of First Nations because it permits their engagement with oil sands expansion and business development. Such responses can be conceived not as straightforward ‘explanations’, which are statements ‘…where untoward action is not an issue and does not have critical implications for a relationship’ (Scott and Lyman, 1968: 47), but as ‘accounts’. These are ‘…statement[s] made by…social actor[s] to explain unanticipated or untoward behaviour…’ (ibid: 46). The specific sub-type of ‘account’ demonstrated in the findings can be categorised as ‘justifications’, where ‘…one accepts responsibility for the act in question, but denies the pejorative quality associated with it’ (ibid: 47). These serve to neutralise an act or its consequences when either of them are subject to a value-based inquiry; ‘…to justify an act is to assert its positive value in the face of a claim to the contrary’ (ibid: 51). This is not to be confused with a Freudian ‘rationalisation’, however, which is offered after an event; an account ‘…must, in some sense, be present *before* the act’ (Cohen, 2001: 59, emphasis in original). While the techniques of neutralisation developed by Sykes and Matza (1957) hold relevance here, providing a typology of justification for relatively orthodox deviant activities, Cohen’s (2001) work on denial can also be drawn from as it adapts this original conception for application to state agencies. Each of the three justifications identified in Chapter 6.3 will be taken in turn, revealing their position as conduits through which more contextual, structural influences associated with settler-colonial societies are actively operationalised within the regulatory process, acting to justify the diluted interpretation of Treaty rights explored in the previous section.

### 9.2.1 Appealing to Higher Loyalties

In all instances, the act of overriding First Nation interpretations of Treaty rights was not refuted by regulatory personnel, only the valuative category to which it has been assigned. As such, the justifications offered can be recognised as a form of ‘implicatory denial’ (Cohen, 2001: 8), where ‘[t]here is no attempt to deny the facts or their conventional interpretation...What are denied or minimised are the…implications that conventionally follow’. Contrary to the technique of denying responsibility, which is typically considered the ‘master account’ within neutralisation theory (ibid: 61; Section 9.2.2), denial here is primarily manifest via an ‘appeal to higher loyalties’ (ibid: 98), where the act is justified by recourse to some provincial ‘social good’. As Chapter 6.3 illustrates, this was consistent amongst those involved with consultation at the ‘planning’ stage of the regulatory process, where the prioritisation of the government’s interpretation of Treaty rights over that maintained by First Nations was considered acceptable because of the resulting benefit seen to accrue to ‘all Albertans’. This bears similarity to the provincialised ‘public interest’ explanations offered by regulatory personnel at the ‘approval’ stage of the process (see Chapter 8.2), along with those pertaining to public service provision (see Chapter 8.1), which is not to be unexpected because ‘[m]uch of what is true about accounts will hold for explanations’ (Scott and Lyman, 1968: 47). However, it does demonstrate the consistency of penetration and acceptance of the ‘strategic myths…crafted about the organisation’s high morality’ (Cohen, 2001: 67). This is particularly so in the context of the narrow, idealistic and ultimately fallible basis of these ‘social good’ claims (see Chapter 8.1; 8.2), and when considering that ‘the organisation’ in this context refers to the various government agencies involved in the regulatory process (see Chapter 3.3).

The over-riding of First Nation interpretations of Treaty rights, by appealing to the perceived ‘higher loyalties’ associated with it being in the interests of ‘all Albertans’, implicates two separate but related characteristics. The first is the assumed legitimacy of majority rule inherent to liberal democracy and the second is the situated identity of such a claim, both of which are coloured by the status of Alberta as a settler-colonial province (see Chapters 1 and 2.2). This technique of neutralisation is not only derived from the language deployed in the consultation policies providing organisational guidance, but also wider and historic political, economic and cultural characteristics of the provincial territory. This is entirely in accordance with Sykes and Matza’s (1957: 669) original formulation, where neutralisations are conceived of as ‘…extensions of patterns of thought prevalent in society rather than something created de novo’, and is echoed by Scott and Lyman (1968: 54), who recognise that ‘[o]rganisations systematically provide accounts for their members in a variety of situations…which “work” because of a set of background expectations’. Put another way, instead of being a private state of mind, denial is ‘…embedded in popular culture, banal language codes and state-encouraged legitimations’ (Cohen, 2001: 76), largely because these broadly established characteristics equip denials with a normativity that renders them acceptable to both user and recipient (see also Scott and Lyman, 1968: pp.52-55). Ultimately it is this that allows neutralisations to be operationalised instead of being dismissed.

The first feature inherent to the appeal to higher loyalties is the assumed legitimacy of majority rule, being operationalised via the notion that personnel within regulatory agencies are legitimately acting on behalf of ‘all Albertans’. This is most clearly visible in the allusion to the government agencies of which the regulatory personnel are part (see Chapter 6.3). Indicative of the consensus-based ‘unanimity illusion’, and bearing similarity to the neutralisation technique labelled ‘denial of personal responsibility’ (see Cohen, 2001: 88), when coupled with the mention of ‘all Albertans’ what is essentially being referenced is the legitimacy of decisions made by agencies operating under control of a democratically elected government. On the surface this is not without credibility, as Alberta’s Progressive Conservative party maintained power for the 44 years between 1971 and 2015. While voter turnout has been substantially lower than the provincial average during this time (Siaroff and Wesley, 2015: 151), the consequences of this have already been discussed elsewhere (see Harrison, 2015), and it is not the fundamental issue here. Instead, the central point of contention is the assumed legitimacy of a process where moral majority justifications are used to override the specific rights held by minority indigenous groups.

The mode of governance deployed in Alberta is broadly recognised as that of a ‘liberal democracy’ (Shrivistava and Stefanick, 2015), despite both ‘liberalism’ and ‘democracy’ referencing a multiplicity of different and historically contingent theoretical positions (see Parekh, 1992). This consists of the institutionalisation of two broadly consistent aspects of ‘liberalism’, which includes the primacy of individual agents and their moral equivalency, along with two elements of ‘democracy’ under liberalism, which include the equality of individual rights and the legitimacy conferred by majority rule (Short, 2005: 271). The concept of legitimacy can here be defined as the equivalence ‘…between a given system of power and the beliefs, values, and expectations…’ which allow it to operate (Beetham, 1991: 11). Resulting in a negotiated compromise between the collectivism of the latter and the individualism of the former, a system of government operating according to these tenets can be generally characterised by ‘…civil liberties, more than one political party competing for election, separation of power, the rule of law, and a representative government based on majority rule with protection for minority rights’ (Shrivistava and Stefanick, 2015: 8). The reference made by regulatory personnel to this latter, majoritarian feature is particularly problematic for minority First Nations because, according to liberal democratic theory, they are treated as little more than groups of ‘outvoted citizens’ (Freeman, 2002: 116). Resulting in a situation where collectives are ‘*persistently* unrepresented’ (Short, 2005: 18, emphasis in original), First Nations are rendered structurally ‘…vulnerable to injustice at the hands of majorities’ (Freeman, 2002: 117). This is particularly pertinent in the context of a province where the majority has repeatedly elected governments that advocate expansion of the oil sands industry.

While the liberal democratic assumptions upon which Alberta’s mode of governance operates provides the set of ‘background expectations’ from which the moral majority neutralisation is drawn, this in itself belies a deeper aspect of denial that is tied to the province’s position within a settler-colonial state. By drawing upon the presumed legitimacy of settler-government sovereignty, the denial implicitly relegates the alternate status of First Nation sovereignty to a secondary position. As such, while the appeal to higher loyalties is demonstrably ahistorical in its content, because it fails to differentiate between minority stakeholder groups on the one hand and the specific rights held by First Nations as ‘colonised peoples’ on the other (Freeman, 2002: 121), its existence as a form of denial is actually historically contingent. The reason for this is straightforward:

*Settler societies were (are) premised on the elimination of native societies. The split tensing reflects a determinate feature of settler colonisation. The colonisers come to stay – invasion is a structure not an event.*

(Wolfe, 1999: 2)

As such, settler-colonial societies are not only characterised by a ‘logic of elimination’ (Wolfe, 2006: 390), which ‘…the native repressed continues to structure…’ (ibid), but also a fundamental need to disavow their status as such (Veracini, 2015). In this sense, denial is intrinsic; settler-colonial societies are ‘…by definition premised on the traumatic, that is *violent* replacement and/or displacement of indigenous others’ (Veracini, 2010: 364, emphasis in original).

This original founding violence intersects with subsequent troubling experiences, such as the residential schools used to break down indigenous autonomy (Miller, 1996), dispossession of First Nation women’s right to land and community membership under the sexist provisions of the Indian Act (Cannon, 2007), and the theft of Aboriginal children under racist child welfare policies (Walmsley, 2005), to produce ‘…traumatised societies *par excellence*’(Vercini, 2010: 76, emphasis in original). As Rifkin (2014: 2) notes in his referencing of Apess’ (1836: 114) description of invader descendants:

*[t]he shame borne by these “children” lies in their relation to those Indigenous peoples whose decimation and dispossession cleared the space for their occupancy and, by implication, that of all subjects of the state…*

The point being made is that unconscious denial is an inherent and enduring feature of settler societies, not something resigned to history. Indeed, even contemporary attempts at reconciliation, where societies confront past injustices in order to ‘…establish a legitimate political order from the ashes of an illegitimate prior regime’ (Short, 2005: 269), are symptomatic of this very interpretation because their focus on overcoming some perceived ‘legacy’ of harm ‘…leav[es] the *present* structure of colonial rule largely unscathed’ (Coulthard, 2014: 22, emphasis added). As such, the presumed legitimacy of the liberal democratic mode of governance, upon which the credibility of the moral majority appeals rest, can be recognised as based on a deeper, historically-derived background assumption regarding the legitimacy of settler-colonial sovereignty. By necessity, this is dependent upon a concurrent, conscious and unconscious disavowal of its indigenous counterpart (see Rifkin, 2014), disregarding the struggle of First Nations for similar recognition by ignoring its continuation in the present.

The second assumption underpinning the appeal to higher loyalties is the situated identity of the province as an oil producer. The provincial identity assigned to the democratic majority is intertwined with the geographically-fixed oil sands resource being exploited. In this sense, the justification draws upon the similar pool of assumptions underpinning the 'public interest' deliberations made by the energy regulator at the level of approvals (see Chapters 8.1 and 8.2), where oil sands expansion is justified because it is seen to result in some 'social good’ common to ‘all Albertans’. However, the less specific way in which the denials were presented by personnel at the 'planning' stage, raises a parallel and more informal source of ‘background expectations’ from which the credibility of the higher loyalties is derived. This is indicative of the way in which the contemporary cultural identity of the province has been built around the oil sands industry, acting to subtly establish a broadly acceptable image of symbiosis between the two.

The relatively recent success of the oil sands industry means that its concomitant cultural entrenchment is a relatively recent phenomenon. However, the oil and gas industry more generally has a long history in Alberta, of which the oil sands are a contemporary manifestation. In describing its direct and pervasive impact since the 1950s, Wall (2015: pp.338-341) explains in detail how oil capital has been used to fund key cultural institutions, including museums, art exhibitions, college-based arts programmes and individual indigenous artists, as a means of ‘…provid[ing] oil companies with social legitimacy, symbolic capital, and established audiences…’ (ibid: 338). The result of this has been a transformation of provincial identity ‘[a]ssociated at various times with images of wilderness scenery, agricultural abundance, and the Wild West…’, to one where ‘…the notion of “being Albertan” resonates today with the oil and gas industry’ (ibid: 344). Indeed, Davidson and Gismondi (2011) explain how the giant bucket wheels used for bitumen extraction have been placed on postage stamps alongside hockey icons, animals and provincial politicians. Trescott (2006) describes how a monster truck used in the bitumen mines was installed as a centre piece for a mall-based exhibition ‘…dedicated to the culture of Alberta’. This is mimicked at a more local level, and to a greater degree, with Fort McMurray boasting the Suncor Community Leisure Centre, which contains the Syncrude Aquatics Centre, Canadian Natural Resource Ltd Arena, and Nexen Energy Field House. This complex is situated next to Shell Place, which is a stadium built for recreation, sports and conferencing, and also houses the CNOOC-Nexen stage. Even the province’s most successful ice hockey team, when judged according to the number of Stanley Cup wins, is named the ‘Edmonton Oilers’, indicative of the long history of oil and gas extraction operating in the province. Taken together, these features represent the contemporary consequences of the almost seventy years of influence exerted by both oil industry and government on the collective provincial identity.

The implications of this are visible in a response given by Taylor (2002: 33) to his own request to ‘[c]onsider what we mean by identity’. In answering ‘[i]t is who we are, “where we’re coming from”’, he brings to attention the relationship between the construction of Alberta’s oil sands image and forms of nationalism common to settler-colonial societies. In this case, the specific area of overlap between the two is the projection of situatedness. Emerging from the same source as the disavowal of aboriginal sovereignty, where the historical perpetuation of trauma against original populations, including their displacement, ‘…lead[s] to stubborn and lingering anxieties over settler legitimacy *and* *belonging*’ (Veracini, 2010: 77, emphasis added), the label given to this particular strategy of identity-creation is ‘indigenisation’ (ibid: 21). Conceived of as the process by which settler societies attempt to reconcile their contemporary status as both indigenous and exogenous, its purpose is the ‘…settler acquisition of entitlement as indigenous…[it] was and is about the replacement of one socio-political collective with another’ (Veracini, 2015: 61). The necessity of this imagery, and the conflict with settler-colonial legitimacy it invokes, is made clear by Moran (2002: 1029):

*To the extent that indigenous peoples distinguish themselves as a community or communities from the settler nation, their connection with land – a powerful competing claim – becomes a problem and a source of tension for settler nationalists. This potential dilemma has been there for settlers from the beginning: the ideological function served by the creation of national space has been to enact ‘legitimate’ possession, through knowledge and sacrifice, of the land. Aboriginal knowledge of the land, its flora and fauna, and its spiritual meaning, has always been a source of potential illegitimacy for settler claims on land.*

While the anchoring of provincial, territorial identity to the oil sands can be read alone, Wall’s (2015) examination illustrates its position as a continuation of settler-colonial attempts at responding to this, by rooting itself in space and, by extension, time. The vacillating images of wilderness, agriculture and the Wild West, which maintained a dominant position within Alberta’s early collective identity (ibid), and indeed continue to do so, have given way to the geographical fixity of crude oil, gas, the oil sands and the industrial ‘frontier’ that it represents. In this sense, the appeal to higher loyalties is drawing upon a contemporary extension of geographically and historically specific ‘mythical reference[s]’ which signify ‘…settler investment in place and landscape’ (Veracini, 2010: 21).

When taken together, the assumed legitimacy of majority rule, and its associated, provincialized territoriality, substantiate the appeal to higher loyalties, lending them a credibility which renders them operationally acceptable. However, these both rest upon the more fundamental assumption regarding the primacy of settler-colonial sovereignty, which itself is premised on the concurrent disavowal of its indigenous counterpart. The provincialism around which the more immediately perceptible denials are framed can therefore be seen as built on a deeper structure of disavowals specific to settler-colonial societies, invoking Orwell’s (1945: 1) concerns about ‘nationalism’ and ‘…its inseperab[ility] from the desire for power’. Cohen (2001: 64) makes clear the specific relevance of this:

*Vocabularies of denial derive from the fact that social rules are negotiable, flexible, conditional and relative. The more tolerant, pluralistic and ‘multi-cultural’ the society, the richer and more varied will be its motivational accounting system. This may sound benign enough. But accounts that are embedded in coherent world views – drawing their legitimacy from appeals to God, the state, the revolution or the volk – become malignant in exactly the ways that Orwell warned about. By ‘nationalism’, he meant not just nationalism in the narrow sense, but all ideologies that maintain themselves by denial of other realities.*

In the case of the oil sands, the provincialised ‘coherent world view’ from which the ‘background expectations’ and ‘state-encouraged legitimations’ derive their credibility has its basis in the historical subversion of indigenous sovereignty and its associated ‘realities’. As such, instead of being premised on recognition of this history, the denials are anchored to a deeper societal disavowal that cloaks such an uncomfortable truth. This is a necessary component in preserving the perception of legitimacy with regard to settler-colonial sovereignty, the common compulsion of which Rifkin (2014: 2) illustrates in his assertion that the very ‘…everydayness of settler domestic life occurs in places whose availability for such inhabitance depends on the suspension of Native “rights”’. Indeed, the justificatory appeals to higher, provincial loyalties can be seen to channel historically-situated, necessary and deeply held assumptions, transforming them from passive and contextual expectations into active, operational components. Their purpose, of continuing to overrule indigenous interpretations of Treaty rights within deliberative processes, remains constant, thus conforming to Wolfe’s (2006: 402, emphasis added) observation on invasion; ‘…*its history does not stop* – or, more to the point, become relatively trivial – when it moves on from the era of frontier homicide’. Put another way, justifying the marginalisation of indigenous interpretations of Treaty rights by appealing to higher loyalties follows an iterative and self-referential pathway, borrowing ‘background assumptions’ from a provincial settler-colonial liberal democracy whose very sovereignty depends on the continued disavowal of that of its First Nation counterpart.

### 9.2.2 Denial of Responsibility

In addition to appealing to the assumed ‘higher loyalties’ of the provincial majority, regulatory personnel also consistently noted that, while it might involve the subordination of First Nation Treaty rights, this was justifiable because government consultation practice was based on case law handed down by the SCC (see Chapter 6.3). Leaving aside the assumed equivalence of this with SCC judgments, which Section 9.1 disputes, such a position implies that it is the responsibility of this latter institution to modify the behaviour of the former. This represents a particular form of Cohen’s (2001: 88) ‘denial of responsibility’; a category which references various denials of agency, intent, autonomy and choice for more ordinary crimes, and, for more political crimes, instructions issued by a superior authority, conformity with a group, or necessity (ibid). In the case of justifications given by regulatory personnel for subordinating First Nation interpretations of Treaty rights, the clearest affiliation is with the denial sub-category ‘obedience to authority’ (ibid), where the authority perceived as higher than the Government of Alberta is the SCC. While deference to SCC case law is the most immediately visible aspect of the justifications given, also invoked is the simultaneous recognition that the SCC, at some point in the future, may deem this existing practice to be illegal. As such, the obedience to authority stems not just from the perceived ‘commands’ rooted in policy and emerging from case law, but also from the absence of instructions telling personnel to behave otherwise by the ‘ultimate’ authority of the SCC (see Chapter 6.3). This results in the claimed ‘minimalist approach’ to consultation described as adopted by the Government of Alberta (ibid), where regulatory personnel are simply obeying instructions handed down by the SCC, or lack thereof.

Another feature of this ‘denial of responsibility’ is also visible, in that it is less than absolute. Accompanying the deference to SCC case law were expressions of uncertainty around the legality of existing practice, meaning that participants also expected the SCC to retroactively deem present consultation processes to be inadequate. Thus maintained in the same moment are two apparently-contradictory positions. This is because, at the micro-level, agency personnel looking upwards see two competing sources of authority in tension; the Government of Alberta and the SCC. It is this lack of a monopoly on authority that generates ambivalence towards the legality of existing consultation practice, if ‘[a]mbivalence’ is recognised as the co-existence of contradictory emotions or attitudes. This holds relevance in the context of Bauman’s (1989) discussion of Milgram’s (1974) findings into obedience to authority, where test subjects were asked by ‘experimenters’ to administer what they believed to be electric shocks of incremental voltage to people in another room. The more infamous of these experiments were relatively simple in that they contained few tiers of authority; the experimenter was the topmost manager of the system, whose power, in turn, appeared to be delegated by the superior and generalised authority of ‘science’ or ‘research’ (Bauman, 1989: 161). As is well-known, 65 percent of research subjects administered the maximum voltages to recipients when asked (Milgram, 1963). However, some of Milgram’s later, less well-known studies contained multiple experimenters, who were instructed to openly disagree with the commands being issued. The results were entirely different; complete obedience to authority was no longer observed in the subjects, being replaced by open disagreement and participant withdrawal (see Milgram, 1974). As Bauman (1989: 165) notes, the meaning of this is ‘unambiguous’:

*The readiness to act against one’s own better judgment, and against the voice of one’s conscience, is not just the function of authoritative command, but the result of exposure to a single-minded, unequivocal and monopolistic source of authority.*

As such, the maintenance of two apparently-contradictory positions, on the legality and potential illegality of existing consultation practice, results from the ever-present possibility that the SCC will force the Government of Alberta to modify its approach to consultation at some future point in time. Informed by its historical tendency to do so (see Chapter 3.3.1), the omnipresent risk posed by this superior source disrupts the Government of Alberta’s monopoly on authority, destabilising assumptions surrounding the legality of consultation inside the very institutions tasked with its implementation. As such, the ‘free-floating’ (Bauman, 1989: 161), or ‘unanchored’ (Cohen, 2001: 88), responsibility seen to result from many individuals denying responsibility within a single bureaucratic organisation is here less than absolute. However, this disruption does not result in organisational paralysis because the influence exerted by the two sources of authority are not equal. The perceived legality of consultation policy is an immediate reality mediated by the organisational command structure inherent to the government agencies, whereas the risk of its rebuttal by the SCC is only a future possibility. This permits both denial of responsibility and the production of obedience in the present, albeit in a qualified form. The background assumptions upon which this form of denial rest, which is based on a perceived parity between consultation policy, practice and SCC case law, have already been critically examined in section 9.1. Nevertheless, the narrow interpretation of Treaty rights is actualised, at least in part, by regulatory personnel who believe existing practice to be justified because of its perceived accordance with existing SCC judgments.

### 9.2.3 The Metaphor of the Ledger

The paternalistic dimension to the provincialism visible in the preceding two sections becomes apparent in the justifications given by those regulatory personnel who were, or had been, in senior government positions. Differing slightly to those offered by more operational personnel, these denials function at a higher level, justifying government aversion to expanding its minimalist stance to Treaty rights by referencing the socio-economic benefits seen to accrue to First Nations under existing arrangements (see Chapter 6.3). As this did not refute the injustice of such a position, nor frame it in terms which allow for such an approach to be interpreted otherwise, these justifications are not examples of ‘literal denial’ or ‘interpretive denial’ (Cohen, 2001: 7), but, again, ‘implicatory denial’ (ibid: 8), where the adverse consequences of an act are denied as opposed to the act itself. The particular way in which this form of denial was deployed references two related sub-categories of denial. The first is the ‘metaphor of the ledger’ (Minor, 1981: 298), which rests upon the ‘…image of good and evil counterbalancing one another…’ (ibid), and ‘denial of injury’ (Cohen, 2001: 95). These are manifest jointly, where the balance inherent to the former frames the ‘injury’ as something less than absolute, thus tempering the status of the latter. Put another way, the injuriousness of marginalisation is perceived as qualified because some benefit is seen to also result to First Nations. If such ‘injury’ was seen to be unqualified then it would be deemed too serious to entertain the possibility of a positive outcome. Although not primarily relevant, it is worth noting that a third form of denial, ‘denial of the victim’ (Cohen, 2001: 96), is present by association, because non-recognition of ‘injury’ also tends to deny a group victim status (see Maruna and Copes, 2005).

Much like the denials outlined in Sections 9.1.1 and 9.1.2, the acceptability of these justifications relies upon a set of ‘background expectations’ common to settler-colonial societies. The most prominent of these is visible in the references made to the ‘remote ghetto system’ and ‘dysfunction’ seen to have developed on First Nation reserves over the past 200 years (see Chapter 6.3). Although derogatory in their form, these descriptions speak to the rates of illness, suicide and poverty on First Nation reserves that are several times higher than the rest of Canada (Anaya, 2013), meaning they are less assumptions and more a recognition of reality. First Nations do have significant issues that have resulted from over two centuries of colonial oppression, and they ‘…bear the scars of that history’ (ibid). The issue here, however, is that the positioning of oil sands expansion, education and business development as solutions to this reality annexes such socio-economic difficulties from historical context. It disregards the way in which this pre-determined and paternalistic approach represents a continuation in the present of the very mechanisms which operated to deny indigenous peoples their self-determination in the past.

Reference to pre-determined, fixed and ultimately blanket solutions requires an equally homogenous target upon which they can be applied. This brings into view the undifferentiated conception of First Nations upon which this assumption rests, where their ‘needs’ are uniform, irrespective of individual characteristics, location, degree of educational attainment or existing engagement with business development. Indeed, the ACFN Business Group, which was re-branded ACDEN in 2013, comprises seventeen businesses and joint ventures specialising in oil and gas services (Slowey and Stefanick, 2015: 200), together generating a reported $250 million in annual revenue (Sterritt, 2014). Similarly, the Mikisew Group of Companies oversees ten businesses under its banner, drawing a reported $100 million in revenue per year (O’Meara, 2014), with the Fort McKay Group (2016) reporting a similar annual amount of $150 million. These characteristics go unregistered within this form of denial, belying the fundamental presence in its exercise of the historic image of First Nations as ‘the Indian’. Acting as ‘…an entity that would stand for the whole’ (King, 2012: 83), this label originally served to collapse the myriad of individual characteristics held by each indigenous nation into one stereotype, discursively homogenising their individuality by ‘…giving this snarl of cultures a definitive and manageable form’ (ibid). The contemporary manifestation of this, when coupled with the socio-economic issues derived from their historical subjugation, is a perspective common to settler-colonial societies. The contemporary characteristics of this are described by King (ibid: pp.124-125):

*Native people can’t look after ourselves. We don’t have the capacity to manage our own affairs; we don’t know what’s good for us. We haven’t the level of sophistication to understand the workings of the contemporary world and to participate in the modern economy.*

It is thus not simply that First Nations are depicted *en masse* as needing ‘education and business development’ across a ‘remote ghetto system’, but that this blanket assumption operates as one of the ‘background expectations’ which make it acceptable for decisions to be made on their behalf. It is as Rifkin (2014: 19) observes; ‘…the coding of Native people(s) as Indian allows for the articulation of propositional statements about them – including expressions of ambivalence, support, sympathy and guilt…’. This permits their more efficient management by bureaucratic state machinery and closes avenues for more open-ended dialogue with individual First Nations, stymying opportunities for deeper and more meaningful consultation by presuming to know both the issues at hand and the most appropriate means for their resolution. Indeed, as the solution to First Nation socio-economic difficulties is being associated with further growth of the oil sands industry, the ‘social good’ status conferred on this process expands to encompass First Nations as well as ‘all Albertans’ (see Chapters 8.1 and 8.2). This assimilates the interests of the former into the broader, settler-colonial body politic of the latter, justifying the marginalisation of First Nation voices in decisions pertaining to Treaty rights and the continuation of their traditional land-based culture.

## 9.3 Conclusion

This chapter has illustrated that the ‘planning’ stage of the regulatory process is characterised by the systematic actualisation of a diluted duty to consult and accommodate. Demonstrating various degrees of disparity between practice, policy and SCC judgments, in terms of the foundational interpretation of Treaty rights, which is evacuated of content (see Section 9.1.1), the trigger of the duty, which is set too late in the process (see Section 9.1.2), the depth of consultation, which is defined by a shallowness born of the foundational interpretation (see Section 9.1.3), and measures for accommodation, which have essentially been absent from the LARP since consultation on its detail began in 2008 (see Section 9.1.4). As illustrated throughout, such features are variously present in policy and practice, meaning there is a recognisable discrepancy between SCC judgments on Treaty rights and the way in which the Government of Alberta is attempting to honour them. Indeed, it is this gap that has allowed for the broad marginalisation of First Nation input at the levels of both policy and practice, destabilising their ability to alter or decelerate production and, in the process, enabling operationalisation of the ‘weak’ ecological modernisation advocated in policy and realised in practice, at the level of ‘approvals’ (see Chapters 5, 7 and 8).

Section 9.2 built on the findings presented in Chapter 6, providing an analysis of the justifications given by those within the regulatory process for actualising such a diluted conception. Taking the form of a ‘compound denial’, where a variety of individualised, surface justifications draw upon a pool of broadly accepted background assumptions and deeper, societal disavowals, the three key, overlapping justifications serving to subordinate First Nation interpretations include the appeal to higher loyalties (see Section 9.2.1), the denial of responsibility (see Section 9.2.2), and the metaphor of the ledger (see Section 9.2.3). The first of these justifies over-riding First Nation interpretations of Treaty rights by recourse to it being in the interests of ‘all Albertans’; a justification also present in the policies on consultation. Relying on ‘background expectations’ rooted in settler-colonial anxiety, the legitimacy of settler-colonial liberal democracy, and, by extension, the non-recognition of First Nation sovereignty, here this is the ‘master account’ (Cohen, 2001: 61), borrowing from the language and legitimations also found in the ‘social good’ justifications for oil sands expansion (see Chapters 8.1; 8.2).

The second denial, ‘denial of responsibility’, justifies the subordination of First Nation Treaty rights via the perception that doing so is in accordance with SCC case law; an assumption that can be described as inaccurate when read in conjunction with Section 9.1. The final denial deployed is that of the ‘metaphor of the ledger’, where the socio-economic benefits seen to result from the government’s minimalist approach to Treaty rights is considered to outweigh its detriments. It is here that the paternalistic dimension is most visible; a stance is adopted wherein the Government of Alberta knows what is best for First Nations, despite their opposition. Taken together, this variety of denials has underpinned regulatory attempts at removing any opportunity for First Nations to effectively participate in the regulation of oil sands production. Indeed, it has channelled broader, and more structural, expectations and disavowals inherent to Alberta as a settler-colonial state into the regulatory process, transforming them from passive, contextual assumptions and into active components of influence. As such, the ‘weak’ ecological modernisation visible at the level of policy and strategy proceeds uninhibited through the control stage of ‘planning’, where systemic marginalisation of ‘non-elite’ First Nation input ensures very little effective opposition, permitting its operationalisation at the 'approval' stage, uninhibited expansion of the industry and, ultimately, the production and reproduction of indigenous environmental victimisation.

# 10. Conclusions and Recommendations

This concluding chapter is divided into three sections. First, a summary of the key findings from this research is presented in Section 10.1. This includes analysis pertaining to the ‘approval’ phase of the regulatory process, which acts as the conduit through which provincial government strategies for ‘sustainable development’ of the oil sands resource are channelled, and the ‘planning’ stage of the process, where the legal duty to consult and accommodate with First Nations is actualised. Section 10.2 builds on this, considering the implications of these findings for both criminological scholarship and broader society. This section also accounts for some of the recent political, economic and policy changes that are set to influence the oil sands industry and its regulation. Finally, the limits of this study are outlined in Section 10.3 before positing recommendations for further research which would go towards addressing them.

## 10.1 Summary of Findings

Based on analyses of almost two decades of government policy documents, records of regulatory approvals issued since 1997, and transcripts from interviews with agency, industry and First Nation personnel, this thesis has demonstrated that operationalisation of eco-modernist-philosophy has, since the mid-1990s, enabled the regulatory process governing oil sands expansion to consistently prioritise economic production over the land-based cultural interests of First Nations. Advocating widespread use of techno-scientific risk-based techniques for environmental mitigation, limited meaningful opportunities for First Nation participation in decision-making processes, and a regulatory approach that avoids problematizing the tendency of production under capitalism to expand, the operationalisation of ecological modernisation has acted as the ‘catalyst’ for indigenous environmental victimisation for the duration in which the contemporary oil sands industry has existed.

The influence of eco-modernist philosophy is particularly visible at the ‘approval’ stage of the regulatory process. Here, the Panels overseeing the quasi-judicial public hearings have repeatedly sanctioned oil sands projects by referencing the future ability of science and technology to address their expected environmental impacts. Such measures are considered sufficient to mitigate against these detrimental effects, constructing an equivalence between social, economic and environmental issues which permits an approval to be sanctioned under the rubric of the ‘public interest’. This is despite an absence of evidence pertaining to the viability of such mitigation, or even recognition of the effects for which mitigation is being sought. All open pit oil sands projects have been sanctioned using this broadly recognisable pattern of reasoning. A distinct but related issue stems from this eco-modernist tendency to not only ignore the fundamental contradiction between economic growth and environmental protection, but also its positioning of the latter as contingent on the former. Giving rise to a ‘consensus-based’ approach to regulation, where a close relationship between an industry and its regulator develops to such an extent that co-operation between the two is more common than antagonism, in Alberta this ensures oil sands projects are effectively approved at a point prior to the date on which the quasi-judicial hearings are opened to the public. The findings also demonstrate that these expansionary tendencies are underpinned by a perspective that frames oil sands growth as a ‘social good’. Such a position is, however, only credible because wider neoliberal reforms have, over time, anchored government social expenditure to the natural resources industry. In this sense, operationalisation of eco-modernist philosophy is buttressed by the active internalisation, within the regulatory process itself, of an idealised image of the neoliberal, state-industry relationship. In this sense, the role of the state and its regulatory apparatus is to facilitate industrial expansion in ways which enable environmental thresholds to be overcome, and not restrict it in accordance with such limits.

The findings also demonstrate that the philosophy of ecological modernisation extends to the ‘planning’ stage of the regulatory process. This is reflected in the tendency to prioritise the input of political and economic ‘elites’ over that of the First Nations, also evidencing the inefficacy of the consultative, participatory mechanism which should act to ‘control’ their victimisation. This, however, is deeply coloured by Alberta’s status as a settler-colonial province and the position of First Nations in that context. Indeed, the input of First Nations, in decisions pertaining to oil sands expansion, has been roundly marginalised at the levels of policy and practice since the inception of the contemporary industry. Facilitated by a diluted interpretation of Treaty rights that has been systematised through successive government policies on consultation, such marginalisation appears to contravene several high-profile judgments issued by the SCC. Importantly, however, the findings also indicate how regulatory personnel justify this diluted interpretation of Treaty rights at the level of operations. Based on what is here labelled a ‘compound denial’ (see Chapter 9.2), which references a variety of individualised, surface justifications drawn from a body of broadly accepted background assumptions, which are also, in and of themselves, denials, the operational marginalisation of indigenous interpretations of Treaty rights is seen to be in the best interests of the provincial majority. This is because such marginalisation facilitates expansion of the oil sands industry, demonstrating the operational internalisation of characteristics common to the contexts of neoliberal political-economy and settler-colonialism.

## 10.2 Implications

This research has several potential implications, which can be broadly categorised as either 'internal' or 'external' to academia. While these are neither mutually exclusive nor all-encompassing, they provide an accessible typology for explaining the original contribution of this research. The first category, that referring to theoretical implications within academia, is taken as the point of departure. Having parity with the 'conceptual' category of 'academic impact' (see ESRC, 2016), these implications relate to attempts to explain environmental harm in the oil sands more specifically, and to the body of green criminological scholarship more generally. The second category of implications reference those relevant to policy. Indeed, the findings can be seen to highlight several potential areas that First Nations, and aligned interest groups, may focus on to pursue beneficial change. Mirroring the ‘instrumental’ category of ‘economic and societal impact’, this refers to the implications of the findings for ‘…individuals, organisations or nations’ outside of the academy (ibid). Here, the ‘theoretical’ implications of the study will be considered first, followed by those relevant to ‘policy’.

### 10.2.1 Theoretical Implications

As explained in Chapter 3.1.6, existing explanations for environmental harm in the oil sands tend to focus on national and international influences at the macro-level of analysis. Disguising the fundamental role of the provincial energy regulator in sanctioning industrial expansion, this has prevented regulation being viewed, and thus analysed, as a mechanism for placating social conflict between broadly incompatible interests. By illuminating the largely unexplored convergence of these social relationships within the regulatory process, the most straightforward implication of this study is that it provides previously unavailable detail on how indigenous environmental victimisation in the oil sands has been produced and reproduced over time through official regulatory processes. More specifically, it highlights how the macro-level features of neoliberal political-economy, expansionist government strategies and settler-colonial anxieties exert influence upon, within and through provincial regulatory apparatus. This demonstrates, in turn, how these influences serve to legitimise and normalise the notion of 'green growth' while rendering acceptable its concomitant indigenous and environmental impacts. As such, the findings illustrate how macro-level influences are invested in the very processes responsible for regulating industrial growth and its environmental consequences.

By investigating the internal workings of the more operational level of oil sands regulation, the findings have also added to the literature in several more specific ways. As noted in Chapter 3.1.6, existing explanations for environmental harm obscure the fundamental role of regulation in sanctioning industrial expansion, suggesting that it occurs without official consideration, mitigation or opposition from within Alberta itself. As such, provincial government efforts at rendering such development ‘sustainable’ through the regulatory process, including the ways in which First Nation voices are taken into consideration, have tended to be overlooked. Indeed, these are some of the key limitations of existing green criminological scholarship focusing on this case (see Chapters 3.1.2 and 3.1.3). However, the findings have demonstrated that, in addition to it being ‘…a synonym for the oxymoronic “sustainable growth”’ (Daly, 1993: 267), the language of ‘sustainable development’ deployed in policy and strategy exerts influence at the level of operational regulation. Giving the appearance of balance between social, economic and environmental interests, it allows for environmental risks to be discursively mitigated in the present by relying on flawed expectations of science and technology. This is largely due to the environmental philosophy being operationalised under the rubric of ‘sustainable development’, which in this case is a specifically ‘weak’ form of ecological modernisation (see Chapter 8). As such, the ‘effective deregulation’ spoken of by Smandych and Kueneman (2010: 91), and the accelerating treadmill of production discussed by Lynch et al (2016), are not being disputed (see Chapters 3.1.2 and 3.1.3). Instead, this study adds to, supports and expands on their specific explanations by providing detail on the operational processes by which the characteristics they speak of have come to fruition.

As highlighted throughout Chapter 3.1, a key feature of existing literature is the absenteeism with which indigenous peoples are treated. They are painted as either ‘ideal’ victims of environmental harm or ignored altogether (see Chapter 3.1.6). Indeed, this latter point is characteristic of green criminology more broadly. Goyes and South (2015) aside, the sub-field has largely neglected to account for the patterns of victimisation associated with indigenous peoples, even in cases where ecological disorganisation has been found to occur on their territories (see Chapters 3.1.2; 3.1.3). Such a characteristic can be seen to stem from the tendency within green criminology to annex questions of colonialism and, much like its parent discipline (see Woolford, 2013), prefer application of political-economic theories more familiar to its disciplinary heritage in radical and critical criminology. As with the treadmills of production and crime, these are traditionally anti-capitalist in their diagnoses and proposed solutions, allowing little room for detailed inclusion of indigenous peoples and their existence under the continuing legacy of colonial structures. In this sense the findings of the study add to a largely under-researched aspect of explanations specific to the oil sands. Illustrating how First Nation voices are systematically marginalised, despite their legal duty to be consulted and accommodated, the findings have demonstrated how their active role in opposing oil sands expansion is rendered impotent relative to their potential to effect change (see Chapter 9).

While providing support and contributions to existing literature, this study also levels two substantive challenges against it. The first is targeted at the passive role envisaged for First Nations in many of the existing explanations reviewed (see Chapter 3). The role of indigenous peoples as active participants within the regulatory process governing industrial expansion marks such an approach as misplaced, generating incomplete explanations and accounts which inadvertently contribute to the subversion of First Nation voices. Recommendations for a future research agenda aimed at addressing this limitation are suggested in Chapter 10.3. The second challenge to existing literature is targeted at the dominant theoretical frameworks currently in use in green criminology, one of which is the treadmill of crime. While Chapter 3.1.3 saw the a-priori modification of its four-group structure of decision-making, to account for the place of indigenous peoples in the regulation of the oil sands industry, the findings suggest that a more permanent expansion of its relatively rigid focus on ‘environmental enforcement organisations’ may be necessary, at least in settler-colonial contexts (Stretesky et al, 2013: 132). A similar adjustment could be made to the ‘institutional’ level of Kramer and Michalowski’s (2006: 25) state-corporate analytical model, to introduce more flexibility and allow for its more straightforward application to situations involving indigenous peoples.

### 10.2.2 Policy Implications

While the findings have several implications for provincial government objectives surrounding the 'sustainability' of oil sands extraction, they also highlight the need for modification of broader government policy. This is particularly so if the operation of industry within environmental thresholds is to be achieved over the long term. As highlighted in Chapter 8.1, provincial policies advocating 'sustainable growth' of the oil sands industry are justified by recourse to Alberta's dependency on its revenues for the provision of public services. This largely singular reliance has been exacerbated by extensive neoliberal reforms since the mid-1990s, where low corporate taxation, high corporate profits and minimal diversion of oil sands revenues into provincial savings funds has been prioritised over economic diversification away from natural resources (Chapter 8.1). As it is this neoliberal context that grants credibility to 'sustainable growth' objectives, its disruption is necessary to destabilise their justificatory basis. Doing so would provide the political and economic space in which regulatory techniques common to ‘strong’ forms of eco-modernist thought could be pursued.

Although an exhaustive examination of the measures needed to encourage such a transition is beyond the scope of this study, several short and long-term strategies can be suggested. Over the short-term, measures to disrupt the relationship between government revenues and oil sands royalties may include increases to royalty rates and corporate taxation, and a diversion of greater proportions of oil sands revenues into a provincial savings fund. Such techniques could also be coupled with increases in personal and sales tax, although this may be particularly difficult, politically, in such a conservative province like Alberta. Taken together, these measures would begin the process of weaning the provincial government away from the oil sands industry by allowing for the collection of revenues from other sources. This would also decrease the risks associated with oil market volatility (see Chapter 8.1), and provide a smoother transition away from such single-sector reliance.

Longer-term solutions would have to encompass some form of province-wide diversification away from oil sands extraction. One more politically manageable way of achieving this might be to avoid granting new approvals until previous projects have reached the end of their operating cycle. While this would not address the issues associated with the industry as it currently exists, it would provide somewhat of a cap on its physical footprint. This would also contribute to the gradual deceleration of expansion, notwithstanding the techno-scientific efficiencies that would likely be applied to existing operations as a means of increasing production. Such diversification, away from natural resource use, was advocated in the Government of Alberta’s 2011 report, Shaping Alberta’s Energy Future (Government of Alberta, 2011c). Pointing to multiple scenarios which pose a risk to the energy industry, including global economic slowdown, markets being flooded with alternative supplies or lower-cost and lower-emission oil, environmental backlash or ‘…growing regulation that drives up the cost of oil sands production’ (Government of Alberta, 2011: 41), the report recommends provincial diversification into industries already established in the province. Expansion of the agriculture and forestry, medical and biotechnology sectors is therefore advocated (ibid: pp.45-47). While these have their own ecological problems, such diversification would go towards tackling the indigenous environmental victimisation at issue in the oil sands.

The second body of policy implications can be made in more direct relation to the agencies of the Government of Alberta, namely the LUS, the AER and the ACO. Taking these in turn, the LUS should not avoid creating buffer zones around First Nation reserves (see Chapter 6.1). Considering that such a decision was made in relation to the LARP, being based on the notion of economic interests having priority over the more environmental interests of First Nations (ibid), and that the *Sparrow* decision affirms that Aboriginal interests should be given priority over others in accordance with s.35 of the constitution (see Chapter 9.1.4), then continued government reluctance to introduce these buffer zones appears at odds with SCC judgments. This discrepancy should be rectified by replacing the prioritisation of oil sands extraction in the LARP with activities pertaining to the exercise of First Nation Treaty rights.

The findings also suggest that the LUS could simultaneously reduce conflict and alleviate a degree of indigenous environmental victimisation by integrating principles of co-management into the LARP. While government opposition to this approach is buoyed by the contextual need to minimise obstacles to oil sands expansion (see Chapter 6.1), such a stance would be less defensible and necessary if the methods aimed at reducing oil sands dependency were pursued. Furthermore, First Nations support the existence of the extractives industry in some form, as they rely on it to participate in the market for wage labour (see Chapter 1). As such, co-management would not necessarily elicit the level of opposition feared. That said, the model adopted should give First Nations veto power over any future applications for projects on their lands, or at least the ability to relocate proposed oil sands projects. Indeed, efforts at decoupling have roundly failed (see Chapter 8.3). The relatively production-averse techniques associated with ‘strong’ forms of eco-modernisation should now be pursued, instead of recycling the evidentially misplaced faith in the future potential of science and technology to mitigate the detrimental effects of ever-accelerating production. Furthermore, in accordance with SCC judgments on the need to consult on any activity which may impact on First Nation Treaty rights, the final model of co-management should be decided upon only after full and meaningful consultation with the First Nations themselves.

Moving onto the AER, its 'compliance-based' approach towards regulation of the oil sands industry is problematic. Firstly, its effective approval of projects prior to the point at which hearings are opened to the public is both compromising its ability to reject a project application and undermining legitimacy as an ‘independent’ authority (see Chapter 8.2). The weakening of this connection could be achieved, at least in part, by requiring transparency of communications between the regulator and the specific industrial actor in question prior to a hearing. While this would introduce elements of delay and even uncertainty into the regulatory process, such criticisms tend to be offered from the standpoint of ‘consensus’, where there are no contradictions between oil sands capital and environmental integrity (see Chapter 8.2). As Chapter 8.3 has demonstrated, such a stance is illusory, particularly if the fallacy of materialisation is taken into account. Considering also that hearing panel personnel are influenced by the land uses designated in the LARP (see Chapter 7.5.2), removing the prioritisation of extractive operations from the strategy should provide regulatory personnel with the space needed to act contrary to such interests. Broader provincial diversification away from oil sands revenue should also destabilise the 'public interest' justifications repeatedly used in the approvals. Furthermore, as the projects are, in effect, approved in private, prior to the public hearings, the extent to which this also amounts to the issuance of an approval prior to a determination of consultation adequacy is unclear. Such a reality would be in clear contravention of the requirement under *Mikisew* (para 54) for consultation to be ‘meaningful’ (see Chapter 9.1.4), as some of the core options for accommodation will have, by this point, already been annexed. Improving the transparency of regulator-regulatee communication may therefore prevent this from happening, or at least illuminate instances in which it is occurring, providing subsequent opportunities for legal challenge.

The findings also have several implications for both the Government of Alberta’s First Nation consultation policy and the ACO as the agency responsible for its implementation. Firstly, the narrow interpretation of Treaty rights, as only for hunting, fishing and trapping for food, needs to be addressed, as does the interpretation which isolates them from geographic location, species quantity and quality. As outlined in Chapter 9.1.1, both interpretations are in contravention of SCC judgments. Secondly, consultation should be triggered earlier in the regulatory process, at the point of land lease disposition, and not at the stage of seismic or exploratory drilling. As it stands, this is another instance in which consultation practice is in breach of SCC Judgments (see Chapter 9.1.2). Finally, the ability of the ACO to decide on the adequacy of its own consultation compromises the credibility of the process. Prior to the creation of the AER under the REDA (Government of Alberta, 2012b), the decision on whether consultation had been adequate fell under the jurisdiction of the LUS and ERCB (see Chapter 3.3.1). This provided some degree of independence. While the REDA removes this power from the AER, Laidlaw (2016) suggests it is retained by the requirement for government agencies to act constitutionally. He therefore posits a return to the previous system as a means of restoring independence of judgement. However, the findings demonstrate that such parity exists between justifications for oil sands expansion at the 'approval' stage (see Chapter 8.2), and those given for marginalising First Nation interests at the 'planning' stage (see Chapter 9.2), that Laidlaw's (2016) solution may simply continue the status quo. In other words, the denials examined in Chapter 9.2 risk being too easily transferable between agencies. As such, it is recommended that a separate agency, operating at the Federal level, be created to determine the adequacy of consultation, sitting outside not only the regulatory process itself but also the province.

So far, the suggested implications have been relatively apolitical in nature. Recommending changes to government agencies, policy and process, there has been little mention of how such modifications would be made by a state apparatus with vested interests in maintaining the status quo. Following Williams’ (2012) recommendation that implications should include proposals for policy and action aimed at entities with the capacity to implement them, it is important to consider the ways in which the suggested modifications could be pursued and enacted. Firstly, advocating co-management as a strategy for the amelioration of indigenous environmental victimisation is not an unrealistic goal. The possibility for its introduction in some form has expanded since the interviews were conducted in January and February of 2015. Under Justin Trudeau's Liberal Party, which was elected later in 2015, the Government of Canada pledged early on to implement the UNDRIP (Delacourt, 2015; Smith, 2015). Confirming this more recently, the federal ministers of Indigenous and Northern Affairs and Justice stated that Canada would 'fully adopt and work to implement' the terms of the UNDRIP, making the announcement to the United Nations in May 2016 (Hill, 2016). The provincial New Democratic Party, which took power in May 2015, also adopted this position, with the now-Premier, Rachel Notley (2015: 1), stating that the UNDRIP will be '…implemented in a way that is consistent with our constitution and with Alberta law'. While evidence of this pledge to 'work to implement' has yet to materialise, at either levels, it demonstrates the potential for co-management to act as the mechanism by which the consent requirement in the UNDRIP could be operationalised by these governments.

With the context apparently conducive for not only movement towards a co-management system, but one which embodies the right to free, prior and informed consent outlined in the UNDRIP, there are several avenues available to those wishing to encourage its introduction. The first option, and that which elicits the least conflict over the short-term, is to wait for the Governments of Alberta or Canada to consult on possible systems and subsequently decide on the one to implement. The issue here, however, is that consultation processes tend not to accommodate First Nation input on any meaningful level (see Chapters 6 and 9). Furthermore, as suggested in Chapter 6.1, governments have greater flexibility in reversing a decision they have made policy provision for, as opposed to one forced upon them by the SCC. As such, while First Nations and their allies should attempt to reach an agreement with respect to a co-management system, they should also consider their options at the SCC, particularly as this was identified as a site of vulnerability for the provincial government in Chapter 6.1.

## 10.3 Limitations and Recommendations for Further Research

One of the primary limitations of this research is that, in concentrating on the activity of regulatory agencies, it maintains a disproportionate focus on the provincial government. While providing a detailed account of the internal processes governing oil sands expansion, how industrial actors work to exert influence on this process and its related policies is left relatively unexplored. This limitation extends from the study parameters initially established as opposed to deficiencies derived from its conduct, but it does generate a blind spot with respect to industry as a key actor exerting influence on the provincial government. While such a scope was deemed impractical for this study, it would be useful for further research to focus on the internal mechanisms by which such influences are not only attempted, but rendered effective. Lobbying was identified as an example of such a mechanism:

*…there’s a lot of lobbying. There’s a huge…so there’s the Canadian Association of Petroleum Producers, which is CAPP, we call CAPP is the acronym. And I mean they’re a heavy lobby group in the province. They represent a lot of oil and gas companies in the province and they lobby heavily, for sure. There are other lobby groups in the province that would put pressure…I mean those companies, they call the Ministers offices…they put a fair bit of pressure on, for sure...usually most people are aware of...they quickly become aware of, you know, if a Minister's Office is getting called about something. It filters down.*

(Participant B, LUS)

While gaining access to populations involved with or knowledgeable of this process would be difficult, several opportunities are available to research its workings. Firstly, the Office of the Ethics Commissioner of Alberta (OECA), as of October 2016, maintains a Lobbyist Registry System (see OECA, 2016). The name and contact details for all those involved in lobbying for both industry and non-industry organisations can be searched, being subsequently presented in list format. This also details each individual’s current and future lobbying efforts, covering a minimum of 6 months. A parallel process also exists at the Federal level, being administrated by the Office of the Commissioner of Lobbying of Canada (OCLC). Containing the same facilities as its provincial counterpart, this also permits users to search a database of all lobbying activities that occurred over the previous 12 months (see OCLC, 2016). Combined, these provide opportunities for the collection of both primary and secondary data pertaining to methods used by industry to exert influence on governments and their agencies.

Another limitation is that, while this study is critical of ‘weak’ eco-modernist philosophy and its associated efforts at ‘decoupling’, the case-study design limits application of its conclusions to the oil sands industry in Alberta. Other studies into other industries should therefore consider whether efforts at ‘sustainable development’ are masking this philosophy of ‘green growth’, examine the official mechanisms by which it is translated into practice, and evaluate the extent to which its objectives are being realised. Potential sites of focus beyond the oil sands might include the relatively new but rapidly expanding practice of drilling for shale gas across the United Kingdom (see Natural Environment Research Council, 2016), or the more established industry in the United States (see U.S. Energy Information Administration, 2016). As the number of case studies increases, so too does the potential for comparative research. This may utilise an ‘import-mirror’ design (May, 2001: 208), where comparisons are made between industries within similar political-economies, such as the shale gas industry in the U.K. and U.S., or a ‘difference’ design (ibid), where regulatory approaches are compared across different industries or political-economies, such as the oil sands industries in Venezuela and Alberta. Combined, such research would go towards addressing the study limitations by allowing its conclusions to hold relevance beyond the confines of this singular case.

Looking to the future, green criminological scholarship should give more attention to indigenous peoples, their rights and the contemporary context of settler-colonialism in which they tend to exist. This is important as the relationship between state-corporate power, indigenous peoples and ecological disorganisation is likely to become more pronounced as late capitalism advances further. Indeed, this is already occurring, as communicated in the warning issued by the Chair of the UN Permanent Forum on Indigenous Issues:

*There are more and more arrests, killings and abuses* [of indigenous peoples]*. This is happening in Russia, Canada, the Philippines, Cambodia, Mongolia, Nigeria, the Amazon, all over Latin America, Papua New Guinea and Africa. It is global. We are seeing a human rights emergency ... Much of the world's natural capital – oil, gas, timber, minerals – lies on or beneath lands occupied by indigenous people.*

(Tauli-Corpus, quoted in Mowforth, 2014)

While the more traditional criminological literatures on state-corporate crime, treadmill theories and industry regulation can account for these relationships to a certain extent, their annexing of questions surrounding settler-colonialism and indigenous rights limits their explanatory and analytical capacity. Initial efforts at accounting for these dimensions may take a transitory form, much like this study, where the more traditional political-economic approach acts as a foundation for application of a settler-colonial analytical lens, allowing them to be used in tandem. Alternatively, Harvey’s (2009) notion of ‘accumulation by dispossession’ may provide a more familiar basis from which to incorporate the struggles of indigenous peoples into political-economic analyses. Whichever approach is used, accounting for notions associated with colonialism and indigenous rights is imperative if green criminology is to develop detailed explanations for environmental victimisation and harm into the future.

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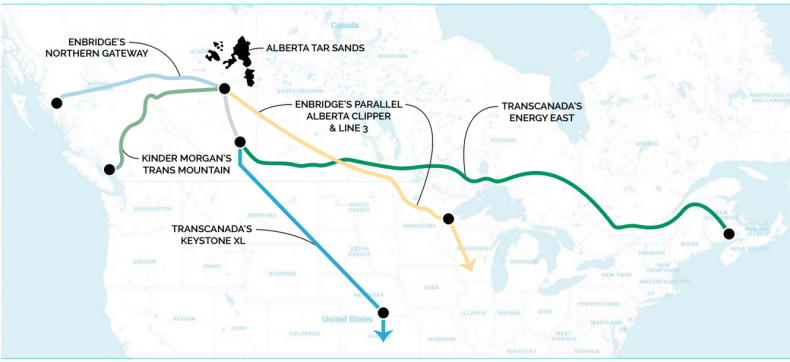
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# Appendices

Appendix I) Geographical Span of Proposed Pipelines being Resisted by the Treaty Alliance



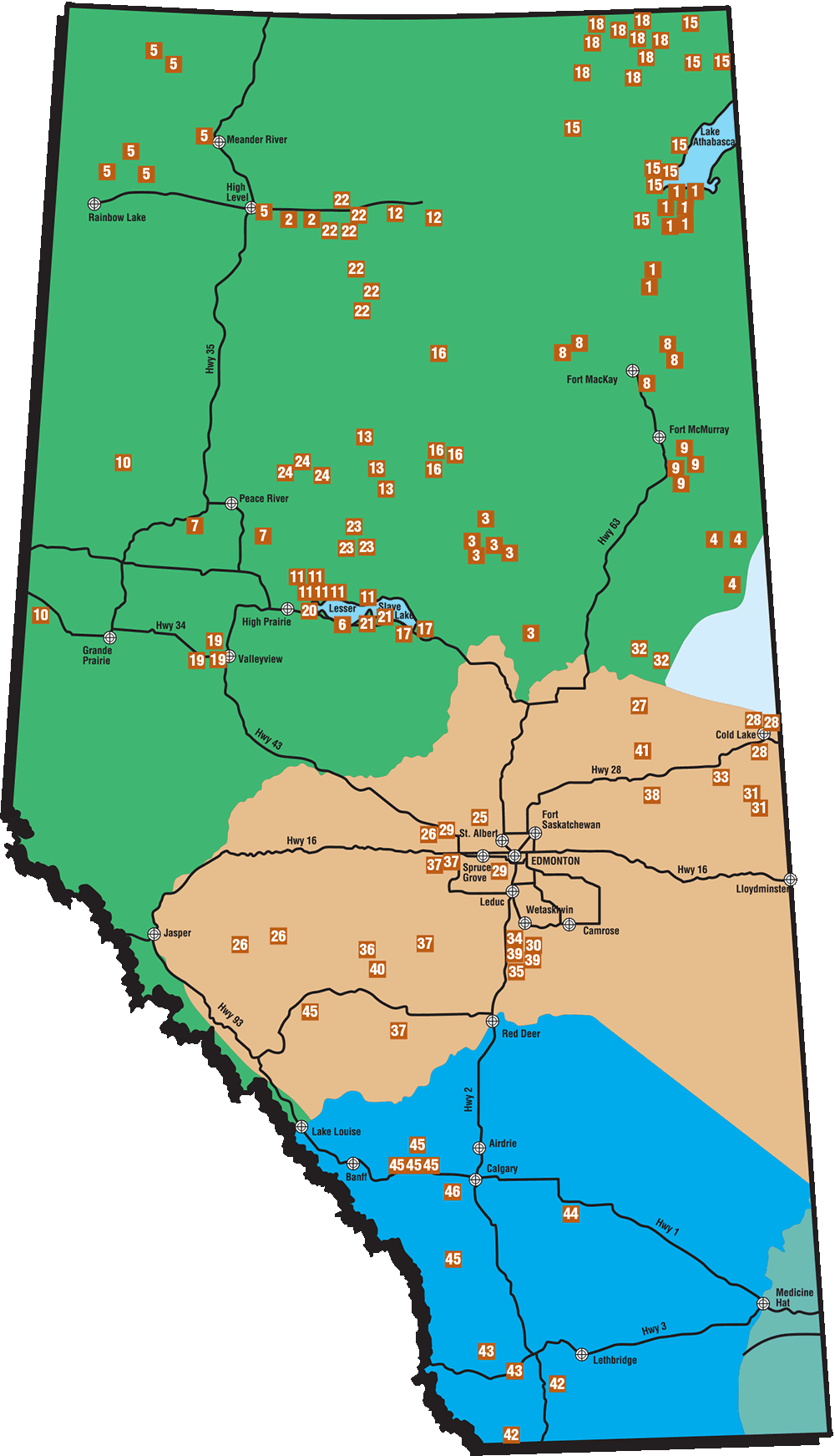
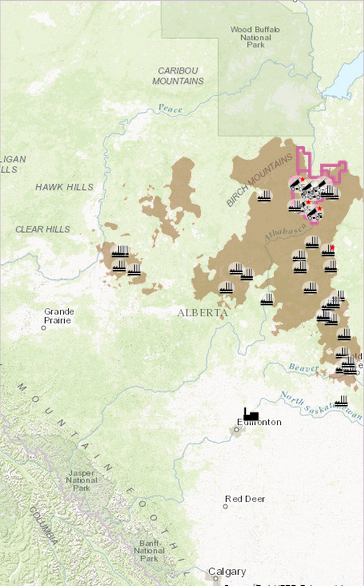
Source: Treaty Alliance (2016c)

Appendix II) Location of Oil Sands Industry in relation to the Numbered Treaties

Treaty 8

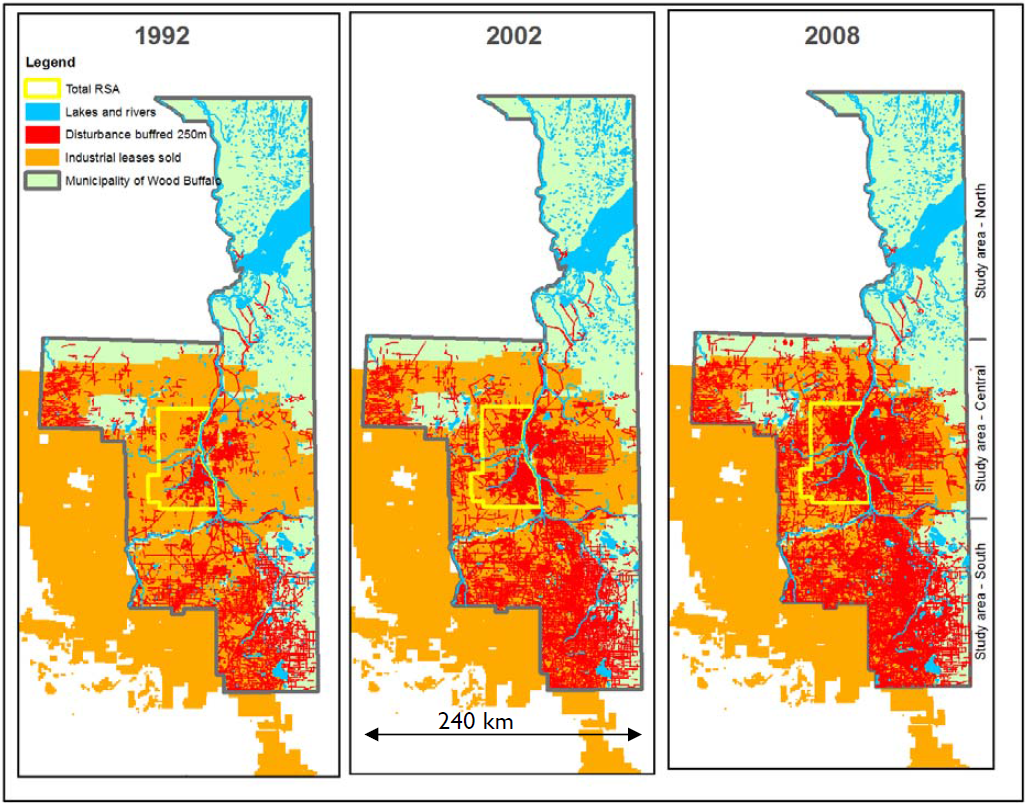
Treaty 7

Treaty 6

Source: Indian and Northern Affairs Canada, 2013; Government of Alberta (2016)

Appendix III) Increasing disturbance of natural surfaces in relation to oil sands leases in the Regional Municipality of Wood Buffalo\*.



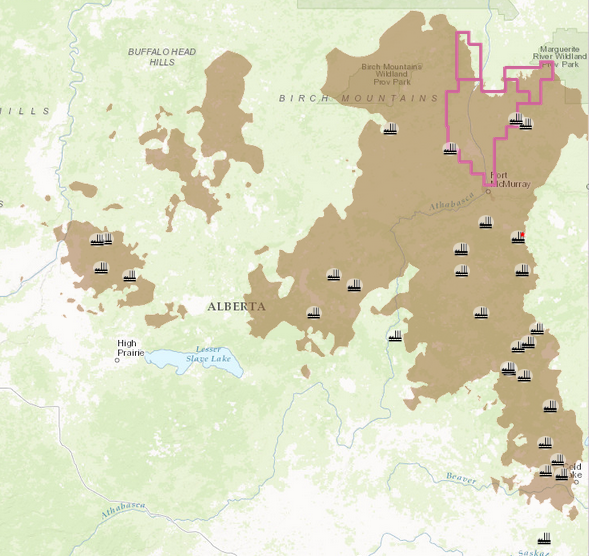
Note: ‘Total RSA’ refers to the Regional Study Area outlined by the paper from which this has been referenced.

\*‘The disturbance shown here includes 250 m zones of influence around all industrial features and is based on satellite image analysis. Overlain are lease areas. Disturbances are underestimated as they do not include AltaLIS (digital mapping software) data’.

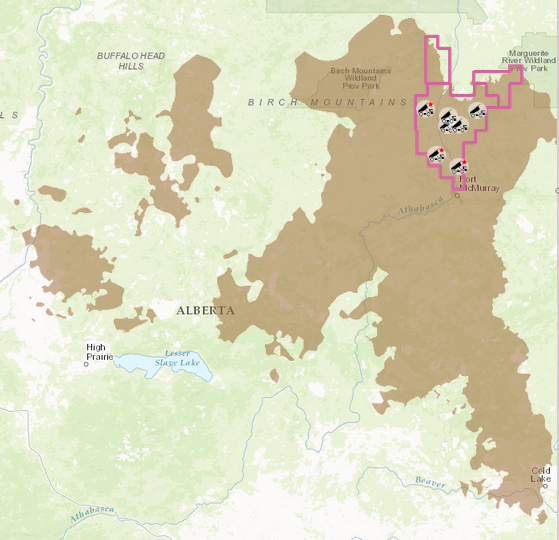
Source: Management and Solutions in Environmental Science (2010: 11)

Appendix IV) In-situ Oil Sands Operations vs. Open Pit/Surface Mine Operations

*In-situ Operations*



*Open Pit/Surface Mine Operations*



Source: Government of Alberta (2015)

Appendix V) Participant Invitation Letter



School

Of

Law.

The School of Law  
University of Sheffield  
Winter Street  
Sheffield

United Kingdom

S3 7ND

**James Heydon**

**Doctoral Researcher**

**Email:** [**Jwheydon1@Sheffield.ac.uk**](mailto:Jwheydon1@Sheffield.ac.uk)

**Telephone: +44 7983556871**

**January 2015**

**Ref: Research into Oil Sands Regulatory Process**

**Dear - *insert name* -**

My name is James Heydon and I am a doctoral researcher in the School of Law at the University of Sheffield in the United Kingdom. I am writing to enquire as to whether you would be interested in taking part in a study seeking to examine the issues associated with the First Nation consultation processes that occur as part of the approval and monitoring of existing and forthcoming oil sands operations. This will form one aspect of an overarching study into the regulatory processes governing the sustainable development of the oil sands resource.

The study is to have a primary focus on those involved with the formal regulatory process in Alberta. This includes those from the AER, the ACO, members of First Nation industry relations departments, representatives from companies operating within the oil sands industry, and relevant environmental and research organisations.

If you take part in this study I would seek to interview you, at your convenience, for no longer than 40 minutes. This can be done using one of a variety of means, including face-to-face, telephone or video-phone, with the aim of being as flexible and accessible as possible. Indeed, as I would like the opportunity to meet and interview participants in person, I will be spending five weeks in Alberta during January/February 2015. At various points during this time I will be in Calgary, Edmonton, Fort McMurray, and, pending responses, Fort McKay and Fort Chipewyan. Interview location and type will, however, be entirely at the discretion of those interested in taking part and can be decided in future correspondence.

In accordance with the University of Sheffield’s strict ethical standards, every individual choosing to participate in this study will be anonymised, have the confidentiality of their personal details upheld, and given the opportunity to withdraw at any time. You will also be invited to maintain contact throughout the duration of the study for updates on its progress and, if requested, to freely receive the final publication developed from the data.

You are invited to respond in any way you wish via the contact details at the top of this document, but e-mail is likely to be the most viable means of communicating at this point. It is important to note that your initial response to this letter will not automatically constitute participation; following your reply, the researcher will answer any questions you have and make arrangements for interview, should you wish to take part. Alternatively, you are welcome to contact the primary supervisor for the research, Professor Matthew Hall, for any further information or clarification. Professor Hall can be contacted at [MHall@Lincoln.ac.uk](mailto:MHall@Lincoln.ac.uk).

Finally, it must be highlighted that this project is funded by the Economic and Social Research Council of the United Kingdom, has up to four years to fulfil its remit, and is unaffiliated with any government, charity or corporate organisation.

Thank you for taking the time to read this letter. I look forward to hearing from you and very much hope that you will be interested in taking part.

Yours faithfully,

James Heydon

Doctoral Researcher

Appendix VI) Participant Informed Consent Form

Participant Consent Form

PIN for this participant (for researcher use): Please initial box

1. I volunteer to participate in a research project conducted by Mr James Heydon from the University of Sheffield. I understand that the study is designed to gather information relating to the regulatory process in the in the oil sands and that I will be one of the participants being interviewed for this research.
2. I confirm that I have read and understand the invitation letter explaining the above research project and have had the opportunity to ask questions about the project.
3. My participation in this project is voluntary and I understand that I will not be paid for my participation.
4. I understand that I am free to withdraw at any time without giving any reason and without there being any negative consequences. In addition, should I not wish to answer any particular question or questions, I am entirely free to decline. Should I wish to withdraw from the study, I understand the lead researcher can be contacted at [Jwheydon1@Sheffield.ac.uk](mailto:Jwheydon1@Sheffield.ac.uk) or via the address on the participant invitation letter.

* I understand that my responses will be kept strictly confidential.
* I give permission for the researcher to have access to my original responses, but for this access to go no further.
* I understand that my name will not be linked with the research materials, and I will not be identified or identifiable in the report or reports that result from the research.

1. I agree to take part in the above research project.

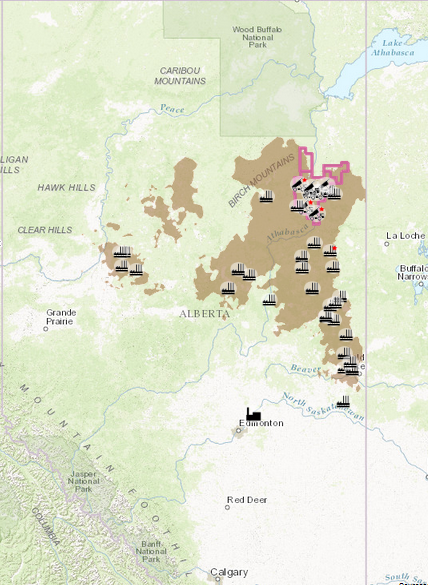
Name of Participant Date Signature

Lead Researcher Date Signature

*James Heydon*

*Once this has been signed by all parties, the participant will receive a copy of the signed and dated participant consent form. A digital and hard-copy of the signed and dated consent form will be kept in a secure location.*

Appendix VII) Travel Schedule



**Edmonton**

**Fort McMurray**

**Calgary**

**Fort Chipewyan**

|  |  |  |  |
| --- | --- | --- | --- |
| Date | Origin | Destination | Mode of Transport |
| 21/01/15 | Manchester | Calgary | Plane |
| 27/01/15 | Calgary | Edmonton | Coach |
| 09/02/15 | Edmonton | Fort McMurray | Coach |
| 16/02/15 | Fort McMurray | Fort Chipewyan | Plane |
| 18/02/15 | Fort Chipewyan | Fort McMurray | Plane |
| 18/02/15 | Fort McMurray | Edmonton | Coach |
| 20/02/15 | Edmonton | Calgary | Coach |
| 25/02/15 | Calgary | Manchester | Plane |

Appendix VIII) ESRC Overseas Fieldwork Funding Grant

18 July 2014

Dear James,

**Re: Application for additional Overseas Fieldwork Visit Expenses 2013/14 – Mr James Heydon, ESRC award number ES/J500215/1, Student ID 130118914**

At the meeting of the White Rose DTC Academic Quality Committee (AQC) your application for overseas fieldwork expenses was considered.

As you may know, the DTC has a limited budget to cover fieldwork and the allocation is at the discretion of the AQC and the actual contribution depends on the funds available from within the DTC’s training grant. I am pleased to be able to offer you the sum of **£1364.00** towards the cost of your overseas fieldwork expenses.

We will arrange to transfer this amount to WBS account **X/007165-15-1** which will be held in your School/Department. Please contact your School/Department Finance Administrator, Audrey Pang for further details. You can make your purchases via this account and your School/Department will ensure that a record is kept of any expenditure incurred, supported by relevant receipts. This sum is in addition to your maintenance grant.

Please note that if your overseas visit is prematurely terminated for any reason, you must repay any of the fieldwork expenses overpaid to you, or on your behalf, either in whole or in part.

Yours sincerely,

N Reilly

Nicola Reilly, WRDTC Manager

cc: Audrey Pang, School/Department Finance Contact, Matthew Hall, Student’s Supervisor, Claire Kennedy – Department of Finance, University of Sheffield, Warren Oates, Department of Finance

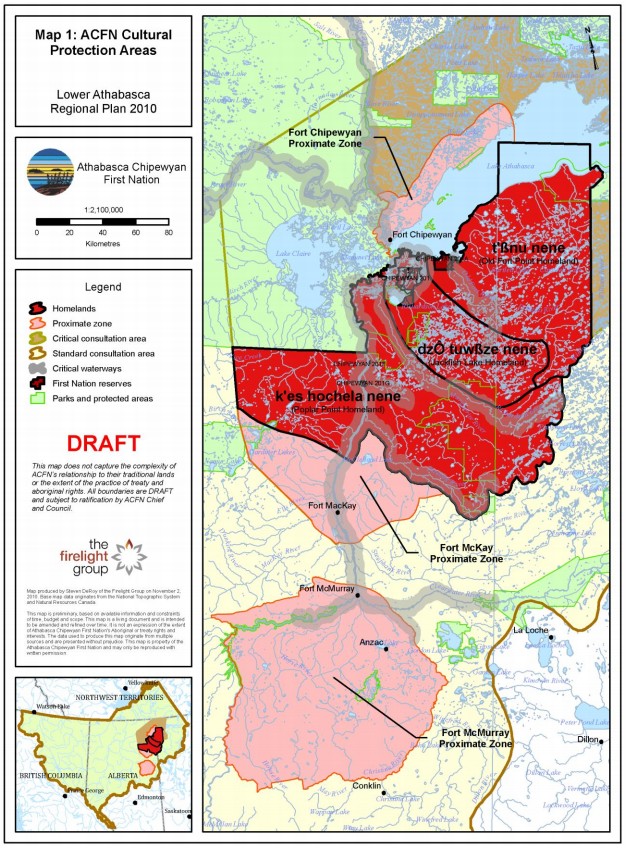
White Rose Doctoral Training Centre

Located at: University of Sheffield, Interdisciplinary Centre of the Social Sciences (ICoSS), 219 Portobello, Sheffield,S1 4DP

Tel: +44 (0)114 222 6060 • Email : [enquiries@wrdtc.ac.uk](mailto:enquiries@wrdtc.ac.uk)

Web: http://wrdtc.ac.uk

Appendix IX) Athabasca Chipewyan First Nation Cultural Protection Areas



Source: Athabasca Chipewyan First Nation (2010: 10)